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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	**Civil Action No. 3:20-cv-10094** **Filing Date: March 14, 2023**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF THE RENEWED MOTION FOR SUMMARY JUDGMENT

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Plaintiff The ERISA Industry Committee ("ERIC") respectfully submits this Memorandum of Law in support of its Renewed Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and this Court's Order dated February 16, 2023 (Dkt. No. 34).

I. PRELIMINARY STATEMENT

ERIC filed its previous motion for summary judgment seeking a declaration that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA") preempts New Jersey Senate Bill No. 3170 ("S.B. 3170"), which amends the Millville Dallas Airmotive Plant Job Loss Notification Act (a/k/a "NJ WARN Act"),[1] as well as injunctive relief to halt future enforcement of S.B. 3170's amendments to the NJ WARN Act. Defendant opposed that motion by requesting to take discovery on whether ERIC has Article III standing to pursue this action. Defendant has now been afforded the opportunity to take such discovery, and it is beyond genuine dispute that ERIC has standing and that S.B. 3170 is preempted by ERISA.

Regarding standing, ERIC is a nonprofit trade organization that represents the interests of its member companies who are employers with 10,000 or more employees that sponsor health, retirement, and other benefit plans governed by

[1] The "WARN Act" is an acronym for the parallel federal legislation entitled the Worker Adjustment Retraining and Notification Act ("WARN Act"), 29 U.S.C. §§ 2101 et seq.

ERISA. As a national association, ERIC's mission includes lobbying and litigation advocacy for nationally uniform laws regarding employee benefits as contemplated by ERISA so that ERIC's member companies may lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws in addition to federal law. ERIC has devoted time and resources to educating and advising its member companies about S.B. 3170 – and its impact on their workforces and severance pay practices – and will have to continue to do so going forward absent the declaratory and injunctive relief sought. As such, ERIC has Article III standing to bring this action.

As to the merits, Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Congress enacted this preemption provision with "the goal . . . to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Thus, a state law will be preempted by ERISA if it requires employers to create or modify an "employee benefit plan," even if the law does not conflict with ERISA's own requirements.

The amended NJ WARN Act requires (among other things) that covered employers provide severance pay to full- and part-time employees who incur a

qualifying severance event as part of a "mass layoff," defined as 50 or more employees within the State of New Jersey. This law is preempted because severance pay obligations are governed by ERISA wherever they require any discretion or ongoing administration. *E.g.*, *Pane v. RCA Corp.*, 868 F.2d 631, 633-35 (3d Cir. 1989) (contractual requirements to pay severance are governed by ERISA where they require any ongoing "administrative scheme"); *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 852 (1st Cir. 1993) (ERISA preempts Massachusetts statute requiring severance pay). Here, the amended NJ WARN Act creates severance obligations that are subject to an ongoing administrative scheme because:

- Employer discretion is necessary to determine who is eligible for severance benefits. Employees who are terminated for misconduct, who retire or voluntarily leave their employment, or who are offered similar employment with the employer within New Jersey and within 50 miles of their existing work location, are not entitled to severance under the amended NJ WARN Act. Employers thus have to consider, as to each individual employee, whether the employee qualifies for severance pay pursuant to the Act. N.J. Stat. Ann. § 34:21-1.

- Employers must establish an ongoing administrative program to continuously monitor all New Jersey terminations to determine when severance benefits must be paid. Specifically, given the amendments' new definition of "mass layoff," employers must monitor all of their terminations in New Jersey, as well as employees "reporting to" a New Jersey location, and pay severance benefits whenever 50 or more such employees are involuntarily terminated (without cause, etc.) during any 30-day period. *Id.*

- By reducing the number of employee terminations that trigger the statutory requirements from 500 to 50, the amended New Jersey WARN

Act makes it much more likely for larger employers, including ERIC member companies that individually have at least 10,000 employees, to have multiple "mass layoffs" in a year and regular "mass layoffs" in successive years. *Id.* This further exemplifies the ongoing administrative scheme required of employers to comply with the amended law.

- Defining "establishment" with reference to the entire state instead of a single facility requires employers to set up new systems and operations across different facilities within the state in order to comply with the amended statute. *Id.*

As such, ERISA preempts S.B. 3170's amendments to the NJ WARN Act. For these reasons, which are further explained below, ERIC respectfully requests that the Court grant this motion for summary judgment.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

On January 21, 2020, Governor Phil Murphy signed into law S.B. 3170, amending the NJ WARN Act. 2019 N.J. Sess. Law Serv. Ch. 423, codified as N.J. Stat. Ann. §§ 34:21-1 *et seq.* Before the amendments, the NJ WARN Act required employers with 100 or more full-time employees to provide 60 days' notice to affected full-time employees in the event of a "mass layoff" or "transfer or termination of operations" and imposed certain penalties for failure to comply. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). S.B. 3170's amendments made sweeping changes to the Act. Those changes are scheduled to become effective

[2] A complete statement of material facts not in dispute is set forth separately pursuant to Local Rule 56.1. *See* Plaintiff's Rule 56.1 Statement of Material Facts Not in Dispute in Support of its Motion for Summary Judgment. ERIC provides a summary of those facts herein for the Court's convenience.

April 10, 2023. New Jersey Assembly Bill A4768, enacted by Pub. L. No. 2022, c. 142.

A. The Amended NJ WARN Act Requires Employers To Pay Severance When Employees Are Terminated Under Certain Circumstances.

Under the amended NJ WARN Act, an employer conducting a "mass layoff" or a "transfer" or "termination" of operations must give severance pay to an affected employee who incurs a "termination of employment," regardless of whether timely and proper notice of the termination is provided.[3] N.J. Stat. Ann. § 34:21-1. Not all terminations of employment qualify as a "termination of employment" under the statute, however, even if they are part of a "mass layoff," "transfer," or "termination of operations." Rather, a "termination of employment" is defined to mean a "layoff" and does not include an employee whose termination of employment is due to "voluntary departure," "retirement," or a "discharge or suspension for misconduct," among other things. As a result, to determine whether each employee's termination is a "termination of employment" under the statute, an employer needs to evaluate (a) whether there was a mass layoff, transfer or termination of operations, and (b) whether the employee's employment ended

[3] Before the 2020 amendments, the NJ WARN Act did not require employers to give severance pay to employees. Instead, monetary payments were only required as a penalty if an employer failed to provide a required notice under the NJ WARN Act.

because of layoff, or because of misconduct, retirement, or voluntary termination, or other reason that renders them ineligible.

The amount of severance pay an employer is required to pay is "one week of pay for each full year of employment." N.J. Stat. Ann. § 34:21-2. An additional four weeks of severance pay must be made if any of the covered employees did not receive the requisite 90 days' notice of their termination. *Id.* The rate of pay for purposes of the calculation is set by statute based on "the average regular rate of compensation received during the employee's last three years of employment with the employer or the final regular rate of compensation paid to the employee, whichever rate is higher." *Id*. Thus, employers must keep compensation records for their employees going back at least three years, and, once employers determine that severance payments must be made pursuant to the amended NJ WARN Act, they must review those records for each affected employee to calculate his or her proper severance payment rate.

The amended law also made other changes that substantially increase the scope of the statute and require employers to implement ongoing administrative schemes to ensure their compliance with the law:

1. The amended NJ WARN Act significantly expands the "Mass Layoff" definition.

Before the amendments, the term "mass layoff" generally was defined as the termination of employment within any 30-day period of either (1) 500 or more full-

time employees at an establishment, or (2) 50 or more full-time employees comprising at least 33% of the full-time employees at an establishment. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The amendments substantially broaden the definition of "mass layoff" to include any "termination of employment" of 50 (not 500) or more full- *or* part-time employees, without regard to whether the termination of employment impacts 1% or 33% of the employees. To comply with these changes, employers will need to implement an administrative scheme to determine whether there are 50 or more qualifying terminations in any 30-day period that would trigger severance pay requirements, regardless of what percentage of the workforce that may constitute. N.J. Stat. Ann. § 34:21-1.

2. The amended NJ WARN Act significantly expands the "Establishment" definition.

Before the amendments, the NJ WARN Act analysis was site-specific and conducted separately for each different "establishment," which was defined as either a single location operated for longer than three years or a group of *contiguous* such locations, such as a group of buildings forming an office park. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The amendments remove "contiguous" from this definition, meaning that *all* of an employer's facilities within New Jersey are considered one aggregated "establishment," with only temporary construction sites and operations in effect for three years or less being excluded. N.J. Rev. Stat. § 34:21-1. This adds more administrative burdens on

employers because they will need to track and aggregate upcoming terminations throughout the state to determine whether severance payments must be made.

3. The amended NJ WARN Act significantly expands the scope of covered employees.

Prior to S.B. 3170, "part-time" employees were not counted when calculating whether an NJ WARN event had occurred. The amendments remove the distinction between "full-time" and "part-time" employees, making it even more likely that a "mass layoff" triggering of the Act will occur. *Id.*

Before the amendments, only those employers with 100 *full-time* employees were covered. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The Amended NJ WARN Act now covers all employers with 100 or more employees (including employees outside the state), regardless of how many are "full-time" or "part-time." The amendments also expand the definition of "employer" by adding the following:

> [A]ny individual, partnership, associate, corporation, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, and includes any person who, directly or indirectly, owns and operates the nominal employer, or owns a corporate subsidiary that, directly or indirectly, owns and operates the nominal employer or makes the decision responsible for the employment action that gives rise to a mass layoff subject to notification.

S.B. 3170, enacted as Pub.L.2019, c. 423. This expanded definition suggests that large companies with multiple subsidiaries employing individuals in New Jersey

could be covered by the amended NJ WARN Act, even if the individual subsidiaries do not employ enough individuals on their own.

B. The Amended NJ WARN Act Has Caused ERIC An Injury-In-Fact Related To ERIC'S Core Mission.

ERIC is a nonprofit trade organization that represents the interest of employers with 10,000 or more employees that sponsor health, retirement, and other benefit plans governed by ERISA, 29 U.S.C. §§ 1001 *et seq.* Declaration of Aliya Robinson ("Robinson Decl.") ¶ 2. ERIC member companies are large employers, with employees in every state, including approximately 60 member companies that employ thousands of individuals in New Jersey. *Id.*; Deposition of Annette Guarisco Fildes ("Fildes Dep.") 22:12-16. As a national association, ERIC's mission includes lobbying and litigation advocacy for nationally uniform laws regarding employee benefits as contemplated by ERISA, so that ERIC's member companies may lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws in addition to federal law. Robinson Decl., ¶ 3.

ERIC pursued this litigation because S.B. 3170 directly conflicts with ERIC's core mission. Fildes Dep. 29:7-15. Specifically, S.B. 3170 impedes ERIC's ability to ensure that its member companies are protected under the federal ERISA law from various state and local laws governing employee benefits. Robinson Decl., ¶¶ 4, 11.

Thus, ERIC has had to expend and divert time, money, and other resources from other critical lobbying and advocacy efforts to address the harms posed by S.B. 3170 and educate its member companies about the ramifications of this law. *Id*., ¶ 5. Moreover, ERIC's member companies will have to expend resources to implement administrative schemes to continuously monitor all potential future New Jersey terminations to determine if and when severance benefits must be paid under S.B. 3170. Robinson Decl., ¶ 4; Fildes Dep. 26:11-27:23. To prevent further harm to itself and its members, ERIC initiated this action on August 6, 2020. The Complaint seeks a declaration that ERISA expressly preempts S.B. 3170's amendments to the NJ WARN Act, Compl. ¶¶ 34-45, as well as injunctive relief to halt future enforcement of the amended NJ WARN Act. *Id*., ¶¶ 46-50.

Defendant sought to dismiss ERIC's Complaint, in part, arguing that ERIC lacks both organizational and associational standing because it lacked an injury. *See* Dkt. No. 17. However, in its Order denying Defendant's motion to dismiss, the Court (Judge Martinotti) found that "Plaintiff's allegations, therefore, that it has had to expend and divert resources to address the WARN Act amendments and educate its members on its ramifications (ECF No. 1 ¶ 16) sufficiently demonstrate an injury-in-fact." *Id*.

In support of its earlier motion for summary judgment, ERIC presented a declaration from Ms. Aliya Robinson attesting to the injury suffered by ERIC

because of the amended NJ WARN Act. Dkt. No. 27-2. This Court granted Defendant limited discovery to confirm ERIC's assertions of an Article III injury-in-fact consistent with the allegations that Judge Martinotti found to be legally sufficient. ERIC answered Defendant's interrogatories, produced documents, and offered Defendant depositions of two witnesses, including Ms. Robinson. Defendant decided not to depose Ms. Robinson, so her declaration testimony is undisputed. The Robinson declaration, the Fildes deposition and other discovery all confirmed that ERIC suffered the very injuries ERIC alleged in its Complaint and that Judge Martinotti found were sufficient to show that ERIC suffered an Article III injury due to S.B. 3170, including, but not limited to, diverting significant amounts of time, money, and other resources toward addressing S.B. 3170, when such resources could have been spent on ERIC's other lobbying and advocacy efforts.

C. The Effective Date Of The Amended NJ WARN Act Is Imminent.

On December 19, 2022, the New Jersey State Senate and Assembly passed Bill No. A4768, which makes the requirements of S.B. 3170 effective 90 days after Bill No. A4768 is enacted. Governor Murphy signed Bill No. A4768 on January 10, making the effective date of S.B. 3170 April 10, 2023. Pub. L. No. 2022, c. 142.

Given these developments, ERIC has incurred an injury, will continue to incur additional similar injuries when the statute becomes effective, and its member companies in New Jersey face impending harm with respect to S.B. 3170.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). A factual dispute is genuine only if there is "a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party," and it is material only if it has the ability to "affect the outcome of the suit under governing law." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

Where the movant satisfied its initial burden of showing the basis for its motion, the non-moving party must point to record evidence creating a genuine issue of material fact. *Anderson,* 477 U.S. at 256. The party "opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but [he] must set forth specific facts showing that there is a genuine issue for trial." *Id*. "[C]onjecture and speculation will not create a genuine issue of material fact sufficient to withstand the grant of summary

judgment." *Wiest v. Tyco Elecs. Corp*., 812 F.3d 319, 328 (3d Cir. 2016); *Kohn v. AT & T Corp*., 58 F. Supp. 2d 393, 411 (D.N.J. 1999) ("[U]nsupported, conclusory allegations . . . do not create a genuine issue of material fact.").

In the present case, the dispositive issues before the Court are purely legal, and the parties have completed the expedited discovery ordered by the Court regarding ERIC's Article III standing. Thus, the case is ripe for decision on summary judgment. *See, e.g.*, *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014), *aff'd sub nom. Gobeille v. Liberty Mut. Ins. Co*., 136 S. Ct. 936 (2016) (reversing district court's grant of summary judgment in favor of the State of Vermont and holding that a law requiring the reporting of health insurance claims data was preempted by ERISA, and remanding with instructions to enter summary judgment for plaintiff because the case involved a legal dispute with no need for trial); *Simas*, 6 F.3d at 852 (affirming the district court's grant of summary judgment finding ERISA preemption of a Massachusetts statute requiring severance pay); *NGS Am., Inc. v. Barnes*, 998 F.2d 296, 297 (5th Cir. 1993) (affirming a district court's summary judgment order holding that ERISA preempted a Texas statute).

IV. ARGUMENT

A. ERIC Has Standing to Challenge S.B. 3170.

ERIC meets the constitutional requirements for standing in this case because it has suffered an actual harm and both it and its members will suffer an imminent injury-in-fact that is caused by the challenged law, and such injury is redressable by a decision in its favor. *See Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 165-166 (3d Cir. 2016) (describing the requirements for standing). Moreover, if the S.B. 3170 amendments become effective, ERIC will incur additional harm that constitutes an injury-in-fact. Specifically, ERIC has Article III standing under two independent bases: (1) direct organizational standing and (2) associational standing.

1. ERIC has organizational standing to challenge S.B. 3170's amendments in its own right.

An organization suffers an injury sufficient to establish standing on its own behalf when it challenges an allegedly unlawful practice that requires it to divert resources to counteract the unlawful conduct or that frustrates its organizational mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding an injury-in-fact where the organization alleged that the unlawful conduct "perceptibly impaired" its ability to provide counseling and referral services by requiring it to "devote significant resources to identify and counteract the defendant's [unlawful conduct]"); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247,

308 (3d Cir. 2014) (finding standing where the organization diverted its resources to remedy the alleged discrimination).

Courts have consistently found organizational standing where, as here, the organization's "activities have been impeded" by the challenged law or action. *See Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (collecting cases); *Fair Hous. Rts. Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 n.5 (3d Cir. 2016) (finding standing where the organization's mission had "been frustrated because it has had to divert resources in order to investigate and prosecute the alleged discriminatory practices"); *New Jersey Civ. Just. Inst. v. Grewal*, 2021 WL 1138144, at *5 (D.N.J. Mar. 25, 2021) (finding standing on motion for summary judgment where the plaintiff organization "expended time and resources to counteract [the challenged law]" which impeded its mission and "forced NJCJI to 'divert resources from its other efforts'").

Furthermore, Article III standing does not require an organization to undertake activities outside its normal operations or divert resources toward new and different goals. *See Scott v. Schedler*, 771 F.3d 831, 836–39 (5th Cir. 2014) (NAACP had standing to challenge failure to provide registration forms to persons visiting benefit offices because NAACP spent *additional* time on registration drives as a result); *Nat'l Council of La Raza v. Cegavske,* 800 F.3d 1032, 1040 (9th

Cir. 2015) (organizations had standing based on additional resources spent assisting people who should have been registered through state public assistance offices with voter registration); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (upholding organizational standing for non-profit Organization for Chinese Americans based on injury – albeit a "not large" one – resulting from extra time spent educating voters about a new Texas voting law restricting interpretation assistance instead of organization's normal "get out the vote" activities with membership).

Here, the NJ WARN amendments directly conflict with ERIC's mission, which is to promote nationally uniform laws regarding employee benefits as contemplated by ERISA on behalf of its member companies. Robinson Decl., ¶ 4. S.B. 3170's amendments to the NJ WARN Act frustrate ERIC's mission by imposing a series of requirements that collectively force employers (like ERIC's member companies) to create or modify severance benefit plans. If each state passed its own laws requiring an administrative scheme to provide severance benefits, like New Jersey, large employers like ERIC's member companies would be governed by different laws for different employees depending on the state and could not have a uniform severance benefit plan structured in the way the employer deemed best for its business and its workforce, the way Congress intended. 29 U.S.C. § 1144(a); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). S.B.

3170, therefore, impedes ERIC's ability to ensure that its member companies are protected under the federal ERISA law from various state and local laws governing employee benefits. Robinson Decl., ¶¶ 4, 11.

To counteract the harms posed by S.B. 3170, ERIC has had to expend and divert time, money, and other resources from other critical lobbying and advocacy efforts. *Id*., ¶¶ 5-9. For example, to counteract the harm from the impending enforcement of S.B. 3170, ERIC's staff has had to:

- Spend countless hours analyzing S.B. 3170. *Id*., ¶¶ 6-7;
- Consult with outside legal counsel on the potential impact and legality of S.B. 3170. *Id*., ¶ 6; Fildes Dep. 20:7-21:4;
- Communicate with member companies, especially those with workers in New Jersey, to educate them on the law and its ramifications. Robinson Decl., ¶ 6;
- Prepare newsletters and presentations on S.B. 3170 for its member companies. *Id*., ¶ 7;
- Reach out to other trade organizations to discuss S.B. 3170 and how those organizations plan to respond to the law. *Id*;
- Work with other organizations to lobby to delay the effective date of S.B. 3170 and otherwise amend the law. *Id*; Fildes Dep. 43:22-44:8; and,
- Reach out to several national, New Jersey state, and employer trade media outlets, including Reuters, Bloomberg Law, Law360, New Jersey Business Magazine, and several others, to discuss ERIC's position on the impact and legality of S.B. 3170. Robinson Decl., ¶ 7.

ERIC has incurred thousands of dollars through the time, effort, and other resources toward all of the aforementioned activities to counteract S.B. 3170. Such

resources could have been directed toward other projects and advocacy efforts that have been ongoing at ERIC, such as:

- Meeting with ERIC member companies to understand how ERIC can support their ability to provide and expand their benefits offerings (*Id.*, ¶ 9);
- Working on federal and state paid leave initiatives that impact ERIC member companies in every state (*Id.*);
- Advocating for federal retirement legislation, including to allow employers to provide emergency funds, student loan assistance to their workforce, and addressing multi-employer pension plan reform (*Id.*);
- Participating in retirement plan litigation at the federal level through amicus briefs (*Id.*); and,
- Advocating to ensure that state retirement plans do not impose burdens on ERIC member companies that are inconsistent with the federal ERISA law (*Id.*).

Absent redress from this Court, the enforcement of S.B. 3170's amendments to the NJ WARN Act will adversely impact ERIC member companies in ways that go to the heart of ERIC's core mission and make it more difficult for ERIC to successfully advocate for nationally uniform laws regarding severance pay and other employee benefits. Robinson Decl., ¶ 4; Fildes Dep. 26:11-27:23. And when S.B. 3170 becomes effective, ERIC will have to expend and divert *additional* time, money, and other resources from other ERIC lobbying and advocacy efforts to address S.B. 3170 and its impact on ERIC member companies, including additional time consulting with counsel, preparing newsletters, webinars, and

training, educating ERIC member companies, and lobbying — time, money, resources, and efforts that otherwise could and would be directed to other issues. Robinson Decl., ¶¶ 9-10.

2. ERIC has associational standing to challenge S.B. 3170's amendments on behalf of its members.

In addition, ERIC has associational standing under Article III. The Supreme Court has established a three-prong test for representative, or associational, standing; the organization must demonstrate that "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). ERIC satisfies each of these requirements for associational standing.

First, ERIC has approximately 60 member companies with operations in New Jersey, many of which will be subject to S.B. 3170's severance pay requirements. Fildes Dep. 22:12-16. This is because those members are large employers who will be forced to implement administrative schemes to monitor all terminations on a rolling basis to determine whether the requirements of the amended NJ WARN Act have been triggered, and whether they must provide additional benefits to their workers. Robinson Decl., ¶ 4; Fildes Dep. 26:11-27:23.

Thus, ERIC's member companies have Article III standing to sue in their own right because they suffer concrete and particularized injuries directly traceable to S.B. 3170's amendments to the NJ WARN Act. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 362 (3d Cir. 2014) ("[W]hen an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing.").

Second, as noted above, the ERISA preemption interest that ERIC seeks to protect in this action is germane to and at the core of ERIC's mission. *See* Robinson Decl., ¶ 3; Fildes Dep. 29:7-15.

Finally, because ERIC seeks prospective declaratory and injunctive relief, participation of its members in this lawsuit it not required. *See Hunt*, 432 U.S. at 343 (recognizing that an association may seek declaratory, injunctive or other forms of prospective relief on behalf of members).

B. The Scope Of ERISA's Preemption Clause Is Broad By Design To Preclude All State Laws That Relate To Employee Benefit Plans.

As to the merits, S.B. 3170's amendments to the NJ WARN Act are preempted by ERISA. 29 U.S.C. § 1144(a). When ERIC first moved for summary judgment, Defendant failed to muster any arguments challenging the substance of ERIC's position that ERISA preempts the NJ WARN Act amendments. Now that ERIC's standing is well established, Defendant may now attempt to counter

ERIC's substantive arguments on the merits. This Defendant cannot meaningfully do.

Congress enacted ERISA to regulate any employee benefit plan established or maintained by a private employer or employee organization nationwide. 29 U.S.C. § 1003(a). However, "ERISA does not guarantee substantive benefits." *Gobeille*, 136 S. Ct. at 943. Rather, ERISA leaves employers free, "for any reason at any time, to adopt, modify, or terminate [benefit] plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

To encourage employers to adopt employee benefit plans and provide benefits to employees, Congress sought to create a system "that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (brackets in original). That is, "ERISA 'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under *uniform* standards of primary conduct and a *uniform* regime of ultimate remedial orders and awards when a violation has occurred.'" *Id.* (emphasis added) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)).

With this purpose in mind, Congress enacted ERISA's preemption provision, which states that "the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit

plan." 29 U.S.C. § 1144(a). Congress enacted this provision with "the goal . . . to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 498 U.S. at 142. As the Supreme Court has explained, "[r]equiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries." *Gobeille*, 136 S. Ct. at 944 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001)); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (ERISA's preemption provision is intended to make the regulation of such plans "exclusively a federal concern").

The Supreme Court has described the language of ERISA's preemption provision as "conspicuous for its breadth," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990), and "deliberatively expansive," *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 324-25 (1997). Courts in this District have also recognized the broad scope of ERISA's preemption clause. *See Riordan v. Optum & Oxford Health Plan*, No. 3:17-cv-6472-BRM-TJB, 2018 WL 3105426, at *3 (D.N.J. June 25, 2018) (Martinotti, J.) (granting motion to dismiss state law claims pursuant to ERISA preemption and holding that "[t]he Supreme Court has interpreted 'relate to' broadly").

ERISA preempts any state law relating to any employee benefit plan "if it has a connection with or reference to such a plan." *Id.* (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)). This is true "even [if the law] does not conflict with ERISA's own requirements and represents an otherwise legitimate state effort to impose or broaden benefits for employees." *See Simas*, 6 F.3d at 852 (citing *District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583 (1992), and *Mass. v. Morash*, 109 S.Ct. 1668, 1673 (1989)). Moreover, "a state statute that obligates an employer to establish an employee benefit plan is itself preempted even though ERISA itself neither mandates nor forbids the creation of plans." *Id.*

C. The Amended NJ WARN Act Is Preempted By ERISA Because It Requires Employers To Establish Or Modify ERISA-Governed Severance Plans.

The amended NJ WARN Act is precisely the type of state law that ERISA displaces because it disrupts the uniform body of federal law governing employee benefit plans. The amendment requires employers to implement ongoing administrative schemes to evaluate whether and when severance benefits are owed, to whom, and for how much. That requires employers either to adopt new severance benefit plans for their New Jersey employees and operations or to modify their existing severance benefit plans specifically for New Jersey employees and operations. Either way, ERISA's preemption provision prevents

New Jersey from forcing employers to implement severance plans in this way, and therefore, the amended NJ WARN Act is preempted.

1. ERISA preempts state laws that compel employers to provide severance benefits requiring ongoing administrative programs.

Severance plans are generally considered employee welfare benefit plans governed by ERISA. *Morash*, 109 S.Ct. at 1673 ("[P]lans to pay employees severance benefits, which are payable only upon termination of employment, are employee welfare benefit plans within the meaning of the Act." (emphasis omitted)); *Koenig v. Automatic Data Processing*, 156 F. App'x 461, 466 (3d Cir. 2005) ("Severance pay plans are classified under [ERISA] as welfare benefit plans."). More specifically, a severance plan that requires an ongoing administrative program or scheme is an ERISA-governed plan that triggers ERISA's preemption clause. *See, e.g.*, *Pane*, 868 F.2d at 633–35 (finding that a severance plan was subject to ERISA because implementing that plan required an "administrative scheme"). In contrast, a severance benefit payable upon a one-time plant closing could be exempt from ERISA, and not trigger ERISA preemption, if it does not require an ongoing administrative program. *See Fort Halifax*, 482 U.S. at 11–12.

This distinction governs the scope of ERISA preemption as applied to state laws requiring severance pay. In *Fort Halifax*, the Supreme Court ruled that

ERISA did *not* preempt a Maine statute that simply required employers to make severance payments to employees terminated in a one-time plant closing. 482 U.S. at 1–4. Although the Court recognized that severance plans could be preempted by ERISA, the Maine law did not require "an ongoing administrative scheme whatsoever to meet the employer's obligations" under that law. *Id.* at 12. "The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control." *Id.* Instead, the law only required "a one-time, lump-sum payment triggered by a *single* event," with "no administrative scheme whatsoever to meet the employer's obligation." *Id.* (emphasis added).

By the same token, state severance requirements that do require employers to establish an ongoing administrative scheme effectively necessarily mandate severance plans and are thus preempted. The First Circuit reached that conclusion in *Simas*, holding that ERISA preempted a Massachusetts statute requiring the payment of severance benefits. 6 F.3d at 849. The Massachusetts law required employers to pay severance benefits to employees terminated within a certain period following a corporate takeover. In particular, employers were required to make severance payments – based on weekly compensation and years of service – to employees who were terminated within 24 months after a "transfer of control" of their employer, provided that the employees were not terminated for cause. *Id.*

at 851–52. Applying *Fort Halifax*, the First Circuit held that ERISA preempted the state law because it required the type of "ongoing administrative [scheme]" that gives rise to an ERISA-covered plan. *Id.* at 853–55. What distinguished the Massachusetts law in *Simas* from the Maine law in *Fort Halifax* was how the Massachusetts statute imposed administrative burdens that the Maine statute did not. Specifically, the First Circuit noted:

> The Maine statute [in *Fort Halifax*] starts and ends with a single, once and for all event, the plant closing, after which all payments are due. . . .
>
> Thus, the Maine employer on closing its plant need do little more than write a check to each three-year employee. The Massachusetts employer, by contrast, needs some ongoing administrative mechanism for determining, as to each employee discharged within two years after the takeover, whether the employee was discharged within the several time frames fixed by the tin parachute statute and whether the employee was discharged for cause or is otherwise ineligible for unemployment compensation under Massachusetts law. ***The "for cause" determination, in particular, is likely to provoke controversy and call for judgments based on information well beyond the employee's date of hiring and termination.***

Id. at 853 (emphasis added).

The Third Circuit has taken the same basic approach: severance benefit plans must be governed by ERISA, as opposed to any state laws, when they require an ongoing "administrative scheme." *See Pane,* 868 F.2d at 633–35. The plaintiff in *Pane* brought claims under New Jersey law, seeking severance benefits. *Id.* The district court dismissed those claims, holding that the employer's severance plan had to be governed exclusively by ERISA. *Pane v. RCA Corp.*, 667 F. Supp.

168, 171 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989). Specifically, the district court distinguished the one-time-only requirement in *Fort Halifax* and found that when "an employee is entitled to [severance] benefits only if a 'triggering event' occurs, such as termination of an employee for reasons other than for cause[,] . . . the circumstances of each employee's termination must be analyzed in light of these criteria, and an ongoing administrative system constituting an ERISA plan exists." *Id.* at 170–71. The Third Circuit affirmed the district court's holding and held that the severance plan is covered by ERISA because "[i]t required an administrative scheme." *Pane*, 868 F.2d at 633–35.

Other courts have also found that severance plans must be governed by ERISA when the plans require an administrative scheme that gives an employer discretion to provide or withhold benefits. *See, e.g.*, *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992) (citing *Pane* and holding that a severance benefit plan was covered by ERISA because it allowed the employer to withhold benefits for employees terminated for cause or for employees offered a "substantially equivalent" position, which required an "administrative scheme"); *Makwana v. Express Scripts, Inc.*, No. 14-7096, 2015 WL 4078048, at *14 (D.N.J. July 6, 2015) (holding that an employer's severance program was an ERISA plan (not just a payroll practice) because it required the employer to analyze whether employees were terminated for cause); *Darlin v. Consol. Rail Corp.*, 93 F. Supp. 2d 599, 601

(E.D. Pa. 2000) (same); *Zgrablich v. Cardone Indus., Inc*., No. CV 15-4665, 2016 WL 427360, at *5-6 (E.D. Pa. Feb. 3, 2016) (same); *Lawson v. Consol. Rail Corp*., No. CIV. A. 97-7206, 1999 WL 171431, at *3 (E.D. Pa. Mar. 29, 1999), *aff'd*, 208 F.3d 206 (3d Cir. 2000) (severance plan was an ERISA plan because it required an administrative scheme to evaluate circumstances of employee terminations); *Whalen v. Revlon, Inc*., No. CIV. 89-4373 (CSF), 1991 WL 10019, at *3 (D.N.J. Jan. 22, 1991) (finding severance plan subject to ERISA because it "involved ongoing administration of a severance plan whose benefits were payable in the event of numerous occurrences").

2. The amended NJ WARN Act compels employers to establish burdensome ongoing administrative programs to pay severance benefits.

Under *Fort Halifax*, *Simas*, and the Third Circuit's decision in *Pane*, two factors help determine whether the payment of severance benefits requires an ongoing administrative program: (1) whether an employer must exercise managerial discretion to determine eligibility and the amount of severance benefits; and (2) whether the employer has an ongoing commitment to provide those benefits. *See Simas*, 6 F.3d at 851–55; *Pane*, 868 F.2d at 635 (holding that severance plan giving managers discretion to select participants over a lengthy period required an administrative scheme); *Bogue*, 976 F.2d at 1323 (holding that a severance plan involving a "case-by-case, discretionary application of its terms"

over an indefinite period required an administrative scheme). Under this framework, the amended NJ WARN Act plainly mandates the creation of severance pay plans that require ongoing administrative schemes or the modification of existing ERISA-governed severance plans.

a. *The amended NJ WARN Act requires employers to exercise managerial discretion to determine severance benefits.*

First, discretion is necessary to determine whether an individual employee is eligible for severance pay *and* whether severance pay must be paid at all under the amended NJ WARN Act. This is because the amended law exempts employees who are terminated for misconduct, retire, or voluntarily resign from the severance pay requirement. It also exempts terminations of "seasonal employees" and employees who are involuntarily terminated without cause, but are offered "the same employment or a position with equivalent status" within 50 miles of their previous work establishment and within New Jersey. N.J. Stat. Ann. § 34:21-1.

Entire lawsuits have been litigated under ERISA about whether an employee's termination of employment was voluntary or involuntary, whether the termination was for cause, *i.e.*, due to misconduct, or not, whether a period of employment was "seasonal," or whether a "similar job" was offered after an involuntary termination. *See, e.g.*, *Darlin*, 93 F. Supp. 2d at 601 (holding that a severance plan was governed by ERISA because "plan eligibility is restricted to

employees who 'are terminated (or constructively terminated) without cause'—a standard involving the use of subjective discretion by the plan administrator," in a dispute over whether the plaintiff was entitled to severance benefits); *Fresolone v. Fiserv, Inc.*, No. 12-3312, 2013 WL 135111, at *1 (D.N.J. Jan. 9, 2013) (denying motion to dismiss in a case where plaintiff brought a claim under ERISA for severance benefits that hinged on whether he was terminated for cause); *Mallon v. Tr. Co. of N.J. Severance Pay Plan*, 282 F. App'x 991, 996 (3d Cir. 2008) (upholding plan administrator's determination that employee's alleged constructive discharge was not an "involuntary discharge" under the plan, but noting the plaintiffs could have claimed benefits if they refused the newly merged company's offer of employment); *Otero Carrasquillo v. Pharmacia Corp*., 466 F.3d 13, 16 (1st Cir. 2006) (assessing whether a rejected offer of employment was for a "comparable position"); *Yochum v. Barnett Banks, Inc. Severance Pay Plan*, 234 F.3d 541, 545–47 (11th Cir. 2000) (determining whether a rejected written offer of employment was "comparable employment" under the terms of a severance plan); *Ossey v. ABT Elecs., Inc.*, No. 97-1319, 1999 WL 202911, at *5 (N.D. Ill. Mar. 31, 1999) (determining whether certain plaintiffs were "regular, full-time employees" eligible for severance benefits or "seasonal" employees who are not eligible for such benefits).

Many courts have held that when employers have to determine whether a termination is for misconduct or without cause for purposes of severance eligibility, that requires an administrative scheme implicating ERISA preemption. *See, e.g.*, *Simas*, 6 F.3d at 851–55; *Makwana*, 2015 WL 4078048, at *14 (holding that an employer's severance program was an ERISA plan because only employees terminated without cause were eligible for severance); *Darlin*, 93 F. Supp. 2d at 601 (same); *Lempa v. Rohm & Haas Co*., No. 05-cv-0985, 2007 WL 878496, at *3 (E.D. Pa. Mar. 20, 2007) (determining "whether an employee was terminated other than for cause . . . militates towards the applicability of ERISA"); *Cole v. Champion Enters., Inc.*, No. 1:05-00415, 2005 WL 8167130, at *5 (M.D.N.C. Nov. 1, 2005) (individualized determination of eligibility and the exercise of managerial discretion weigh in favor of finding that the agreement is an ERISA plan). As discussed already, in *Simas*, the First Circuit found that the Massachusetts statute was distinguishable from the Maine statute in *Fort Halifax* primarily because the Massachusetts statute exempted employees terminated for cause, whereas the Maine statute did not. *Simas*, 6 F.3d at 853–54. Like the Massachusetts statute in *Simas*, S.B. 3170 excludes employees terminated for misconduct from severance eligibility. Like the statute in *Simas*, S.B. 3170 is preempted by ERISA.

b. *The amended NJ WARN Act requires employers to exercise this managerial discretion on an ongoing and indefinite basis.*

Second, given the new definitions of "mass layoff" and "establishment" in the amended NJ WARN Act, employers will need to monitor all of their terminations in New Jersey as well as terminations of employees "reporting to" a New Jersey location, then pay severance benefits whenever 50 or more employees at, or reporting to, any location within the state are terminated for qualifying reasons during any 30-day period. This analysis, in turn, intersects with the evaluation of the circumstances of each individual termination. For example, if an employer terminates a total of 55 employees in a 30-day period, but six of those terminations were for misconduct (or retirement or relocation), then the employer may not owe severance to *any* of its employees.

Thus, to comply with the amended NJ WARN Act's mandated severance payment requirement, employers will need to establish the following administrative process and adhere to it on an ongoing basis:

- Continuously monitor every upcoming employee termination in any establishment in New Jersey that has been operating for more than three years and terminations of employees reporting to such establishments;
- Determine the reasons for each employee's termination, including whether each of those terminations is (a) voluntary, (b) involuntary without cause, (c) involuntary due to misconduct, or (d) involuntary but for a "seasonal" employee;

- On a rolling basis, determine whether there are 50 or more involuntary terminations without cause upcoming for non-seasonal employees in the covered New Jersey establishments during any 30-day period, and, if so, issue 90-day notices of the anticipated terminations to those affected employees (as well as to the New Jersey Commissioner of Labor and Workforce Development and to the chief elected official of the municipality where the affected establishment(s) is (are) located);

- During the 90-day notice period, determine whether any of the involuntarily terminated employees have been offered "the same employment or a position with equivalent status" within 50 miles of their previous work establishment and within New Jersey and, if so, remove such employees from the count toward the 50-employee threshold that applies in determining whether any employees are entitled to severance pay under the Act;

- Provide each covered, terminated, eligible employee with severance pay equal to one week of pay for each full year of employment, using the average regular rate of compensation received during the employee's last three years of employment with the employer or the final regular rate of compensation paid to the employer, whichever is higher (which requires keeping track of historical employee compensation for each employee); and

- For any employers that already maintain an ERISA-covered severance program for their employees in New Jersey, take the additional step of evaluating the severance payment under their program, comparing it against the mandated severance payments under the amended NJ WARN Act, and then amending their plan to comply with the amended NJ WARN Act and paying the higher severance amount.[4]

[4] Moreover, to the extent employers (including ERIC's member companies) offer ERISA-governed severance benefits to their employees nationwide under the terms of ERISA-governed severance plans and conditioned on their acceptance of a general release, now, with the amendments to the NJ WARN Act, those employers will be compelled to provide severance benefits to employees in New Jersey *without* a release, or they must alter the terms of their existing severance plans to provide additional severance pay beyond the amount required by the amended Act if they want to still receive a release from the affected employees.

Employers cannot meet these obligations without establishing ongoing systems that track all of the necessary information about each employee termination that occurs in New Jersey and for employees reporting to a location in New Jersey. Employment turnover and terminations are a regular part of conducting business for all employers, but especially for large employers like ERIC member companies with operations in New Jersey. This is true even where such employers also are hiring employees in other locations or for other job functions. And given the current economic environment, it is possible and even likely that large employers could trigger the amended NJ WARN Act thresholds every year, and multiple times per year. Even medium-sized employers will have to constantly evaluate whether they are triggering severance eligibility. In other words, the amended NJ WARN Act requirements are not just one-time events occasioned by the complete shutdown of operations in the state, but rather require ongoing administration.

ERISA preempts state laws to avoid precisely this problem. If the NJ WARN Act amendments are allowed to stand, other states could pass similar laws but with their own (lower or higher) thresholds, or their own conditions for inclusion or exclusion from severance eligibility, or with different severance amounts, and employers would face exactly the sort of lack of uniformity that ERISA preemption was intended to avoid. Even if New Jersey is alone in

endeavoring to regulate severance benefits, the disruption to uniformity caused by New Jersey law is enough to trigger ERISA's express preemption provision.

Accordingly, the Court should declare S.B. 3170's amendments to the NJ WARN Act void as preempted by ERISA and enjoin their enforcement. The amendments undermine the regime of nationally uniform employee benefit plans for which ERISA was enacted. And given that the amendments are preempted by ERISA, Defendant should be enjoined from informing employees about the severance payments required by the amendments, instructing employers to provide such severance payments, or otherwise engaging in any conduct to enforce the amendments pursuant to his statutory authority as Commissioner of the New Jersey Department of Labor and Workforce Development. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. 12, 7-10 (describing Defendant's responsibilities with regard to enforcing the NJ WARN Act).

V. CONCLUSION

For the foregoing reasons, ERIC respectfully requests that this Court hold that ERISA preempts the amendments to the NJ WARN Act made in S.B. 3170, so that the law can remain in its pre-amended form. ERIC also respectfully requests that this Court enjoin Defendant from enforcing the amendments to the NJ WARN Act.

Dated: March 14, 2023

Respectfully submitted,

s/ Richard G. Rosenblatt

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