No. 21-1019

In the
Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state or local law if it "forc[es] [ERISA] plans to adopt any particular scheme of substantive coverage" or "acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation." *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480–81 (2020); see 29 U.S.C. 1144(a).

Here the City of Seattle enacted an ordinance that requires hotel businesses to pay certain employees additional compensation. The ordinance gives those employers the option to comply by making expenditures through their ERISA health benefit plans instead of paying the additional cash directly to the employees.

The Ninth Circuit held that ERISA did not preempt that ordinance because an employer can satisfy the law through direct cash payments to employees, regardless of whether it has an ERISA plan and without changing a word in its plan if it does have one. That decision is consistent with thirty years of precedent rejecting preemption challenges to prevailing-wage laws. No court of appeals has ever held that ERISA preempts a law that functions like the Seattle ordinance, *i.e.*, that does not require an employer to alter or create an ERISA plan.

The question presented is:

Whether the Ninth Circuit correctly concluded, consistent with this Court's precedent and the unanimous view of all courts of appeals, that ERISA does not preempt a local law requiring employers to pay employees additional compensation merely because it gives employers the option of complying by making contributions to ERISA plans.

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INTRODUCTION

ERISA did not federalize employee compensation. This Court has recognized for decades that while ERISA's preemptive reach is broad, it is concerned only with the administration of "employee benefit *plans*." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 7 (1987).

Accordingly, states and localities are free to impose minimum levels of compensation. Such laws may even "increase costs or alter incentives for ERISA plans" so long as they do not dictate an alteration of a benefit plan or make compliance depend exclusively on a plan's existence. *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020). These well-settled precepts resolve this case.

What Petitioner derisively calls Seattle's "play-or-pay" law is nothing more than a mandate to pay a certain wage that gives an employer the option of complying by making expenditures to an ERISA plan. Had Seattle simply required the direct payment of wages, there would be no serious preemption argument. Petitioner asserts the outcome should be different, however, because Seattle allowed employers, at their complete discretion, to meet their payment obligations through their health benefit plans.

The Ninth Circuit correctly rejected that argument. An employer can comply with Seattle's ordinance without changing or even looking at its ERISA plan—if it even has one. A simple cash payment to its employees suffices. It thus does not "forc[e] plans to adopt any particular scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480.

That holding is consistent with this Court's precedent and the unanimous view of the courts of appeals, which have for decades recognized that ERISA does not preempt compensation statutes that merely allow, but do not require, employers to satisfy their obligations through ERISA plans.

Every circuit agrees that if a statute unavoidably requires modifying an ERISA plan, that law is preempted. Every circuit also agrees that if a statute permits compliance through direct cash payments to employees, then the law is not preempted. Unsurprisingly, courts have reached different judgments in different cases—preemption or no preemption—because the statutes under review had material differences. Put simply, there is no circuit conflict.

As the Third Circuit explained nearly thirty years ago in addressing a prevailing wage statute: "Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of an employer, it 'affect[s] employee benefit plans in too tenuous, remote, or peripheral a manner to'" be preempted. *Keystone Chapter, Associated Builders & Contractors, Inc.* v. *Foley*, 37 F.3d 945, 960 (3d Cir. 1994) (alteration in original) (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). The Second, Third, Sixth, Eighth, and Ninth Circuits have all upheld analogous statutes. And no court of appeals has ever found such a statute preempted.

Petitioner is wrong that the First and Fourth Circuits have disagreed. Both circuits addressed inapposite statutes that left employers no reasonable choice but to change their ERISA plans. The First Circuit held that a city apprenticeship ordinance was

preempted because, in order to comply, an employer "either would have to modify" its "ERISA-governed" program or "establish and coordinate a separate plan." *Merit Construction All.* v. *City of Quincy*, 759 F.3d 122, 130 (1st Cir. 2014). The court was explicit that Ninth Circuit precedent was "not to the contrary." *Ibid*. Likewise, the Fourth Circuit held that a Maryland law was preempted because it "effectively require[d] employers . . . to restructure their employee health insurance plans." *Retail Indus. Leaders Ass'n* v. *Fielder*, 475 F.3d 180, 183 (4th Cir. 2007).

In short, the statutes considered by the First and Fourth Circuits were preempted because, unlike the Seattle ordinance, they did not provide any *meaningful, non-ERISA alternative* for compliance.[1]

Petitioner's effort to portray a conflict merely rehashes the arguments made by an industry group the last time the Court denied certiorari on this issue. See *Golden Gate Rest. Ass'n* v. *City & County of San Francisco*, 561 U.S. 1024 (2010). Just as the industry group argued a decade ago, Petitioner asserts that *Fielder* held the Maryland law preempted because it "would interfere with uniform nationwide plan administration." Pet. 14. But Petitioner omits the factual basis for that conclusion.

As the United States' invitation brief told this Court, "the Maryland law in *Fielder* effectively forced the single affected employer to alter its ERISA plan." U.S. Br. at 20, *Golden Gate*, No. 08-1515 (May 28, 2010) ("U.S. *Golden Gate* Br."). This was not true of

[1] Indeed, every circuit (including the Ninth Circuit) agrees that statutes that compel ERISA benefits are preempted. See, *e.g.*, *Standard Oil Co.* v. *Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980).

the statute considered in *Golden Gate*. *Ibid*. The Fourth and Ninth Circuit opinions therefore did "not present a direct conflict that warrants this Court's review." *Id*. at 17; contra Pet. 2–3 (falsely asserting that "the United States acknowledg[ed] the circuit conflict"). There was no conflict then and there is no conflict now.

Nor has anything changed to warrant the Court's review of what remains a uniform, national interpretation of 29 U.S.C. 1144. Petitioner and its *amici* attempt to construct a narrative about a surge of new ordinances in the years since *Golden Gate*, but they have not identified a single statute—proposed or enacted—that imposes any requirements on ERISA plans or forces employers to adopt ERISA plans. At most, *amici* have cited various *wage* laws that all courts agree are not preempted by ERISA.

Petitioner does not actually seek to protect the status quo against an emergent threat of local health care ordinances. Instead, Petitioner seeks to radically upset the settled understanding of wage laws in this country that for nearly 30 years has garnered unanimous agreement from all courts of appeals.

Indeed, not a single judge dissented from the Ninth Circuit's refusal to rehear this case *en banc*. Further review is simply unwarranted.

STATEMENT OF THE CASE

A. Statutory Background

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). That text refers "to state laws relating to 'employee benefit *plans*,'" not simply "employee benefits." *Fort Halifax*,

482 U.S. at 7. Although its language is "expansive," this Court has advised against applying the text with "uncritical literalism." *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Courts "must go beyond the unhelpful text and the frustrating difficulty of defining its key term." *Ibid.*; see also *Cal. Div. of Lab. Standards Enf't* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335–336 (1997) (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").

The Court's "efforts at applying the provision have yielded a two-part inquiry: A law 'relate[s] to' a covered employee benefit plan for purposes of § [1144](a) 'if it [1] has a connection with or [2] reference to such a plan.'" *Dillingham*, 519 U.S. at 324 (majority op.) (first alteration in original) (citing cases).

A state law "references" ERISA plans only if it "acts immediately and exclusively upon ERISA plans" or "where the existence of ERISA plans is essential to the law's operation." *Dillingham*, 519 U.S. at 325. A law has a "connection with" ERISA plans only if it "require[s] providers to structure benefit plans in particular ways" or "force[s] an ERISA plan to adopt a certain scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480 (citation omitted).

Recently, this Court reiterated that ERISA does not preempt state laws "that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480. And a law is not preempted where it may take full effect regardless of

whether any ERISA plan exists. *Id*. at 481 (citing *Dillingham*, 519 U.S. at 328).

B. Factual Background

In September 2019, Seattle enacted a measure called the "Improving Access to Medical Care for Hotel Employees Ordinance," codified at Seattle Municipal Code (SMC) 14.28. Pet. App. 21–57. The purpose of the ordinance is to "improve low-wage hotel employees' access, *through additional compensation*, to high-quality, affordable health coverage." SMC 14.28.025 (emphasis added).

The ordinance requires hotel employers to make monthly expenditures at fixed, per-employee rates. SMC 14.28.060. These per-employee expenditure rates are based on whether the employee has dependents and a spouse or domestic partner. SMC 14.28.020, 14.28.060.A, F.

Although the ordinance calls these payments "healthcare expenditures," it allows hotel employers to satisfy the law by making wage-like cash payments, *i.e.*, "[a]dditional compensation paid directly to the covered employee." SMC 14.28.060.B.1. The ordinance also gives employers the choice to credit amounts they spend on health insurance or self-insured health plans towards their expenditure obligation. SMC 14.28.060.B.2–3. Employers have complete discretion to choose one or more of these forms of expenditure. SMC 14.28.060.B. For example, if an employer's insurance premiums satisfy 80% of the expenditure requirement, the employer may pay the balance in direct wage-like payments. SMC 14.28.060.B, C. Choosing one option versus another does not affect the total expenditure the ordinance requires.

All non-managerial employees are entitled to payments if they work an average of 80 hours per month and do not receive health coverage from another source (*e.g.*, a spouse's health plan). SMC 14.28.030.A, B. Employees may waive their right to increased compensation under the ordinance by signing an approved waiver form. SMC 14.28.060.D.

As with minimum wage and tax laws, employers are required to "retain records that document compliance with" the ordinance, including "[p]roof of each required healthcare expenditure made each month" and copies of waivers from employees. SMC 14.28.110.A. Where an employer chooses to comply by making cash payments to employees, the employer need not provide any information to the City regarding ERISA plans or benefits. See SMC 14.28.060.B.1, 14.28.110.A.

C. Procedural Background

1. Petitioner is an association whose membership includes "employers owning or operating large hotels or ancillary hotel businesses" in Seattle. Compl. ¶¶ 9–10, C.A. E.R. 26. Petitioner seeks an order declaring the ordinance preempted by ERISA with respect to its members and enjoining the City from enforcing the ordinance against them. Pet. App. 8.

2. The district court granted Seattle's motion to dismiss, concluding that the ordinance neither references nor has a connection with ERISA plans and thus is not preempted. Pet. App. 5–20. The court disposed of each of the three bases for preemption alleged by Petitioner. *Id.* at 8.

a. The court rejected Petitioner's argument that the ordinance has a "connection with" ERISA plans

because it "compels" employers "to alter their current" ERISA plans. Pet. App. 16. The court disagreed that the direct-payment route is "financially more onerous and therefore not a realistic and legitimate alternative." *Ibid.* (citation omitted). Its conclusion rested on this Court's explanation that ERISA does not preempt a state law exerting an "indirect economic influence" that does not "bind plan administrators to any particular choice." *Id.* at 16–17 & n.8 (citing *Travelers*, 514 U.S. at 650, 659).

b. The court next rejected Petitioner's argument that the ordinance makes "reference to" ERISA plans because when an employer *chooses* to rely on health plan contributions, it would have to compare those contributions to the statutory expenditure obligation. Pet. App. 18–19. The court explained that Petitioner incorrectly relied on *District of Columbia* v. *Greater Washington Board of Trade*, 506 U.S. 125 (1992), which held that a workers' compensation ordinance impermissibly referenced ERISA plans where the employer obligation was derived from the "level" of benefits provided under "existing ERISA coverage." Pet. App. 18–19. "In contrast," Seattle's ordinance does not "measure the required level of payments based on an ERISA plan" but instead enumerates specific "dollar amounts." *Id.* at 19.

c. The court also disagreed that an employer's payment of direct compensation to employees would itself constitute an ERISA plan. Pet. App. 12–15. The court explained "[t]here is little to differentiate the payments under this option from regular wages, and they can be coordinated with employees' regular pay periods." *Id.* at 13–14. That reasoning found support in *Massachusetts* v. *Morash*, 490 U.S. 107 (1989), which

held that an ERISA plan is not created where monies are paid to employees directly from an employer's general assets in amounts that are "fixed, due at known times, and do not depend on contingencies outside the employee's control." *Id*. at 115–116.

3. The court of appeals affirmed in a unanimous, unpublished decision. Pet. App. 1–3. The panel explained that, "[a]s in *Golden Gate*, [the Seattle ordinance] does not 'relate to' employers' ERISA plans because an employer 'may fully discharge its expenditure obligations by making the required level of employee health care expenditures,'' in whole or in part, through either ERISA or non-ERISA means. *Id*. at App. 2–3 (quoting *Golden Gate Rest. Ass'n* v. *City & County of San Francisco*, 546 F.3d 639, 655–656 (9th Cir. 2008)).

4. The court of appeals denied the petition for rehearing en banc, with no judge requesting a vote. Pet. App. 4.

REASONS TO DENY CERTIORARI

I. THERE IS NO CIRCUIT CONFLICT

Petitioner contends that the Ninth Circuit has split with the First and Fourth Circuits over whether ERISA preempts what Petitioner calls "play-or-pay laws"—laws that require minimum employee compensation that can be satisfied either through cash payments or benefits. But every court of appeals has used the same rule: "ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480.

The courts reached different outcomes only because the laws they examined operated differently. The laws considered by the First and Fourth Circuits were simply "play" laws; they provided no real cash option. So whereas those circuits held that the statutes required employers to create or alter ERISA plans, the Ninth Circuit interpreted Seattle's ordinance as not having that effect and thus held that it was not preempted. Had Seattle's law come before the First or Fourth Circuits, the result would have been the same. As the United States told this Court the last time someone asserted a circuit divide on this issue, there is no conflict. U.S. *Golden Gate* Br. 20.

A. The Ninth Circuit Applied Basic Principles About Which All Circuits Agree

1. Every court of appeals agrees that a state or municipal law is preempted if it unavoidably requires employers to create or modify ERISA plans. For example, the First Circuit held preempted a municipal ordinance that "mandates an employee benefit structure and specifies how that structure must be administered." *Merit Construction*, 759 F.3d at 129. Likewise, the Fourth Circuit held preempted a law that "effectively mandates that employers structure their employee healthcare plans to provide a certain level of benefits." *Fielder*, 475 F.3d at 193–194.

The Ninth Circuit agrees. As *Golden Gate* observed, the Ninth Circuit has held that a "Hawaii statute was preempted because it required employers to have health plans, and it dictated the specific benefits employers were to provide through those plans." 546 F.3d at 655 (citing *Agsalud*, 633 F.2d at 766).

2. Key to this case, however, is a related principle about which all circuits also agree: a state or local law does not mandate ERISA benefits, and thus is not preempted, if it allows employers to comply through a realistic, non-ERISA option. This principle represents a straightforward application of this Court's longstanding precept that ERISA does not preempt laws that merely exert some tenuous influence on ERISA plans without forcing them to adopt any scheme or coverage. See, *e.g.*, *Rutledge*, 141 S. Ct. at 480–481.

The courts of appeals elucidated this rule in a series of decisions upholding state laws requiring that workers receive the prevailing minimum wage. For example, the Third Circuit addressed a prevailing wage statute that included a benefits component, which required that "[c]ontracts for public works must either provide benefits contributions at the level determined in the prevailing wage *or the monetary equivalent thereof*." *Keystone*, 37 F.3d at 960 (emphasis added). The Third Circuit held that the law was "not preempted[] because an employer may comply without making any adjustment in its ERISA plans." *Id*. at 961. Specifically, "[u]nless the employer chooses otherwise, the benefits component imposes a cash wage requirement, and . . . ERISA does not preempt a state's power to set a minimum cash wage." *Ibid*.

Nearly thirty years ago, the Third Circuit articulated the following clear standard: "Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of an employer, it 'affect[s] employee benefit plans in too tenuous, remote, or periph-

eral a manner to warrant a finding that the law relates to the plan.'" *Keystone,* 37 F.3d at 960 (second alteration in original) (quoting *Shaw*, 463 U.S. at 100 n.21).

In the decades since, multiple other circuits have adopted this reasoning. For example, the Second Circuit held that New York's prevailing wage law was not preempted because it applied a "total liability" approach, under which an employer could satisfy its obligations "exclusively through ERISA plans, exclusively through non-ERISA plans, through additional cash wages, or through some combination of the three." *Burgio & Campofelice, Inc.* v. *N.Y. State Dep't of Labor*, 107 F.3d 1000, 1009 (2d Cir. 1997); accord *Concerned Home Care Providers, Inc.* v. *Cuomo*, 783 F.3d 77, 87–89 (2d Cir. 2015); *Associated Builders & Contractors, Saginaw Valley Area Chapter* v. *Perry*, 115 F.3d 386, 392–394 (6th Cir. 1997); *Minnesota Chapter of Associated Builders & Contractors, Inc.* v. *Minnesota Dep't of Labor & Indus.*, 47 F.3d 975, 978–980 (8th Cir. 1995); *WSB Elec., Inc.* v. *Curry*, 88 F.3d 788, 793–794 (9th Cir. 1996).

3. The Ninth Circuit applied this universally accepted principle here, holding that the Seattle ordinance is not preempted because employers can fully satisfy their expenditure obligations through a non-ERISA option. Pet. App. 2–3.

The panel relied on the Ninth Circuit's *Golden Gate* decision, which addressed a San Francisco ordinance that imposed a "health care expenditure rate" and gave employers both an ERISA and non-ERISA option for compliance. 546 F.3d at 644–645. Under the San Francisco ordinance, employers could make payments through an ERISA plan or make payments to

the city on behalf of employees, which would entitle such employees to municipal health services and reimbursement accounts. *Ibid.*

As with the prevailing wage statutes, the *Golden Gate* ordinance offered both ERISA and non-ERISA options for compliance. That meant "the [o]rdinance does not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans." 546 F.3d at 646. The city payment option meant the San Francisco ordinance stood in "stark contrast" to the Hawaii statute the Ninth Circuit found preempted in *Agsalud*, which, as discussed above, "required employers to have health plans" and "dictated the specific benefits employers were to provide." *Id.* at 655. Because the San Francisco ordinance "does not require any employer to adopt an ERISA plan" or "to provide specific benefits through an existing ERISA plan," it "preserves ERISA's 'uniform regulatory regime.'" *Id.* at 655–656 (citation omitted). That same reasoning foreclosed Petitioner's challenge here.

B. *Fielder* Is Not In Conflict

There is no conflict between the decision below and the Fourth Circuit's decision in *Fielder* because the relevant laws materially differ. As the United States explained the last time a petitioner made this argument, "the Maryland law in *Fielder* effectively forced the single affected employer to alter its ERISA plan." U.S. *Golden Gate* Br. 20. The Seattle ordinance, by contrast, does not require any ERISA plan changes.

1. The Fourth Circuit held preempted a Maryland law that required employers with over 10,000 employ-

ees "to spend at least 8% of their total payrolls on employees' health insurance costs or pay the amount their spending falls short to the State of Maryland." *Fielder*, 475 F.3d at 183. There was no option, as there is here, for an employer to make cash payments directly to its employees. Although the Maryland law ostensibly provided employers the option to pay the state, after examining the statute and legislative record, the Fourth Circuit concluded that option was nothing more than a "penalty" imposed to force employers to change their health plans. *Id.* at 193–194. No "reasonable employer" would select that option because it would not benefit either the employer or its employees. *Id.* at 193. As the Fourth Circuit explained,

> Healthcare benefits are a part of the total package of employee compensation an employer gives in consideration for an employee's services. An employer would gain from increasing the compensation it offers employees through improved retention and performance of present employees and the ability to attract more and better new employees. In contrast, an employer would gain nothing in consideration of paying a greater sum of money to the State.

Ibid.

Because "the only rational choice employers" had was "to structure their ERISA healthcare benefit plans so as to meet the minimum threshold," the act "effectively mandate[d] that employers structure their employee healthcare plans to provide a certain level of benefits." *Fielder*, 475 F.3d at 193. The act thus had

an impermissible "connection with" ERISA plans. *Id*. at 194.[2]

2. By contrast, Seattle's ordinance provides employers a realistic, non-ERISA alternative: paying their employees additional cash wages. Unlike a penalty paid to the state, these cash payments to employees indisputably benefit employees. And as the Fourth Circuit explained, paying additional compensation to employees likewise benefits employers. *Fielder*, 475 F.3d at 193. This favorable outcome for employees and employers under Seattle's ordinance is the same regardless of whether employers make payments through an ERISA plan or through additional cash wages. *Ibid*. A "rational" employer thus could readily choose the cash option. *Ibid*.

3. Perhaps recognizing that the Seattle ordinance does not resemble the *Fielder* statute, Petitioner fabricates an "independent" holding in *Fielder*: that "even if there were a 'meaningful avenue' by which employers could comply without creating or altering ERISA plans," the Maryland law would still be preempted for "interfer[ing] with 'uniform nationwide' plan administration." Pet. 17–18 (quoting 475 F.3d at 196–197). The Fourth Circuit made no such holding.

Contrary to Petitioner's assertion, it was impossible to fully comply with the law through non-ERISA spending without also altering or creating an ERISA plan. The court explained that even if an employer

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[2] Accord *Retail Indus. Leaders Ass'n* v. *Suffolk County*, 497 F. Supp. 2d 403, 416–418 (E.D.N.Y. 2007) (addressing law that was "substantially similar" to the *Fielder* statute and concluding that "the alternative options for compliance" were "unrealistic").

could incur *some* spending through non-ERISA alternatives, the only realistic way to spend *enough* to "satisfy" the law's demands would require "alter[ing] its package of ERISA health insurance plans." *Fielder*, 475 F.3d at 197. "In short, the [Maryland law] leaves employers no reasonable choices except to change how they structure their employee benefit plans." *Ibid.*

Thus, when the Fourth Circuit concluded the Maryland law would "deny Wal-Mart the uniform administration of its healthcare plan[]" (*Fielder*, 475 F.3d at 197; see Pet. 18), that was because it found that the statute required alterations to ERISA plans one way or another. As the court unambiguously stated at the outset of its opinion, "*[b]ecause* Maryland's [law] effectively requires employers . . . *to restructure their employee health insurance plans*, it conflicts with ERISA's goal of permitting uniform nationwide administration of these plans." *Fielder*, 475 F.3d at 183 (emphasis added).[3]

4. In sum, all of the Fourth Circuit's analysis flowed from its conclusion that the only realistic option for the employer to comply with the Maryland law was to restructure its ERISA plan. See U.S. *Golden*

[3] The dissent from the denial of rehearing *en banc* in *Golden Gate* (see Pet. 18) misread *Fielder* in the same manner as Petitioner. As Judge Fletcher's concurrence explained, "the dissent quotes the first and last sentences from a passage from *Fielder* but omits the intervening three sentences." *Golden Gate Rest. Ass'n* v. *City & County of San Francisco*, 558 F.3d 1000, 1002–1003 (9th Cir. 2009) (Fletcher, J., concurring). "The omitted sentences make clear the difference between the Maryland law and the San Francisco Ordinance," namely that "Wal-Mart's use of the non-ERISA spending option would necessarily produce a change in its ERISA plans." *Id.* at 1003.

Gate Br. 19–20. Accordingly, as the United States previously recognized, *Fielder* and *Golden Gate* "do not present a direct conflict that warrants this Court's review." *Id.* at 17.

C. *Merit Construction* Is Not In Conflict

For similar reasons, there is no conflict with the First Circuit's decision in *Merit Construction*. Like the law in *Fielder*, this law demanded that an employer necessarily "modify" an existing ERISA plan or create "a separate plan." 759 F.3d at 130. The court thus easily and expressly distinguished the Ninth Circuit's rule as "not to the contrary." *Ibid.*

1. The municipal law in *Merit Construction* "categorically require[d] all contractors on Quincy public works projects to operate a Massachusetts-approved apprentice training program" that must comply with "a raft of stringent conditions." 759 F.3d at 129. The First Circuit acknowledged that municipal laws may "influence" ERISA plans, but cautioned that such laws may not cross the line into "coercion." *Ibid*. The Quincy law flunked that test. "It mandates an employee benefit structure and specifies how that structure must be administered." *Ibid.*

Seattle's ordinance, by contrast, does not mandate anything about ERISA plans. An employer may comply without having any plan at all. SMC 14.28.060.B.1. If an employer chooses to comply by contributing to an ERISA plan, the ordinance imposes no requirements on such plans: they need not provide any particular type or level of benefits. SMC 14.28.060.B.2–3. Even if an employer's plan contributions are insufficient to satisfy its expenditure obligations, the ordinance still requires no changes to

ERISA plans: the employer may simply pay the balance in additional wage-like compensation. SMC 14.28.060.B, C.

2. The First Circuit expressly distinguished *Golden Gate* as "not to the contrary." *Merit Construction*, 759 F.3d at 130. The Ninth Circuit "recognized that state laws that 'required employers to have [benefit] plans, and . . . dictated the specific benefits employers were to provide through those plans' would be preempted." *Ibid*. (alteration in original) (quoting *Golden Gate*, 546 F.3d at 655). As the First Circuit's opinion thus makes clear, the Ninth Circuit also would have preempted the Quincy ordinance.

3. Petitioner again tries to invent an alternative holding: that the Quincy law would be preempted even if a contractor could comply "without altering or creating ERISA plans." Pet. 20 (citing 759 F.3d at 130). Like the Fourth Circuit, however, the First Circuit never considered such a proposition because the non-ERISA alternative was illusory: "To comply with the [o]rdinance, an employer with an ERISA-governed apprentice training program either would have to modify that program to provide apprentices on Quincy-based projects with special benefits or would have to establish and coordinate a separate plan into which such apprentices would be funneled." 759 F.3d at 130 (citing *Fort Halifax*, 482 U.S. at 13).

In other words, an employer would have to modify an existing ERISA plan or create one anew. That is clear from the First Circuit's reliance on an Eighth Circuit decision finding preempted a law that "directly influence[d] how the ERISA plans are administered." *Minnesota Chapter of Associated Builders & Contractors., Inc.* v. *Minnesota Dep't of Pub. Safety*,

267 F.3d 807, 817 (8th Cir. 2001); see also *id*. at 814 (explaining that the law did "more than merely encourage or provide economic incentives" but rather "dictate[d] the choices facing ERISA plans") (citation omitted); *Merit Construction*, 759 F.3d at 130. There simply was no other form of compliance with the Quincy law that did not involve a benefit plan, such as the option to make wage-like payments to employees.

* * *

In sum, no circuit has held that ERISA preempts a state or local law where an employer has a non-ERISA means of compliance consisting of direct, wage-like payments to employees. The Second, Third, Sixth, Eighth, and Ninth Circuits have all upheld such laws. And the First and Fourth Circuits have never considered them. There is no circuit conflict.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT

Petitioner's fallback argument is that the Ninth Circuit's decision conflicts with this Court's decisions on three separate preemption grounds. Pet. 15, 21–31. Given the circuits' agreement on the underlying legal rule, these arguments essentially ask this Court to interpret the Seattle ordinance differently than the Ninth Circuit. In other words, Petitioner seeks error correction on narrow, case-specific grounds that do not warrant this Court's attention. Regardless, Petitioner's merits arguments are wrong.

A. The Ordinance Does Not Have An Impermissible "Connection" With ERISA Plans

1. A law has an impermissible connection with an ERISA plan if it "require[s] providers to structure benefit plans in particular ways" or "if 'acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage.'" *Rutledge*, 141 S. Ct. at 480 (citation omitted). But this Court has repeatedly emphasized that a law can "increase costs or alter incentives for ERISA plans" or "cause[] some disuniformity in plan administration" without creating an impermissible "connection." *Ibid*.

For instance, *Dillingham* considered a state prevailing wage law that allowed contractors to pay less to workers in approved apprenticeship programs. 519 U.S. at 319. This law did not have an impermissible "connection" with ERISA plans because "[n]o apprenticeship program [wa]s required" and contractors were free to hire apprentices from approved programs or unapproved programs. *Id*. at 332. The fact that contractors could pay lower wages only if they hired from California-approved programs "merely" supplied an "economic incentive" for ERISA programs to comply with California's standards. *Ibid*. In other words, "[t]he prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans." *Id*. at 334; see also *Merit Construction*, 759 F.3d at 128 ("laws that merely exert an 'indirect economic influence' on a plan do 'not bind plan administrators to any particular choice'") (citation omitted); *Fielder*, 475 F.3d at 193 (same).

2. Like the *Dillingham* statute, the Seattle ordinance does not dictate any decision to alter (or create)

an ERISA plan. An employer need not have any ERISA plan whatsoever and remains free to structure its ERISA plan in any way it chooses. At most, the Seattle ordinance, like the *Dillingham* statute, merely supplies an economic incentive. But there is even less of an incentive here because unlike the *Dillingham* statute, the Seattle ordinance requires employers to expend the *same amount of money* under any of the available alternatives.

3. Petitioner contends that this case is controlled by *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), but it mischaracterizes that decision. According to Petitioner, "compliance" with the *Egelhoff* statute "did not require altering ERISA plans." Pet. 24. Not so. "[T]he law in *Egelhoff* was preempted because it offered no method of compliance that did not require a change in the way an ERISA plan was operated or written." U.S. *Golden Gate* Br. 20. The statute dictated rules for determining ERISA plan beneficiaries upon divorce by requiring benefits be paid "to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Egelhoff*, 532 U.S. at 147. The statute thus bound "ERISA plan administrators to a particular choice of rules for determining beneficiary status." *Ibid.*

Although the statute allowed plans to opt out, they could do so only by *amending their plan documents*: "Plan administrators must either follow Washington's beneficiary designation scheme or alter the terms of their plan so as to indicate that they will not follow it." 532 U.S. at 150. In other words, "the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow." *Id.* at 151 n.4.

The Seattle ordinance is obviously distinguishable. It does not impose any requirements on ERISA plans and an employer can both comply with the ordinance and adhere to its plan terms without changing a word of its plan.

Petitioner complains that *employers* must evaluate their expenditure obligations and retain records of their payments, Pet. 24–25, but that does not create an impermissible connection. This is no different from the obligations imposed by any minimum wage law. While the employer may choose to count ERISA plan expenditures towards its expenditure obligation, even if it does, it need not make any changes whatsoever to its plan. Thus, the fact remains that in stark contrast to the *Egelhoff* statute, an employer need not change its ERISA plan, and plan administrators need not "master" the Seattle ordinance or any other analogous, hypothetical, future ordinance. Contra Pet. 24–25. Plan administration remains uniform.

4. Petitioner argues that in distinguishing *Egelhoff*, *Golden Gate* erred by relying on the difference between obligations imposed on employers and obligations imposed on plans. Pet. 25–26. But as already explained, *Egelhoff* is also distinguishable because that ordinance required employers to amend their plans. As applied here, the pertinent distinction is not just that the Seattle expenditure obligation falls on employers, but also that the ordinance does not concern *plan administration* whatsoever; it concerns an employer's obligations to pay *wages* and retain related employment records.

This Court has never held that all burdens imposed on employers are preempted. Petitioner cites *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990),

but *Ingersoll-Rand* clearly recognized that ERISA's preemption provision "was intended to ensure that plans and plan sponsors would be subject to a uniform body *of benefits law*," *id.* at 142 (emphasis added) and that "only state laws that relate to benefit *plans* are pre-empted," *id.* at 139.

Ultimately, Petitioner's position would prove too much: if ERISA's preemption test were satisfied by the imposition of any burden on employers, regardless of any connection to ERISA plans, ERISA would preempt all wage, hour, and other employment laws, which have long been recognized as within the proper purview of state and local regulation. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985); *Self-Insurance Inst. of Am.* v. *Snyder*, 827 F.3d 549, 556–558 (6th Cir. 2016).

B. The Ordinance Does Not Impermissibly "Reference" ERISA Plans

1. "A law refers to ERISA if it 'acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation.'" *Rutledge*, 141 S. Ct. at 481 (citation omitted). Petitioner ignores that test. An employer can comply with every aspect of the Seattle ordinance "whether or not" it has an ERISA plan. *Ibid.*

2. *Greater Washington* is distinguishable. Contra Pet. 26–28. Under the D.C. law considered there, employers were required to provide benefits through a workers' compensation plan "'equivalent to the existing health insurance coverage'" they provided under their ERISA plans. *Id.* at 127–128 (citation omitted). The existence of an ERISA plan was essential to the

operation of the law because the level of ERISA benefits provided the touchstone of an employer's compliance with the statute. Any change to an ERISA plan's benefit level also changed the amount of workers' compensation benefits the employer had to provide. See U.S. *Golden Gate* Br. 21.

In sharp contrast, the expenditure obligation under the Seattle ordinance does not depend on what an ERISA plan provides. Instead, it is a fixed dollar amount that can be met purely through a cash payment. Cf. U.S. *Golden Gate* Br. 21. Unlike under the D.C. law, an increase or decrease in ERISA benefits does not alter the employer's total expenditure obligation under Seattle's ordinance. Contra Pet. 27.

3. Petitioner also lists a few ancillary provisions in the ordinance that mention health plans (Pet. 28), but those provisions apply only if the employer *chooses* to make its payments through a plan. See SMC 14.28.260.B, 14.28.060.C, D.1. Because an employer may comply with the ordinance without using any ERISA plan, ERISA plans are not essential to the operation of the ordinance and the ordinance does not act exclusively on ERISA plans. See *Rutledge*, 141 S. Ct. at 481 (explaining that a law does not impermissibly "reference" ERISA plans where it may take full effect regardless of whether any ERISA plan exists) (citing, *e.g.*, *Dillingham*, 519 U.S. at 328).

Contrary to Petitioner's suggestion (Pet. 28), *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), does not stand for the proposition that any literal reference to an ERISA plan renders a statute preempted. Rather, as this Court subsequently clarified, *Mackey* held that a law "references" an ERISA plan if it "acts *immediately and exclusively*

upon ERISA plans." *Dillingham*, 519 U.S. at 325 (emphasis added). The law in *Mackey* "solely applie[d]" to ERISA plans by expressly exempting them from a state garnishment statute. 486 U.S. at 829. Because the statute "single[d] out ERISA employee welfare benefit plans for different treatment," it acted immediately and exclusively upon ERISA plans and was preempted. *Id.* at 830.

In contrast, the Seattle ordinance treats all employers equally, whether they have ERISA plans or not; all employers must pay the statutorily defined compensation.

4. Finally, what minimal incentives (if any) the ordinance creates for ERISA plans (see Pet. 28–29) do not constitute an impermissible "reference." For one thing, this argument conflates the "reference" and "connection" prongs. See, *e.g.*, *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016) ("A state law also might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage[.]") (citation omitted). And in any event, "ERISA does not pre-empt" laws that "alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480; see *supra* pp. 20-21.

Because the expenditure obligation is identical whether paid through cash payments or benefit plans (or any combination thereof), SMC 14.28.060.A & B, the ordinance does not privilege one form of payment over any other. And contrary to Petitioner's suggestion (Pet. 28), direct cash payments could be paid

through payroll along with other wages and would not require employers to "establish a separate scheme."

Petitioner also believes the ordinance's alternative waiting period provisions—which accommodate existing plan features—might create a modest incentive for employers to amend their plans to *delay* their contributions. Pet 28–29. But it is doubtful Petitioner has standing to challenge such provisions, which *benefit* employers. And in any event, these modest incentives do not rise to the level of "acute" economic effects that "force" ERISA plans to adopt any particular structure, as would be required to satisfy the "connection with" test. *Gobeille*, 577 U.S. at 320.

C. The Ordinance Does Not Require Employers To Create ERISA Plans

Finally, Petitioner insists the courts below erred in rejecting the argument that the Seattle ordinance's direct cash payment option would itself constitute an ERISA plan. Pet. 29–31.

Even under Petitioner's (mistaken) view, there is plainly no "conflict[] with relevant decisions of this Court." S. Ct. R. 10(c); see Pet. 15. The only relevant decisions the Petition cites—*Fort Halifax* and *Morash*—held that the laws at issue did *not* create ERISA "plans." And to the extent Petitioner complains about the lower courts' understanding of the intricacies of the Seattle ordinance, that case-specific interpretation does not satisfy Rule 10.

Regardless, Petitioner's argument is meritless. An ERISA "plan" exists only if an employer is providing health "*benefits*" to its employees. 29 U.S.C. 1002(1) (emphasis added). The cash payment is no different

than regular wages. While Seattle may hope that employees use the wages for healthcare, nothing in the ordinance requires or even pressures employees to do so. There are no strings attached. *E.g.*, Pet. App. 14 n.5.

And *Fort Halifax* and *Morash* make clear that to constitute a plan, the payments must require the employer to establish a discretionary administrative scheme to process and pay benefits. In *Fort Halifax*, the Court relied on the fact that the state law imposed "no need for an ongoing administrative program *for processing claims and paying benefits*." 482 U.S. at 12 (emphasis added). The Court explained that benefit "plans" require claims adjudications and other "administrative activity potentially subject to employer abuse." *Id.* at 16. The state statute did not implicate such concerns because the "statute itself" made clear the terms of the employer's payment obligation. *Ibid*. The same is true of the Seattle ordinance's direct pay option.

Morash likewise held that a Massachusetts vacation pay law was not preempted because it "present[ed] none of the risks that ERISA is intended to address." 490 U.S. at 115. ERISA's protections were designed to "insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Ibid.* Although a vacation pay program may constitute an ERISA plan if the benefits are "payable only upon the occurrence of a contingency outside of the control of the employee," the vacation pay required by the Massachusetts law, like the cash payments under the Seattle ordinance, is paid directly from employers' general assets in amounts that are "fixed, due

at known times, and do not depend on contingencies outside the employee's control." *Id.* at 115–116. Accordingly, "[i]f there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed—a danger Congress chose not to regulate in ERISA." *Id.* at 115.

Although Petitioner attempts to distinguish *Fort Halifax* and *Morash* on the grounds that they addressed "one-time" payments (Pet. 29), that ignores the bulk of the Court's reasoning. The cash-payment option under the Seattle ordinance does not require the kind of ongoing, *discretionary administrative scheme* that *Fort Halifax* and *Morash* described. Contra Pet. 30. Employers have no discretion over the amounts or eligibility for payments: all non-managerial employees working 80 or more hours per month are eligible, SMC 14.28.030.A, and the statute specifies the amount of the expenditure obligation, which depends only on whether employees have a spouse, domestic partner, or dependents. SMC 14.28.060.A.[4]

Moreover, the reporting and recordkeeping requirements are materially identical to the mechanical obligations employers fulfill under minimum-wage and tax laws. In the words of the district court: "[T]he

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[4] The process for determining family composition is straightforward. Contra Pet. 30. Employers may avoid any discrimination concerns by "provid[ing] enough information about the reason for their inquiry and only ask[ing] for information after the employee has been hired." *Improving Access to Medical Care for Hotel Employees Ordinance; Question and Answers* ("Seattle Q&A") 7–8, Seattle Off. of Lab. Standards, https://bit.ly/3vDrXT5 (last visited Apr. 23, 2022). And "[i]f an employer is unable to obtain the information," it "may assume that the employee qualifies for the rate for an employee with no spouse/domestic partner or dependents, until otherwise notified by the employee." *Ibid.*

employer actually has no responsibility other than to retain records that it would maintain in the normal course of business. Those minimal record keeping and administrative requirements do not give employers discretion to deny or limit benefits under the Ordinance." Pet. App. 14–15.[5]

D. The Ninth Circuit Correctly Applied The Presumption Against Preemption, Although Its Decision Would Have Been The Same Regardless

Petitioner argues that *Puerto Rico* v. *Franklin California Tax-Free Trust*, 579 U.S. 115 (2016), a bankruptcy case, eliminated the presumption against preemption for *every federal statute* containing an express preemption provision. Pet. 32.

This argument is beside the point here. Although the Ninth Circuit disagreed with Petitioner's argument about the presumption, it also held that "[e]ven so," the Seattle ordinance is not preempted. Pet. App. 2. The presumption thus did not affect the outcome. Cf. *Fielder*, 475 F.3d at 191 (applying presumption); *Merit Construction*, 759 F.3d at 128 (same).

In any event, Petitioner is wrong. *Franklin* stands only for the proposition that where an express preemption clause's meaning is clear, the presump-

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[5] Petitioner conflates issues by discussing the minimal record-keeping requirements related to "employees who decline coverage," Pet. 30–31, as employees may decline coverage only where an employer makes payments through an ERISA plan. SMC 14.28.060.D; Seattle Q&A 8 (provision "necessarily" applies only where employer make "payments toward an employer-sponsored health insurance plan"). This has no bearing on whether the *cash payment* option constitutes an ERISA plan.

tion against preemption cannot override that unambiguous text. 579 U.S. at 125–127. *Gobeille* reached a similar holding addressing ERISA. 577 U.S. at 325. The Court presumed that Congress does not supplant state law, especially in areas of "traditional state power," but held that the presumption was overcome because the state law in *Gobeille* came within the heart of ERISA's preemption clause. *Id.* at 325–326.

Petitioner's reading of *Franklin* would mean that a bankruptcy case silently overruled decades of ERISA precedents applying the presumption, see, *e.g.*, *Travelers*, 514 U.S. 655–662—and that it did so by citing a case, *Gobeille*, that itself acknowledged that the presumption should be considered in ERISA cases. That is not a reasonable interpretation of *Franklin* and *Gobeille*.

III. PETITIONER OFFERS NO REASON TO UPSET THE CIRCUITS' LONGSTANDING, UNIFORM INTERPRETATION OF ERISA

Petitioner claims the Court's review is "urgently needed," Pet. 33, but it fails to show any pressing problem of legal or practical significance. The prevailing wage cases that first addressed alternative, non-ERISA cash payments were decided nearly 30 years ago. The main circuit decisions invoked by Petitioners—*Golden Gate* and *Fielder*—were decided over 10 years ago. Petitioner admits there was a "lull" in new legislation after *Fielder* and *Golden Gate*. Pet. 3. Petitioner claims this issue has "returned," *ibid.*, but fails to show it has arisen with any frequency whatsoever.

The Ninth Circuit followed clear principles about which no circuit disagrees. That decades-long status quo has not undermined ERISA. Petitioner and its

amici's strenuous objection to increasing employee compensation does not satisfy Rule 10.

A. Petitioner and its numerous *amici* have not cited a single recent example of a local government considering—much less adopting—an ordinance that regulates or mandates ERISA benefits.

1. Petitioner's primary effort to demonstrate the issue's importance rests on pure speculation. Petitioner cites an *amicus* brief filed by a few other cities that expressed a vague "desire" to pursue local health-related measures. Pet. 3; see *id.* at 35–36. But Petitioner misconstrues that brief. Petitioner points to an ambiguous sentence indicating that certain cities "have studied the San Francisco model," *id.* at 35 (citation omitted), but the article cited in the *amicus* brief discusses a program called *Healthy San Francisco*, which is a city-operated program that provides direct health care services.[6] While the article briefly discussed San Francisco's Health Care Security Ordinance ("HCSO"), which is the employer-spending ordinance addressed in *Golden Gate*, the article does not indicate that other cities have considered pursuing the employer spending requirements of the HCSO. Likewise, Petitioner quotes the *amicus* brief as saying New York and Los Angeles "are also pursuing local healthcare reforms," though Petitioner adds the word "similar" to the sentence. *Id.* at 35–36 (citation omitted). But here

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[6] Glenn Daigon, *Cities are Blazing the Trail Toward Healthcare For All*, Salon (Feb. 10, 2019), https://bit.ly/37ydlfZ (last visited Apr. 23, 2022).

again, the cited articles indicate these cities are considering direct health services like *Healthy San Francisco* rather than an employer payment obligation.[7]

Petitioner provides no indication that any of the cities it identifies have considered or adopted any law imposing obligations *on employers*. Indeed, Petitioner provides no specifics whatsoever about any such laws. Ultimately, it remains to be seen what any future laws will look like or how courts will address them. Should some jurisdiction go further than Seattle and "dictate[] the specific benefits employers [a]re to provide," *Merit Construction*, 759 F.3d at 130 (quoting *Golden Gate*, 546 F.3d at 655), the Court can take that case. Petitioner's protestations about the changed state of affairs since *Golden Gate* are unfounded.

2. *Amicus* the Chamber of Commerce's effort to fill the Petition's gap only undermines the pitch for certiorari. The Chamber cites various minimum or living *wage* ordinances,[8] but these merely contain optional benefit alternatives (*i.e.*, a lower minimum wage where employers choose to offer benefits), which are analogous to the prevailing wage provisions that have, for decades, been upheld by every circuit. See *supra* Part I.A. Those laws plainly do not interfere

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[7] Sarah Varney, *Beyond Beltway's 'Medicare-for-All' Talk, Democrats in States Push New Health Laws*, Kaiser Health News (Feb. 14, 2019), https://bit.ly/3rKm31r (last visited Apr. 23, 2022); Daigon, *supra* note 6.

[8] Chamber Br. 13–14 (citing Berkeley, Cal. Mun. Code 13.27; Oakland, Cal. Mun. Code Ch. 2.28; Marin Cnty., Cal. Admin. & Pers. Code § 2.50.050; San Leandro, Cal. Mun. Code § 1-6-625; Sonoma, Cal. Mun. Code § 2-377; Richmond, Cal. Mun. Code Ch. 7.108.040(A)(5)); *id* at 15 (citing Albuquerque, N.M. Mun. Code § 13-12-3(b); Bernalillo Cnty., N.M. Cnty. Code § 2-220(d)).

with uniform benefits administration, and there is no reason to upset the status quo by wiping them off the books.

For instance, the Chamber and other *amici* (American Benefits Council Br. 20–21; Chamber Br. 13) cite an Oakland ordinance that requires employers to pay employees a $20 minimum wage, which is reduced to $15 if the employer provides health insurance. Oakland, Cal. Mun. Code Ch. 5.93. Although another industry group initially challenged this ordinance on ERISA preemption grounds, the district court dismissed the claims based on the basic principles addressed above, and the industry group never appealed. See *Cal. Hotels & Lodging Ass'n* v. *City of Oakland*, 393 F. Supp. 3d 817, 829 (N.D. Cal. 2019). Finally, although the Chamber cites the San Francisco HSCO addressed in *Golden Gate* (and an analogous San Francisco ordinance applicable to airport workers, (S.F., Cal. Admin. Code § 12Q)), this hardly demonstrates any trend in the years since *Golden Gate*.

B. Petitioner's "uniformity" concerns are again based on nothing more than unfounded speculation. Contrary to Petitioner's baseless assertions, the decision below does not open the floodgates for myriad laws "requir[ing] plans and plan sponsors to adopt" specific plan terms, such as "vesting rules" or "leave entitlements," thus requiring employers to "tailor[]" their plans "to the idiosyncratic policy preference of every jurisdiction in which they operate." Pet. 34–36. Seattle's ordinance does not require plan sponsors to make any such changes to their plans, and nothing in the Ninth Circuit's decision would permit such an ordinance. Indeed, the Ninth Circuit has made clear

that ERISA does preempt laws that require changing ERISA plans. *Supra* p. 10.

Petitioner and its *amici* also complain about employers having to comply with different local *wage* laws. Pet. 36. But employers have long been required to monitor and comply with state and local wage and other employment laws, and ERISA's preemption provision was never intended to change this. As this Court has made clear, "States possess broad authority under their police powers to regulate the employment relationship," including through "minimum and other wage laws." *Metropolitan Life*, 471 U.S. at 756 (citation omitted); see *Keystone*, 37 F.3d at 960 ("ERISA's preemption clause aims 'to ensure benefit plans will be governed by only a single set of regulations,' not to bestow on employers a uniform regulatory and economic environment for all their activities across the country.") (citation omitted). Petitioner and its *amici* do not identify a single decision that has approved a law that crossed that line and directly regulated ERISA plans.

IV. THIS CASE IS A POOR VEHICLE TO DECIDE THE QUESTION PRESENTED

Petitioner's question presented turns on the provisions of the Seattle ordinance that allow compliance through ERISA plan expenditures. But this case is a poor vehicle to address that issue. That is because the Seattle ordinance contains a strong severability provision:

> If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this Chapter 14.28, or the application thereof to any employer, employee, or circumstance, is held to be

> invalid, it shall not affect the validity of the remainder of this Chapter 14.28 or the validity of its application to other persons or circumstances.

SMC 14.28.250. The Court is bound by that provision. See, *e.g.*, *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law.").

Accordingly, even if Petitioner could find some "reference" or "connection" to ERISA plans in the provisions allowing employers to make payments through ERISA plans, the severability provision means that employers would still have to satisfy the law by paying additional wages. And as discussed above, that cash-payment option is not even plausibly the subject of a conflict among the courts of appeals or with this Court's decisions.

Critically, employers who oppose the ERISA payment options would be in exactly the same position they are in now: they already can choose not to change their ERISA plans (if they have them). They do not need a court order prohibiting them from doing what they need not do in the first place. And no matter what the outcome, such employers would still be required to pay the additional wages.[9]

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[9] This vehicle concern will not always arise. For one thing, political constraints may prevent state and local governments from adding a similar severability provision—they will not want to enact a law that risks losing the flexibility of compliance through health plan expenditures. For another, if Petitioner is correct about the cash-payment option, then a court will soon hold a similar law preempted, teeing up this issue for review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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