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Data Transparency, ERISA Preemption, and Freedom of Contract

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5.1 INTRODUCTION

In recent years, an increasingly libertarian judiciary has struck down a range of health care transparency regulation under the Employee Retirement and Income Security Act (ERISA). ERISA preempts state laws that "relate to" employee benefit plans.[1] This test is an indeterminate one,[2] and thus, lower courts bolster their analysis with policy considerations in striking down these laws.

Several scholars, including myself, have argued that invalidating these transparency laws is undesirable for various reasons.[3] I do not seek to reprise that debate here. Rather, this chapter focuses on rebutting a specific policy consideration that courts advance when invalidating transparency laws – namely, that such laws undermine freedom of contract by forcing plaintiffs to disclose information in violation of contracts to which they are parties. This chapter identifies a doctrinal thread in ERISA cases that rebuts such freedom of *contract* claims using freedom of *choice* arguments: indeed, as various cases hold, it is freedom of *choice* that truly vindicates freedom of contract values. Based on those cases, I argue that transparency laws advance both freedom of choice and contract by giving parties necessary information.

Advancing this argument is important. State defendants generally highlight the public regulatory interests that transparency laws serve. But many market-oriented

[*] This is a truncated version of the essay. A fuller version of the essay is on file with the author.

[1] 29 U.S.C. § 1144(a).

[2] Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc., 154 F.3d 812, 818 (8th Cir. 1998).

[3] Erin C. Fuse Brown & Jaime S. King, ERISA as a Barrier for State Health Care Transparency Efforts, in Transparency in Health and Health Care in the United States: Law and Ethics 304–05 (Holly Fernandez Lynch et al. eds., 2019); Craig Konnoth, Health Data Federalism, B.U. L. Rev. 2169, 2187–89 (2021); Craig Konnoth, Privatization's Preemptive Effects, 134 Harv. L. Rev. 1937, 1961, 2207 (2021).

judges are less attuned to the goals of public regulation. Advancing arguments that vindicate market- and contract-based values might prove more successful.

The chapter begins by describing how courts have invalidated significant amounts of state transparency regulation, including regulation pertaining to All Payers' Claims Databases (APCDs),[4] pharmacy data,[5] and surprise billing prohibitions.[6] Sections 5.3 and 5.4 then explain how, to justify ERISA preemption of state law, courts invoke policy arguments sounding in freedom of contract.

While such arguments have a powerful resonance, Section 5.5 traces a line of ERISA cases, namely those involving any willing provider (AWP) laws, in which state defendants neutralized freedom of contract claims by advancing freedom of choice arguments. It also looks to historical contract law cases, which juxtaposed freedom of choice and freedom of contract to hold that ultimately, freedom of choice helped vindicate true freedom of contract values.

Section 5.6 lays out the argument that transparency laws furthers freedom of choice, and, resultantly, of contract. States have generally offered arguments sounding in public regulatory interests, such as cost- and quality-control to defend these laws. I argue that presenting transparency rationales as ways to allow informed consumers to make choices to promote well-functioning markets may produce better outcomes before market-oriented judges. By forcing information availability, data transparency laws promote contracting in the private market as did AWP laws.

5.2 TRANSPARENCY LEGISLATION

"[H]ealth care price transparency initiatives are all the rage."[7] While the Affordable Care Act and subsequent federal legislation have taken significant steps to promote transparency, states have been at the forefront of the effort. Three initiatives have received significant commentary.

The first are laws that promote APCDs – databases containing information that providers send to insurance companies for reimbursement.[8] Many state laws require health insurance companies to submit this data to a state agency.[9] APCDs serve a dual purpose: first, giving states information to address public health crises like COVID-19 and opioid misuse, and, second, cross-checking health data accuracy, calculating reimbursement rates, and the like. The databases also promote price transparency as they supply information to consumers and health care providers.

[4] Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 323–24 (2016).
[5] Pharm. Care Mgmt. Ass'n v. Gerhart, 852 F.3d 722, 728–30 (8th Cir. 2017).
[6] Brown & King, supra note 3, at 308.
[7] Stephen Barlas, Health Care Price Transparency Initiatives Are All the Rage: But Burgeoning Efforts Suffer from Myriad Shortcomings, 43 P&T 744 (2018).
[8] Konnoth, Health Data Federalism, supra note 3.
[9] Id. at 2189–90, 2205–10.

Next, starting in 2016, numerous states have passed bills requiring pharmacy benefits managers (PBMs) to report pricing methodology to state insurance commissioners and, often, to the pharmacies with which they contract. Information includes "increases in list prices, . . . aggregated dollar amount of rebates, [and] fees or price concessions provided by manufacturers."[10]

A third category in which states have shown a pattern of promoting health transparency is in the context of surprise billing by out-of-network providers. Several states have enacted regulations requiring plans and providers to disclose information about network participation so that patients are not surprised by the higher costs incurred from going to out-of-network providers.[11] As of 2022, federal legislation also provides out-of-network coverage protection,[12] but some state laws go further.[13]

5.3 ERISA PREEMPTION CASES

ERISA preempts state laws that "relate to" employee benefit plans.[14] The inquiry has two prongs. First, a state law that makes "reference" to a plan is preempted. Next, laws that have a "connection to" ERISA plans are also invalid.[15] This chapter will not analyze this test in detail. Suffice it to say that a series of cases have invalidated state transparency laws under this test.

In *Gobeille v. Liberty Mutual*, the Supreme Court invalidated data collection mandates for self-insured employers in APCDs under the "connection to" prong of the preemption test. According to the Court, the APCD reporting law would "govern, or interfere with the uniformity of, plan administration and so ha[s] an impermissible connection with ERISA plans."[16] As a result of the ruling, 60 percent of all employers can ignore information mandates in their states.[17]

A year after *Gobeille*, in *Pharmaceutical Care Management Association v. Gerhart*, the Eighth Circuit targeted the second category of transparency regulation—PBM reporting, under both prongs of the preemption test. *Gerhart* held first that, because the state PBM statute explicitly *exempted* certain ERISA

[10] Colleen Becker, Digging into Prescription Drug Data: Affordability Boards and Transparency, Nat'l Conf. of State Legislatures (Oct. 26, 2022), https://www.ncsl.org/health/digging-into-prescription-drug-data-affordability-boards-and-transparency.

[11] Brown & King, supra note 3, at 303–04.

[12] No Surprises Act, 42 U.S.C. § 300gg-111(e) (effective Jan. 1, 2022).

[13] Jack Hoadley et al., No Surprises Act: A Federal-State Partnership to Protect Consumers from Surprise Medical Bills, The Commonwealth Fund (Oct. 20, 2022), https://www.commonwealthfund.org/publications/fund-reports/2022/oct/no-surprises-act-federal-state-partnership-protect-consumers.

[14] 29 U.S.C. § 1144(a).

[15] Pharm. Care Mgmt. Ass'n, supra note 5, at 729.

[16] Gobeille, supra note 4, at 320 (quotation marks omitted).

[17] Konnoth, Privatization's Preemptive Effects, supra note 3, at 2204.

plans from compliance, the statute therefore made explicit "*reference*" to the plans.[18] Then, for good measure, the court also relied on *Gobeille* to hold that the law failed under the "connection to" prong. PBMs act as third-party administrators of pharmacy benefits for ERISA plans, reasoned the court. Referencing *Gobeille*'s language that I quote above, the court held that a law that "compels PBMs as third-party administrators to report to the commissioner and to network pharmacies their [reimbursement] methodology" therefore "intrudes upon a matter central to plan administration and interferes with nationally uniform plan administration."[19]

Notwithstanding subsequent Supreme Court case law on PBM legislation, *Gerhart* remains – in part – good law. In 2020, the Supreme Court upheld a state law requiring PBMs to reimburse pharmacies at higher rates. The Court noted that the PBM regulation does not "refer" to an ERISA plan as it "does not act immediately and exclusively upon ERISA plans because it applies to PBMs whether or not they manage an ERISA plan."[20] *Gerhart*'s "reference to" analysis thus no longer survives. But *Gerhart*'s analysis under the "connection with" prong remains intact.[21]

5.4 THE FREEDOM OF CONTRACT BACKDROP

The cases above purport to rely on formalistic analysis, and scholars treat *Gobeille* in particular as a straightforward example of ERISA preemption.[22] But ERISA doctrinal analysis is indeterminate.[23] As a practical matter, courts invoke policy considerations such as uniformity of administration or burdens on administrators, and scholars have commented on these policy claims. But one policy justification that has received no attention is that concerning freedom of contract.

As I argue elsewhere, there was more to *Gobeille* than met the eye. The employer's ERISA plan argued in its briefing that preemption of state law was required because the state regulation displaced contracts between beneficiaries and the insurance company, which, it claimed, required keeping data confidential.[24] Significant text was devoted to this argument by the United States Solicitor

[18] Id. Somewhat confusingly, the court held that ERISA also made "implicit" reference to ERISA by regulating PBMs, which provide services to ERISA plans.

[19] Id. at 731.

[20] Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 481 (2020).

[21] *Rutledge*'s PBM regulation involved reimbursement standards and was therefore governed by N.Y. State Conf. Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), which had approved of such standards. Rutledge, supra note 20, at 480. But *Gerhart*'s regulation involved data transparency, and would be governed by *Gobeille*. Space limitations do not allow me to explain further.

[22] Konnoth, Privatization's Preemptive Effects, supra note 3, at 2204.

[23] See, e.g., N.Y. State Conf. Blue Cross & Blue Shield Plans v. Travelers Ins. Co., supra note 21, 655 ("[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course").

[24] Id. at 2204–05; Konnoth, Privatization's Preemptive Effects, supra note 3; Harris v. BP Corp. N. Am. Inc., No. 15 C 10299, 2016 WL 8193539, at *7 (N.D. Ill. July 8, 2016).

General's Office before the ERISA plan even filed its brief.[25] This debate over the importance of respecting contracts was strange: While the Supreme Court in the nineteenth and early twentieth centuries was sympathetic to plaintiffs who challenged state laws that, they claimed, undermined freedom of contract under the Contract Clause, since the New Deal, this approach to the Contract Clause has been repudiated. State law has generally been understood to govern contract terms.[26]

Despite the demise of freedom of contract arguments in constitutional doctrine, they retained a strange afterlife in ERISA cases. The earliest ERISA preemption cases in the 1970s concerned pension benefits,[27] with plaintiffs complaining that ERISA undermined freedom of contract in pension arrangements. Courts replied that that was exactly what ERISA was *meant* to do. As an Alabama district court wrote in 1979, with ERISA, "freedom of contract was largely eliminated from the world of pension agreements."[28] That line of thinking filtered its way into courts of appeals.[29]

While freedom of contract arguments failed in the 1970s pension cases, in the 1980s, employers brought a new set of preemption cases, claiming that state laws regarding *health plans* were preempted. By this time academic, and then, judicial, attitudes to freedom of contract had changed, and courts took a different tack.[30] A decade after one Alabama district court opinion repudiated freedom of contract principles in pension plans, another Alabama district court held that those principles remained alive and well in welfare benefit plans: "Congress included welfare benefit plans within the scheme of ERISA, but did not provide an extensive array of mandatory provisions as it did for pension plans. The implication here is that parties retain a greater degree of freedom to contract between themselves as to what benefits will be provided under welfare plans."[31] This language became boilerplate in

[25] See Konnoth, Privatization's Preemptive Effects, supra note 3, at 2208. As Respondent, the ERISA plan filed its briefs only *after* the US brief was filed. Space constraints prevent a full treatment of the argument.

[26] See generally James W. Ely, Jr., Whatever Happened to the Contract Clause?, 4 Charleston L. Rev. 371 (2010).

[27] Patricia McDonnell et al., Self-Insured Health Plans, 8(2) Health Care Fin. Rev. 1–2 (Winter 1986).

[28] Thomas v. Marshall, 482 F. Supp. 160, 164 (S.D. Ala. 1979).

[29] For example, van Boxel v. Journal Co. Emps. Pension Tr., 836 F.2d 1048, 1052 (7th Cir. 1987); Williams v. Rohm & Haas Pension Plan, 497 F.3d 710, 714 (7th Cir. 2007); Esden v. Bank of Bos., 229 F.3d 154, 173 (2d Cir. 2000); all argued that in pension contexts, ERISA was meant to eliminate freedom of contract.

[30] See F. H. Buckley, Introduction, in The Fall and Rise of the Freedom of Contract 1–2 (F. H. Buckley ed., 1999) (noting how freedom of contract sentiments had returned to vogue since the 1970s).

[31] Carland v. Metro. Life Ins. Co., 727 F. Supp. 592, 597 (D. Kan. 1989), aff'd, 935 F.2d 1114 (10th Cir. 1991).

judicial opinions that emphasized the importance of freedom of contract in welfare benefit plans.[32]

While there were some asides in opinions that recognized the limitations of freedom of contract doctrine,[33] in a small but steady diet of cases since the 1980s through today, courts have infused the policy analysis that characteristically underlies ERISA preemption cases with freedom of contract claims. One district court linked the "'vital public interest' in health care cost containment … with the traditional freedom to contract as one pleases."[34] Another emphasized that "the public has an interest in protecting the freedom to contract by enforcing contractual rights and obligations."[35] And in 2017, a court held that "[r]equiring … compl [iance] with … plan[] procedures not only respects freedom of contract, but will also serve important purposes," relating to the ERISA dispute resolution process.[36] Every court to invoke freedom of contract has found that ERISA preempts the state statute. Even though freedom of contract is never the centerpiece of the holdings, its appearance is notable.

ERISA preemption cases involving transparency statutes also endorse contract principles (albeit not as explicitly as the ERISA preemption cases I describe above). The *Gobeille* Court began its application of ERISA doctrine by observing that "ERISA does not guarantee substantive benefits. The statute, instead, seeks to make *the benefits promised by an employer more secure* by mandating certain oversight systems and other standard procedures."[37] Similarly, the offense in *Gerhart* is described as "dictating the manner by which PBMs contract with pharmacies regarding … pricing."[38]

5.5 REBUTTING FREEDOM OF CONTRACT – THE AWP CASES

How might one address the freedom of contract anxiety that courts evince in striking down transparency statutes? One answer might lie in a line of cases that successfully defeated these arguments – those concerning AWP statutes.

These statutes require insurers or PBMs to contract with any provider willing to abide by their terms to prevent insurers from limiting costs by artificially throttling

[32] Carland v. Metro. Life Ins. Co., 935 F.2d 1114 (10th Cir. 1991) (quoting cases with similar holdings).

[33] Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1150 n.1 (11th Cir. 2001) (Barkett, J., concurring) (noting in a footnote "the limits the 'savings clause' imposes on an ERISA insurer's freedom to contract").

[34] St. Francis Reg'l Med. Ctr. v. Blue Cross & Blue Shield of Kansas, Inc., 49 F.3d 1460, 1466–67 (10th Cir. 1995).

[35] MBI Energy Servs. v. Hoch, No. 1:16-CV-329, 2016 WL 9307197, at *4 (D.N.D. Sept. 19, 2016).

[36] In re UnitedHealth Grp. PBM Litig., No. 16-CV-3352, 2017 WL 6512222, at *14 (D. Minn. Dec. 19, 2017).

[37] Gobeille, supra note 4, at 320–21 (emphasis added).

[38] Pharm. Care Mgmt. Ass'n, supra note 5, at 728.

the ability of individuals to access care.[39] By 1986, eight states had passed these AWP statutes,[40] leading to some of the earliest ERISA preemption litigation. But outcomes conflicted. Two circuits held that ERISA preempted these laws; two circuits held the opposite.[41]

Those supporting the laws argued that even if these laws "relate[d] to" a plan, and therefore met ERISA's preemption test, they survived under a preemption exception which allowed states to "regulate[] insurance."[42] The Supreme Court, through Justice Scalia, sided with this view in *Kentucky Association of Health Plans v. Miller*.[43]

The doctrine surrounding the insurance savings clause, as the Court admits in *Miller* itself,[44] is far from clear.[45] Indeed, commentators have suggested that *Miller* was "self-contradictory" and probably unworkable.[46] Just as courts rely on policy arguments to determine whether state laws "relate to" an ERISA plan in the first place because of the term's indeterminacy, those parsing the insurance savings clause also invoke policy claims – including freedom of contract arguments.

The previous section notes that in ERISA health preemption cases, courts that mention freedom of contract arguments do so to hold that the state laws are invalid. The AWP cases are no exception. In *CIGNA Healthplan of Louisiana v. Ieyoub*, the first lawsuit that resulted in appellate invalidation of an AWP law,[47] the plaintiffs sought freedom of contract as an independent ground of relief. They argued both that "the Any Willing Provider Statute is preempted by ERISA" and, "[a]s an alternative claim, ... that the statute violates the Due Process Clause ... because it interferes with the plaintiffs' freedom to contract with health care providers of their choice."[48] In a ruling affirmed on appeal, the court held that ERISA preempted the AWP law. Similarly, in a lower court ruling in the Eighth Circuit (the other

[39] The countervailing concern is that network providers would not be incented to provide discounts if out of network providers could force their way into the network.

[40] Elizabeth Rolph et al., State Laws and Regulations Governing Preferred Provider Organizations 47–48 (1986).

[41] Petition for a Writ of Certiorari at 11, Ky. Ass'n Health Plans v. Miller, 538 U.S. 329 (2003) (No. 00-1471). While courts that uphold AWP statutes tend to conflate mandated provider laws and AWP laws, see Cmty. Health Partners, Inc. v. Com. of Ky., 14 F. Supp. 2d 991, 1000 (W.D. Ky. 1998), there are meaningful differences between the laws, see Express Scripts, Inc. v. Wenzel, 102 F. Supp. 2d 1135, 1150 (W.D. Mo. 2000).

[42] 29 U.S.C. 1144(b)(2)(A).

[43] Ky. Ass'n Health Plans v. Miller, 538 U.S. 329, 341–42 (2003).

[44] Id.

[45] Id. at 339–40.

[46] Sara Rosenbaum et al., Law and the American Health Care System 403 (2d ed. 2012).

[47] CIGNA Healthplan of La., Inc. v. State, ex rel. Ieyoub, 883 F. Supp. 94, 96 (M.D. La. 1995), aff'd sub nom., CIGNA Healthplan of La., Inc. v. State of La. ex rel. Ieyoub, 82 F.3d 642 (5th Cir. 1996). In a previous case, a Virginia district court had invalidated an AWP law only to be overturned on appeal. Stuart Circle Hosp. Corp. v. Aetna Health Mgmt., 995 F.2d 500 (4th Cir. 1993).

[48] CIGNA Healthplan, supra note 47, 883 F. Supp. at 96.

jurisdiction to invalidate AWP laws) the court explained that the effect of AWP laws "on ERISA plans is to eliminate their freedom to contract with HMOs."[49] In the other AWP cases as well, petitioners advanced arguments that sounded in freedom of contract – ultimately, and unsuccessfully – at the Supreme Court.[50]

But two circuits, and later, the Supreme Court, upheld these laws and rejected ERISA preemption. In these cases, freedom of contract was never mentioned. Rather, courts emphasized a different concept – freedom of choice. As proponents of AWP statutes emphasized, the laws allowed consumers to choose providers they wanted. For instance, in *Stuart Circle v. Aetna*, the court explained that the state legislature had given "priority to an insured's freedom to choose doctors and hospitals over the possibility of reduced insurance premiums …. The wisdom of this decision is a concern of the legislature, not the judiciary."[51]

Five years later, faced with the challenge that would mature into *Miller*, the district court quoted extensively from *Stuart Circle*, and noted that "freedom to choose a treating physician is inextricable from the nature of the coverage provided."[52] On appeal, the Sixth Circuit plugged the same refrain with even greater vigor. It noted that the law would "increase benefits to the insureds by giving them greater freedom to choose health care providers,"[53] and noted that policyholders were concerned with "restriction on their freedom of choice in seeking medical treatment."[54] Indeed, the freedom of choice argument attracted the dissent's ire. After questioning whether the AWP law actually promoted "freedom of choice," the dissent curtly cautioned, "any concerns over freedom of choice are beside the point."[55] The Supreme Court affirmed the majority, though without mentioning freedom of choice.

The contrast is clear. Cases coming down in favor of ERISA preemption generally, and with respect to AWP laws in particular, raise freedom of contract as one of ERISA's aims. In the AWP context, however, courts that decided against ERISA preemption invoked freedom of choice arguments instead.

Critics might suggest that I am reading too much into these cases. After all, prominent literature that defends freedom of contract uses the terms "contract" and

[49] Express Scripts, Inc. v. Wenzel, 102 F. Supp. 2d 1135, 1147 (W.D. Mo. 2000), aff'd, 262 F.3d 829 (8th Cir. 2001).

[50] Petition for a Writ of Certiorari at 5 n.2, Miller, 538 U.S. 329, (No. 00-1471) ("restrictions on petitioners' freedom to contract with chiropractors"); Express Scripts, 102 F. Supp. 2d at 1147 (W.D. Mo. 2000) ("The alleged impact of H.B. 335 on ERISA plans is to eliminate their freedom to contract. . ..").

[51] Stuart Circle, supra note 47, at 504–05.

[52] Health Maint. Org. Ass'n of Ky. v. Nichols, No. CIV.A. 97-24, 1998 WL 34103663, at *7 (E.D. Ky. Aug. 6, 1998) (citation omitted).

[53] Kentucky Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352, 368 (6th Cir. 2000).

[54] Id. at 370.

[55] Id. at 380 (Kennedy, J., dissenting).

"choice" interchangeably,[56] as do widely cited judicial decisions,[57] and one appellate ERISA preemption case.[58] Yet, however the terms are used elsewhere, in the ERISA opinions I describe above, and in related party submissions, freedom of choice constitutes a term of art, referring to a certain subset of laws that allows patients to see providers that they prefer. And the courts in *these* cases, at least, do not use the term interchangeably but almost in contraposition to each other.

Indeed, we see even more explicit juxtaposition of freedom of contract and choice in other lines of cases. During the 1970s, when courts were least sympathetic to freedom of contract claims,[59] the need to ensure true freedom of choice was widely relied on as a reason to ignore formalistic adherence to contract. In an influential and widely quoted passage,[60] for example, the New Jersey Supreme Court in *Kugler v. Romain* defended unconscionability doctrine, by noting, "[t]he intent of the clause is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion."[61] Thus, held *Kugler*, "freedom to contract survives," but is dependent on whether there is actual freedom of choice.[62]

At the same time, these courts reasoned, it is a mistake to paint freedom of choice as a completely separate concept from 'true' freedom of contract. Indeed, many courts that relied on freedom of choice to counter freedom of contract arguments ultimately concluded that freedom of choice as they saw it enabled true freedom of contract. As the Puerto Rico Supreme Court explained in another highly cited opinion that drew limits around noncompete agreements: excessively stringent contracts "not only … violate contractual good faith but also public policy, by excessively and unjustifiably restricting the employee's freedom of contract and the general public's freedom of choice."[63] As another court explained in the early years of freedom of contract's decline, "[l]iberty of contract does not mean the right to make any kind of contract with any body but merely the right to make contracts with competent persons on a plane of relative parity or freedom of choice."[64]

[56] Robin Kar, Contract as Empowerment, 83 U. Chi. L. Rev. 759, 807 (2016); Gregory S. Alexander, Freedom, Coercion, and the Law of Servitudes, 73 Cornell L. Rev. 883, 903 (1988).

[57] Barnes v. New Hampshire Karting Ass'n, Inc., 509 A.2d 151, 153 (1986) (exculpatory agreements) ("freedom of choice [means that] parties should be able to contract freely"); Essling v. Markman, 335 N.W.2d 237, 239 (Minn. 1983) (referring to "freedom of choice or contract").

[58] St. Francis Reg'l Med. Ctr., supra note 34, at 1464. ("Congress has chosen not to interfere with the parties' own freedom of contract on this matter, so must we insist that the states not interfere with the parties' freedom of choice.")

[59] See Ely, supra note 26.

[60] See, e.g., 8 Richard A. Lord, Williston on Contracts § 18:8 (4th ed. May 2023).

[61] Kugler v. Romain, 279 A.2d 640, 652 (N.J. 1971).

[62] Id.

[63] Arthur Young & Co. v. Vega III, 136 P.R. Dec. 157 (1994) (cited by PACIV, Inc. v. Perez Rivera, 159 P.R. Dec. 523, 2003 TSPR 84 (2003); TLS Mgmt. & Mktg. Servs., LLC v. Rodriguez-Toledo, 966 F.3d 46, 60 (1st Cir. 2020)).

[64] McGrew v. Indus. Comm'n, 85 P.2d 608, 613 (Utah 1938).

Thus, "freedom of choice" considerations may undermine freedom of contract as a formal matter but ultimately advance its true goals. Such an approach to freedom of contract – which relies on whether parties have freedom of choice – has implications for the ERISA transparency cases.

5.6 TRANSPARENCY LAWS FURTHER FREEDOM OF CHOICE

It is hard to assess the extent to which freedom of contract arguments play a role in ERISA preemption. Yet, it would appear that increasingly market-oriented courts see freedom of contract as an important value, and view ERISA preemption as a means to vindicate it. These courts might be unsympathetic to counterarguments that draw on public regulatory goals, such as price-setting. But advancing freedom of choice arguments – which, ultimately, can be reframed as helping achieve true freedom of contract, might prove more successful.

Transparency laws in general serve dual purposes as Section 5.2 explains. For example, APCD laws serve public regulatory goals such as price setting, but also private purposes, such as providing data transparency to allow consumers and other stakeholders to negotiate with insurers. This is true of other transparency initiatives including those involving PBMs. State litigants, however, have tended to emphasize the regulatory importance of these laws.

Consider the *Gerhart* litigation. The state's brief did not raise concerns about inequitable bargaining power even once. It rather emphasized the public, regulatory goals of the PBM statute. The AWP law "*regulates* a PBM's reimbursement of pharmacies. It *regulates* the pharmacy side of PBMs' business."[65] Rather than explaining how the law helps pharmacies negotiate with PBMs, it emphasized how the law regulates the negotiation.

By contrast, amici heavily emphasized how the transparency laws promoted private bargaining between parties. They point to the bargaining inequity between parties: "independent pharmacies cannot simply refuse to do business with PBMs, much less insist upon fair contractual terms . . . as PBMs manage drug benefits for 95 percent of all Americans with prescription-drug benefits . . .. Thus, PBMs are able to impose take-it-or-leave-it contracts on pharmacies." Notably, "even large pharmacies, like those managed by CVS, Walgreens, and Kmart, have struggled to secure fair treatment from PBMs."[66] The legislation addresses these concerns because – in part – it "requires PBMs to disclose how they calculate their reimbursement amounts in any contracts with Iowa pharmacies and gives contracting pharmacies a chance to contest the reimbursement amount."[67] In this way, their

[65] Brief of Defendants/Appellees at 31, Gerhart, 852 F.3d 722 (No. 15-3292) (emphasis added).
[66] Brief of the National Community Pharmacists Association at 3, Gerhart, 852 F.3d 722 (No. 15-3292).
[67] Id. at 4.

reasoning evoked the contract analysis of the courts in the AWP cases described above, who sought to promote freedom of choice.

The *Gobeille* briefing presented the same problem. Some – including government entities – did mention the importance of the data for private bargaining, though none of them foregrounded it as a purpose of the legislation. Thus, only after explaining how states used APCD data to address costs in their regulatory capacity did the brief of the AARP (formerly the American Association of Retired Persons) and others explain: "patients usually do not know the price of health care … [and] need information to make informed choices about … health care services, before they purchase these services – just as they would to make any other major purchase. They … need to know … whether they are getting the best value for their dollar."[68] The American Hospital Association with the American Association of Medical Colleges first emphasized the public health regulation that APCDs achieve at length, before, in a brief paragraph, noting that the "[p]atients – especially those who personally bear a significant share of their health care costs – need reliable sources of information for determining how to spend their health care dollars," and noting that Colorado had a website to promote this goal.[69] Other prominent briefs did the same, emphasizing a range of other significant public goals.[70] Few of these briefs mentioned, much less explained, the powerlessness that patient–consumers experience. None of them used the language of freedom of choice, which figured so prominently in the AWP cases, to defend the laws.[71]

And most of the briefs – including individual briefs filed by other states and by the American Medical Association[72] – did not even mention how data transparency furthered consumer choice. Most notably, the brief of the Petitioner, the state of Vermont, lists the uses of the data as follows: "improve the delivery of medical care to its citizens and guide health care regulation and policy."[73] Its Reply brief even mentions the federal uses to which the data is put.[74] Consumer and market participant needs were not mentioned.

Yet, there is a strong argument that transparency laws support freedom of choice. Colorado, New Hampshire, and Maine have each "used its APCD data to create a public website that enables its residents to compare the cost of health care services

[68] Brief Amici Curiae of AARP et al., at 13–14, Gobeille, 577 U.S. 312 (No. 14-181).
[69] Brief of Amici Curiae American Hospital Association, at 14, Gobeille, 577 U.S. 312 (No. 14-181).
[70] Brief for the United States at 16, Gobeille, 577 U.S. 312 (No. 14-181); Brief for the States of New York et al. at 10–17, Gobeille, 577 U.S. 312 (No. 14-181) (hereinafter New York brief).
[71] The closest was the US Department of Justice, which mentions it in passing. Brief for the United States at 19, Gobeille, 577 U.S. 312 (No. 14-181) ("over a dozen States have determined that such informational efforts can improve their citizens' healthcare, lower costs, and enhance consumer choice").
[72] Brief of Amicus Curiae Connecticut Health Insurance Exchange at 2, Gobeille, 577 U.S. 312 (No. 14-181); Brief of Amici Curiae American Hospital Association, supra note 69.
[73] Brief for Petitioner at 12, Gobeille, 577 U.S. 312 (No. 14-181).
[74] Reply Brief for Petitioner at 23, Gobeille, 577 U.S. 312 (No. 14-181).

across providers within the State," while others intend to do so. Patients can "compare costs by selecting a particular kind of health care service [say, a hip replacement], a geographical area [say, within 25 miles from Denver], and the kind of insurance to be billed …. The website would then display the median price." The Maine website gives consumers and providers transparent information on provider performance, cost, and reimbursement.[75]

Arguing that data transparency supports freedom of choice for those who would otherwise lack it may prove to be important in advancing data transparency claims in other contexts. To be sure, the Supreme Court is unlikely to revisit APCDs. But other important data transparency efforts remain ongoing, as Section 5.2 describes. Further, the Department of Labor has drafted policies that would require self-funded plans to report APCD data federally – but only on a voluntary basis, likely fearing opposition to the policies.[76] Freedom of choice arguments might prove important in those policy contexts as well – while they are used in judicial decisions, they are policy arguments to begin with.

5.7 CONCLUSION

Freedom of choice is not the only, or arguably, even the most important, argument for data transparency. The public values – including those emphasized and foregrounded in the *Gobeille* briefing – are probably more vital than providing data to consumers to enable bargaining. Even with data, consumers will lack market power.[77] Data can also prove hard to parse and analyze for consumers, especially those experiencing serious medical conditions.[78] Yet, freedom of choice arguments allow promoters of transparency laws to meet those who promote freedom of contract on their own turf and can prove to be of strategic value in advancing the cause of data transparency before market-oriented courts. Rather than emphasizing public regulatory goals, then, state defendants and policymakers should create a record that emphasizes how these databases support contracting between private parties in order to withstand ERISA preemption challenges.

[75] New York brief, supra note 70, at 18–19.

[76] State All Payer Claims Databases Advisory Committee (SAPCDAC), U.S. Dep't of Labor, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/state-all-payer-claims-databases-advisory-committee.

[77] Michael K. Gusmano et al., Patient-Centered Care, Yes; Patients as Consumers, No, 38 Health Affs. 368, 370 (2019).

[78] Id.