No. 21-1019

IN THE

Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,

Petitioner,

v.

CITY OF SEATTLE, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL, BUSINESS GROUP ON HEALTH, THE HR POLICY ASSOCIATION, THE NATIONAL ALLIANCE OF HEALTHCARE PURCHASER COALITIONS, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, THE ALABAMA EMPLOYER HEALTH CONSORTIUM, THE HEALTHCARE PURCHASER ALLIANCE OF MAINE AND THE SILICON VALLEY EMPLOYERS FORUM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Benefits Council (the "Council") is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

Business Group on Health (the "Business Group") is the leading non-profit organization representing large employers' perspectives on optimizing workforce strategy through innovative health, benefits and well-being solutions and on health policy issues. The Business Group keeps its membership informed of leading-edge thinking and action on health care cost and delivery, financing, affordability and experience with the health care system. The Business Group's over 440 members include 74 Fortune 100 companies as well as large public sector employers, who collectively provide health and well-being programs for more than 60 million individuals in 200 countries.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties were provided the required notice and have consented to the filing of this brief.

The HR Policy Association ("HRPA") is the leading organization representing chief human resource officers of over 400 of the largest employers in the United States. Collectively, their companies provide health care coverage to over 21 million employees and dependents in the United States and spend more than $110 billion annually on health care benefits and related taxes.

The National Alliance of Healthcare Purchaser Coalitions ("National Alliance") is the only nonprofit, purchaser-led organization with a national and regional structure dedicated to driving health and healthcare value across the country. Its members represent private and public sector, nonprofit and Taft-Hartley organizations, and more than 45 million Americans, spending over $300 billion annually on healthcare.

As the voice of all things work, workers and the workplace, the Society for Human Resource Management ("SHRM") is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. With more than 300,000 human resources and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. SHRM members design and administer benefits, including health care, in their respective organizations.

The Alabama Employer Health Consortium (the "AEHC") is an employer-led non-profit organization dedicated to improving the provision of healthcare benefits from the employer's perspective. The AEHC provides important resources to private and public member employers to optimize value of their healthcare spending and to promote quality and value for the benefit of member companies and their employees in the State of Alabama.

The Healthcare Purchaser Alliance of Maine is a non-profit organization whose over 50 members include public and private employers, benefit trusts, hospitals, health plans, doctors and consumer groups working together to improve health and maximize the value of health care services in the State of Maine.

The Silicon Valley Employers Forum ("SVEF") comprises over 55 high-tech employers, representing over 2 million employees and dependents. SVEF impacts and influences the evolution of global benefits where member companies benchmark and share best practices to optimize, manage and create leading-edge programs in the areas of health care, retirement, and other benefits.

This is a case of great significance for *amici* and their members, who are at the forefront of the employer-sponsored health coverage system and who offer many millions of workers employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including comprehensive health coverage. As most specific to this case, the Seattle ordinance at issue, Seattle Municipal Code chapter 14.28 (2019) (the "Seattle Ordinance"), will directly impact a substantial number of *amici* members. The complex compliance scheme required by the Seattle Ordinance, upheld by the Ninth Circuit, increases the overall employer burden of administration and costs that are borne by employers and, typically, shared in part by employees.

More generally, *amici's* interests and those of their members are significantly amplified because of the importance of the regulatory uniformity provided by

ERISA's sweeping preemption provision. This regulatory uniformity ensures that all employers, whether local, multi-state, or national, offering their employees ERISA-covered benefits can do so efficiently without being subject to a host of state and local requirements. Because of "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force," *Boggs v. Boggs*, 520 U.S. 833, 839 (1997), the protection of uniform plan administration is essential to the interests of employers and employees alike. Moreover, ERISA preemption helps ensure that employers can fairly and equitably extend health coverage and other employee benefits to workers without regard to their place of residence or employment, which has become all the more essential as the pandemic has created new norms with respect to where employees carry out their work.

The Seattle Ordinance and other similar state and local "play-or-pay" laws (*i.e.*, laws in which employers must provide a certain level of benefits or pay a penalty, as described by Petitioner) directly undermine the regulatory uniformity provided by ERISA preemption by dictating the content and benefits under ERISA plans. *Amici* and their members are gravely concerned about the consequences if state and local governments are permitted to impose play-or-pay laws, and circumvent ERISA's clear and broad preemption provision, by simply adding that, as an alternative mode of compliance employers may make a payment of the same amount directly to employees or the government (described by Petitioner as an "or-pay option").

SUMMARY OF ARGUMENT

Congress created ERISA not only to establish important procedural protections for participants and beneficiaries with respect to certain employer-sponsored benefits plans, but also to create a uniform regulatory structure that would promote the offering of these benefit plans in the first place. When enacting ERISA, Congress recognized that many employers operate in more than one state or locality. Thus, Congress understood that, to encourage the sponsorship and maintenance of these programs, the governing regulatory framework must ensure that employers are able to look to a single set of federal laws. If, instead, employers are confronted with myriad state and local laws, they may decide they are unable to bear the cost or burden required to offer such voluntary benefits to their employees.

This case presents the question of whether ERISA's preemption provision permits state and local governments to mandate that private employers choose to either provide coverage of a certain value through the employer's ERISA-governed plan or make required payments to certain employees for the specified purpose of providing health coverage. As Petitioner fully explains, and as is clear from both Congressional intent in drafting ERISA and the forty-some years of Supreme Court precedent that followed, the answer is a resounding "No."

Nevertheless, in this case the Ninth Circuit, relying on *Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008) ("*Golden Gate*"), further entrenched a circuit split that creates a practical morass for private employers who wish to provide their employees with uniform health and other benefits

covered by ERISA. In failing to distinguish the unique and prescriptive nature of the Seattle Ordinance, and ignoring significant jurisprudential developments with respect to the scope of ERISA preemption since it ruled in *Golden Gate*, the Ninth Circuit has opened the door to significant burdens on the employer-sponsored healthcare system, and all ERISA-covered benefit plans as well. As can be seen from the stated intentions of other localities in the Ninth Circuit and elsewhere, these types of local laws present the kind of inconsistency in regulation that Congress clearly intended to prohibit in enacting ERISA.

The potential disruptive effects of multiple states and localities adopting similar, but inconsistent, requirements with respect to ERISA-covered plans undermines uniformity and imposes the kind of administrative burden on ERISA-covered plans that Congress expressly sought to avoid—a burden that could result in a myriad of adverse consequences for employees and employers alike, including: the need for employers to track and comply with a complex patchwork of benefit-related laws across multiple jurisdictions and the associated increased costs for plans and participants; the need for employers to offer different benefits to different employees based on geography despite the employees being otherwise similarly situated; employee confusion regarding the benefits available to them by their employer; and ultimately, a potential reduction in the generosity of benefits for many employees or even the complete loss of benefits. Such outcomes clearly defy Congressional intent in adopting ERISA's broad preemption provision, and necessitate this Court's intervention so as to preserve the nationally uniform plan administration necessary for employers to continue offering the generous and effective benefits they offer today.

As relevant here, the Seattle Ordinance requires certain hotel industry employers to modify the terms of existing ERISA-covered plans or else make a payment to non-covered employees. *See* Seattle, Wash., Mun. Code ch. 14.28.060 (2019). While the terms of the Seattle Ordinance are cabined to a specific industry, the repercussions of the Court permitting a single locality to exercise this type of power over ERISA-covered plans reach much further, provide a roadmap for other localities to undermine Congressional intent, and impose significant risks to the core pillar of health coverage in this country, employer-sponsored health care. Because ERISA and forty years of case law clearly prioritize uniformity and prohibit actions of the type the City of Seattle took in this case and because of the potentially harmful results should the Ninth Circuit decision stand for both employers and employees, the Court should consider the present case and overturn the Ninth Circuit's decision below.

ARGUMENT

I. Circuit Split Exists on a Matter of National Importance

As Petitioner has ably described, the *Golden Gate* decision is an outlier among the Circuits with respect to whether ERISA preempts state and local laws mandating that employers either pay a specified sum or provide a specific coverage. This outlier status derives largely from the failure of the Ninth Circuit to apply the Supreme Court's prior precedents in the decision below, as well as the inconsistency of *Golden Gate* with the Supreme Court's more recent rulings. As explained below, those dictates from the Supreme Court have led both the First and Fourth Circuits to determine that laws similar to the

Seattle Ordinance are preempted by ERISA. Allowing the break with other circuits to continue risks a regulatory morass of local laws, unnecessary legal costs, the need for prohibitively expensive compliance programs, and the reduction of benefits or increased costs passed along to participants.

The *Golden Gate* decision, which is the foundation of the decision in this matter, created a circuit split with the Fourth Circuit's decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007) ("*Fielder*"), which predated *Golden Gate* and concerned a Maryland law requiring certain employers to spend a specific portion of their payroll costs on health care or surrender the difference between the actual spend and the required amount to the state. *Golden Gate Rest. Ass'n v. City & Cnty. of S.F.*, 558 F.3d 1000, 1004 (9th Cir. 2009) (Smith, J., dissenting) (recognizing a circuit split with the Fourth Circuit) ("*Golden Gate II*"). The Fourth Circuit held that the Maryland law was preempted because it created a situation where the only rational course of action was to increase spending on health care to avoid the tax and because it offended uniform nationwide plan administration by requiring employers to monitor local health care spending. *Fielder*, 475 F.3d at 193, 196–97.

Moreover, following the decision in *Golden Gate*, the First Circuit deepened the split, siding with the Fourth Circuit, in a case concerning a municipal training ordinance that required contractors to offer apprenticeships, which are benefits covered by ERISA. *See Merit Constr. All. v. City of Quincy,* 759 F.3d 122 (1st Cir. 2014) ("*Merit*"). In holding the ordinance to be preempted, the First Circuit adopted reasoning similar

to *Fielder* focusing on the ordinance's effect on uniform benefit administration. *Merit*, 759 F.3d at 131. In arriving at its decision, the First Circuit specifically rejected the reasoning of *Golden Gate*. *Id.*

The decision by the Ninth Circuit in this matter, and by extension the *Golden Gate* decision on which it relies, is in direct conflict with both the Fourth Circuit's decision in *Fielder* and the First Circuit's decision in *Merit*. In those cases, the courts rejected arguments that relied on compliance with the laws at issue via other options that theoretically allowed compliance without offending ERISA. *Id.*; *Fielder*, 475 F.3d at 193, 196–97. Because an alternate mode of compliance underpins the decision in this matter and indeed also in *Golden Gate*, they are in direct conflict with both *Fielder* and *Merit*.

II. ERISA Preemption Is Fundamental to Employers Offering Health Coverage to Employees

By including a broad preemption provision in ERISA, Congress made a deliberate policy choice to render federal law the sole regulatory regime for multi-state employee benefit plans. "In enacting ERISA, Congress also intended to safeguard employers' interests by 'eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans.'" *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1501 (9th Cir. 1993). *See also Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). One key sponsor of the bill characterized ERISA's preemption provision as its "crowning achievement" and declared that Congress "round[ed] out the protection afforded

participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 CONG. REC. 29197 (1974) (statement of Rep. Dent).

> It should be stressed that with the narrow exceptions specified in [ERISA], the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

H.R. CONF. REP. 93-1280, 1974 U.S.C.C.A.N. 5038, 5188.

In so doing, Congress was able to "minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government …, [and to prevent] the potential for conflict in substantive law … requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Golden Gate II*, 558 F.3d at 1007 (Smith, J. dissenting) (alterations in original) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans. v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)).

ERISA preemption, and the uniformity of regulation it affords, is essential for the longevity of our employer-sponsored benefit plan system for several significant reasons. Vitally, uniformity creates important administrative efficiencies that permit plans to provide

generous benefits, by providing a single set of rules, thus minimizing the cost and burden of tracking and complying with different rules in each locality and state. In this way, ERISA's broad preemption of related state laws serves as a principal means to accomplish the "congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Egelhoff*, 532 U.S. at 149–50 (alterations in original) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

In addition, ERISA preemption and uniform regulation of employer-provided benefit plans allows employers to tailor benefits to the unique needs of employees, rather than providing benefits on the basis of what each state and locality mandates. ERISA ensures that employers face "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." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). This structure permits employers to focus their efforts on providing appropriate and meaningful benefits that are best suited for their workforce based on their own unique business situations.

Furthermore, the regulatory uniformity provided by ERISA gives employers the flexibility both to provide the type of benefits best suited to the needs of their employees and to provide them in an expedient fashion. For example, in response to the COVID-19 pandemic, many large employer plans quickly pivoted to provide their participants and beneficiaries with access to telemedicine to ensure that non-COVID-related care was available.

Deborah Pike Olsen, *Private Insurers Expand Telehealth Coverage, Which plans pay what — and how new state rules factor in*, AARP (Aug. 31, 2020), https://www.aarp.org/health/conditions-treatments/info-2020/telehealth-private-insurance-coverage.html; Devin M. Mann et al, *COVID-19 transforms health care through telemedicine: Evidence from the field* (2020), https://pubmed.ncbi.nlm.nih.gov/32324855/#affiliation-1 ("Between March 2nd and April 14th 2020, telemedicine visits [in the NYU Langone Health system] increased from 102.4 daily to 801.6 daily[] (683% increase) in urgent care after the system-wide expansion of virtual urgent care staff in response to COVID-19."). This was made possible, in very large part, because of ERISA's preemptive scope, which allowed these employers to quickly operationalize and implement vital telehealth coverage for their employees and their families. While this is but one example, without regulatory uniformity, these types of changes would be impossible to accomplish, especially on short time frames when necessary.

Moreover, uniformity also ensures that employers can equitably offer similarly-situated employees the same benefits regardless of where they live or work. This essential benefit of ERISA preemption has become even more valuable during the pandemic, as workplaces evolve and employees' place of work becomes less geographically centralized. This not only supports fairness and consistency but also, by reducing complexity and variation, supports employee awareness. As any employer will attest to, and as noted by the Ninth Circuit, "[u]niformity is essential to ensuring that employees understand what benefits they are entitled to and how to obtain them." *Golden Gate II*, 558 F.3d at 1009 (Smith, J. dissenting).

The benefits of the uniformity granted by ERISA preemption are apparent in our health care landscape today. For more than 40 years, employers have proven to be the backbone of the American health coverage system. More than 177 million Americans, or 54.4 percent of the U.S. population, receive health insurance through employment-based benefit plans. Katherine Keisler-Starkey & Lisa N. Bunch, *Health Insurance Coverage in the United States: 2020*, U.S. Census Bureau, 4 (Sept. 2021), https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-274.pdf. ERISA preemption does not exist solely to protect health care benefits either. Rather, employers rely on ERISA preemption to more efficiently offer their employees all forms of ERISA-covered benefits, including disability, pension (both defined benefit and defined contribution), and important ancillary benefits like life insurance. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) ("It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."). For all these reasons, it is essential that ERISA preemption be vigilantly protected, in order to support employer-sponsored benefits and the millions of Americans who receive them.

III. *Golden Gate* and its Progeny Render ERISA Preemption Meaningless and Are Likely to Result in Increased Health Coverage Costs and Fewer Health Coverage Options

As Petitioner ably explains, state and local play-or-pay laws, including the Seattle Ordinance, directly conflict with ERISA's preemption provision and the addition of an "or-pay" option does nothing to change that fact. *Amici* and their members are deeply concerned that the rule adopted in *Golden Gate*, and reaffirmed by the Ninth Circuit in this case, not only violates ERISA but also furthers the potential for a labyrinth of well-intended, but ultimately detrimental, state and local laws. The circuit split and lack of clarity in the courts, combined with the strong desire by state and local governments to impose benefit mandates on ERISA-covered plans as described by Petitioner, leaves the ground fertile for a substantial increase in state and local mandates for employers to contend with.

This is a matter of great concern for *amici* and their members because it is inconsistent with ERISA and the uniformity it affords, undermining the vast array of attendant benefits described above. Relatedly, this patchwork of state health coverage benefit mandates creates a substantial concern that the regulatory landscape will have the net effect of reducing or eliminating coverage for many Americans. This is because the administrative burdens imposed by conflicting State laws are no mere theoretical concern. They have concrete consequences for the many Americans who depend on ERISA plans for their benefits. For example, with respect to health plan coverage specifically, evidence shows that "each one

percent increase in … plans' costs … results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers*: *1999-2003* iii (1998). The cumulative effect of "[r]equiring ERISA administrators to master the relevant laws of 50 States" is to massively increase the costs of maintaining and operating a multi-state employee benefit plan. *Egelhoff*, 532 U.S. at 149–50.

As *amici* local governments in the case below made clear, the desire not just for states, but also for local governments to adopt mandatory schemes like the Seattle Ordinance is robust. The result of such granular and potentially conflicting benefit mandates, coverage requirements, and contribution requirements for employers would result in not only enormous administrative burdens on employers and ERISA-covered plans, but are likely to materially reduce the generosity and availability of employer-sponsored health coverage more generally.

Even where employers only operate in a single state or locality (as opposed to those that operate in multiple states or localities, which we discuss infra), they could face significant headwinds if localities were permitted to regulate them in a manner similar to the law at issue here. The additional administrative burdens of complying with the additional layer of regulation could put them at a significant disadvantage as compared to other businesses that are not confronting similar rules, even those businesses quite close in geographic proximity. Further, these types of laws, if not preempted, could impose material, additional expenses (either in the form

of additional benefits or cash payments) that could very well stress the finances of smaller local businesses, many of which may not have the needed financial reserves or overall profitability to manage the additional economic burdens presented. For many of these employers, they may have no choice but to eliminate their benefit programs rather than attempt to administer their benefit plans within a complex web of federal, state and local laws. For *amici* representing state and regional, as opposed to national, employers this concern represents a material threat to their plan offerings.

By ensuring efficiencies in the administration of ERISA-covered plans, preemption allows employers to offer health insurance coverage to their employees at lower cost and with enhanced benefits over insurance policies regulated by states, all while meeting rigorous benefit and design requirements imposed by ERISA. As noted above, when the administrative cost of offering coverage increases, the availability and generosity of benefits necessarily declines, leaving employees with fewer, not more, health care resources, and eroding the backbone of the American health care delivery system, employer-sponsored health coverage.

Amici have similarly grave concerns outside the context of health plan coverage. For example, a patchwork of state and local laws applicable to retirement benefits (such as 401(k) plan contributions, profit sharing plan contributions, and/or traditional pension benefits or accruals) could drive up benefit as well as administrative costs, and could also place employers in the position of facing conflicting vesting and asset management requirements. Not only are such laws administratively difficult for plan sponsors, they also materially increase

the likelihood of employee confusion, as different employees in different locales could have varying benefits while having to meet different requirements to access those benefits (either in the form of different vesting rules or in administrative differences imposed on employers in terms of claims forms). This would become particularly acute if a state or locality adopted fiduciary requirements inconsistent with those that are imposed under ERISA. These types of play-or-pay requirements could also materially alter the availability and generosity of other important benefits, like employee assistance programs, life insurance, and apprenticeship programs, all of which are covered by ERISA, and all of which are important components of employee compensation and retention.

A useful example that illuminates the problems associated with the potential inconsistent and often contradictory regulation of employee benefits arises in the context of state and local paid leave laws. Employers are currently, generally subject to a variety of leave laws at the local, state, and even federal level. In a recent survey of employers by Business Group on Health, 77 percent of respondents indicated that complying with state and local leave laws was their "greatest challenge" in administering their leave programs, with 70 percent of respondents preferring a uniform federal approach to leave laws.[2]

The following hypothetical illustrates the complexities and administrative burdens that can confront employers

2. Business Group on Health, *2020 Large Employers' Leave Strategy and Transformation Survey*, (Jan. 31, 2020), https://www.businessgrouphealth.org/resources/2020-large-employers-leave-strategy-and-transformation-survey.

when they have to comply with a myriad of state, city and local laws. Assume a hypothetical company ("Company") is domiciled in New York City and has employees living and working not only in New York City, but also in neighboring cities and towns across the States of New York, New Jersey, and Connecticut. For Company to ensure compliance with applicable city, state, and other local leave laws, it must take account of at least fourteen state and local laws, including not only the New York City[3] paid leave law, but also the paid sick leave laws of Westchester County[4] and New York State[5], the state laws of Connecticut[6] and New Jersey,[7] and at least nine local New Jersey[8] laws.

As this one example demonstrates, the burdens imposed on even a tristate employer can be severe. When extrapolated to the burdens imposed upon employers operating not just in the three states noted above, but also the various state and local government's desirous of imposing benefit mandates or other ordinances, like the Seattle Ordinance on self-insured group health plans, the

3. N.Y.C., N.Y., Code §§ 20-911–924.

4. Westchester Cnty., N.Y., Code §§ 585.01–16.

5. N.Y. Lab. Law § 196-b (McKinney 2020).

6. Conn. Gen. Stat. Ann. §§ 31-57r–57x (West).

7. N.J. Stat. Ann. §§ 34:11d-1–d-11 (West).

8. Twp. of Bloomfield, N.J., Code §§ 160-1–16; City of East Orange, N.J., Code §§ 140-1–15; Twp. of Irvington, N.J., Code §§ 277-1–14; City of Jersey City, N.J., Code §§4-1–10; Twp. of Montclair, N.J., Code §§ 132-1–14; City of Newark, N.J., Code §§16:18-1–15; City of Passaic, N.J., Code §§ 128-1–14; City of Patterson, N.J., Code §§ 412-1–13; City of Trenton, N.J., Code §§ 230-1–13.

burden becomes insurmountable. Moreover, unlike paid leave, where an employer may have some possibility of creating a paid leave policy that meets the requirements of all jurisdictions in which it employs individuals, health coverage and health coverage requirements pose an extraordinary level of complexity, with the potential for one locality to require coverage of a given service while another precludes such coverage. Not only does this complexity result in significant costs to employers, but it also vastly increases the potential for ERISA plan participants to be confused regarding the coverage to which they are entitled, a chief goal of ERISA's detailed disclosure requirements. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

Should the Ninth Circuit's decision stand, employers could face extraordinary and potentially conflicting variability in the amount and type of benefits they must offer. For example, a large national employer might have to offer a certain type of coverage in one state or locality (such as comprehensive group major medical coverage), similar to the Seattle Ordinance, while being required to offer a different form of coverage to similar types of employees in another state (such as employer-subsidized individual market coverage or an employer-funded medical savings account). In both cases, the state would effectively dictate the eligibility or benefit requirements of the plan, or expose the employer to a penalty. This concern becomes particularly acute with large employers that have diversified businesses, where they might have employees in shipping and retail that are subject to different requirements depending upon the state or locality's views of how employees of that type should be offered health insurance coverage.

To be clear, under ERISA, such a result is not permitted. It would lead to a complete erosion of uniform plan administration. Notwithstanding this fact, the Ninth Circuit would view both states and localities as having this flexibility as long as employers could comply by incurring some expense outside the plan (*i.e.*, the "or-pay" option). As a practical matter, the employer would be required to create separate plans or benefit arrangements for separate groups of employees depending on their residency or place of employment. Of course, this is precisely what the Seattle Ordinance accomplishes because the tax benefits to employees of receiving health insurance coverage through a group health plan renders the "or pay" option all but meaningless—as a result, employers subject to the Seattle Ordinance must amend or create group health plans to meet local requirements in Seattle. And, the concept that such local activity is limited to Seattle has been dispelled by *amici* city and local governments in the case below. *The ERISA Indus. Comm. v. City of Seattle*, No. 20-35472, 2020 WL 6682044, at *29 (9th Cir. 2020) ("Other large cities, including New York and Los Angeles, are also pursuing local healthcare reforms.").

While this type of activity is not cabined to the Ninth Circuit, even within the confines of the Ninth Circuit, employers face significant administrative burdens. For example, a hotelier with venues in Seattle,[9] San Francisco,[10]

9. *See* Seattle Ordinance.

10. *See* S.F., Cal., Admin. Code ch. 14, S.F. Health Care Security Ordinance, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-9099.

and Oakland,[11] potentially faces three distinct mandates with respect to the health care it offers its employees. When employers are forced to deal with the administrative costs associated with meeting these various local regimes, a number of results can ensue. These state and local laws result in less efficient, more costly coverage, which in turn has the effect of either reducing the generosity of benefits for employees as a whole, increasing the cost to employees of the coverage, or limiting coverage for employees in other localities.

As this Court has made clear, ERISA's preemptive force is extensive, and is focused largely on providing a regulatory regime where employer plans can operate under uniform coverage and benefit rules. *Rutledge*, 141 S. Ct. at 480; *Gobeille*, 577 U.S. at 320; *Egelhoff*, 532 U.S. at 148. ERISA's preemption provision embodies the "congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Egelhoff*, 532 U.S. at 149–50 (alteration in original). That goal is clearly frustrated by *Golden Gate* and the potential for increased burdens under *Golden Gate* appears more apparent today than it has since the Ninth Circuit ruled. Because there is no doubt that the dilemma faced by a hotelier in the Ninth Circuit, let alone a nationwide employer facing our hypothetical conflicting laws, was one Congress intended to foreclose, the Ninth Circuit's rule must fall in the face of ERISA preemption.

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11. Oakland, Cal., Mun. Code ch. 5.93, Hotel Minimum Wage and Working Conditions, https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT5BUTAPERE_CH5.93HOMIWAWOCO.

Moreover, while Congress has made some statutory changes to ERISA since its enactment, Congress has not materially altered ERISA's preemption provision. All of which makes clear that despite the hopes and desires of state and local lawmakers, the field of self-insured, employer-sponsored health care regulation remains squarely a matter of federal law, and any attempt by a state or local government to subvert the flexibility that employers have in offering their benefit plans runs squarely in the face of ERISA preemption, particularly when considered in light of the material adverse consequences to both employers and employees of such non-federal action.

CONCLUSION

Amici respectfully request that the Court grant the petition.

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