No. 21-1019

In the Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE, PETITIONER

v.

CITY OF SEATTLE, WASHINGTON

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
BENJAMIN W. SNYDER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SEEMA NANDA
Solicitor of Labor
WAYNE R. BERRY
Acting Associate Solicitor
JEFFREY M. HAHN
Counsel for Appellate and Special Litigation
GARRETT N. TRAUB
Senior Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, preempts a municipal ordinance that requires certain employers to make payments to or on behalf of their employees at fixed monthly levels, where the ordinance gives an employer flexibility to discharge that obligation by paying additional compensation directly to employees, paying a third party for providing healthcare to employees, or contributing to the employer's health plan.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. With specified exceptions, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of [Title 29]." 29 U.S.C. 1144(a). The "employee benefit plan" described in Section 1003(a) includes "any employee benefit plan" that is "established or maintained" by an "employer" that is "engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. 1003(a). In particular, it

includes an "employee welfare benefit plan" established or maintained for the purpose of providing, "through the purchase of insurance or otherwise," "medical" benefits, 29 U.S.C. 1002(1).

In explaining the scope of ERISA's preemption provision, this Court has held that "[a] law 'relates to' an employee benefit plan * * * if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). A state law has an "'impermissible connection' with * * * ERISA plans" if it "'governs a central matter of plan administration or interferes with nationally uniform plan administration.'" *Rutledge* v. *Pharmaceutical Care Management Ass'n*, 141 S. Ct. 474, 480 (2020) (citation omitted). A law makes "reference to" ERISA plans if the law "acts immediately and exclusively" upon ERISA plans, *California Division of Labor Standards Enforcement* v. *Dillingham Construction N. A.*, 519 U.S. 316, 325 (1997); or if "the existence of ERISA plans is essential to the law's operation," *ibid.*; or if the law "impos[es] requirements" to provide "coverage that * * * is measured by" a comparison to an existing ERISA plan, *District of Columbia* v. *Greater Washington Board of Trade*, 506 U.S. 125, 130 (1992).

2. In September 2019, the Seattle City Council adopted Ordinance No. 125930 (Ordinance), entitled "Improving Access to Medical Care for Hotel Employees." Seattle, Wash. Municipal Code (SMC) Ch. 14.28 (2019) (capitalization altered; emphasis omitted); see Pet. App. 21-57.[1] This case concerns the Ordinance's requirement that certain employers in the hotel industry (and ancillary businesses) make monthly healthcare

[1] All references to the SMC refer to the version in effect in 2019.

expenditures on behalf of their employees in certain fixed amounts. SMC ch. 14.28.060. In particular, the Ordinance specifies that covered employers must make monthly payments of $420 for an employee with no spouse, domestic partner, or dependents; $714 for an employee with only dependents; $840 for an employee with only a spouse or domestic partner; or $1260 for an employee with a spouse or domestic partner and one or more dependents. SMC ch. 14.28.060(A). The Ordinance provides for annual adjustments of those amounts based on inflation in the cost of medical care. *Ibid.*

The Ordinance gives employers discretion to make the required expenditures in any of three ways: (1) a direct-payment option, under which the employer pays additional compensation directly to the employee; (2) payments to a third party, "such as to an insurance carrier" or "into a tax favored health program" such as a health savings account, "for the purpose of providing healthcare services to the employee" or the employee's beneficiaries; or (3) paying for healthcare services provided to employees and their beneficiaries through a self-funded health program. SMC ch. 14.28.060(B). The Ordinance provides that its required expenditures shall not be deemed to satisfy any other "hourly wage and hourly compensation laws." SMC ch. 14.28.060(E).

3. Petitioner is a trade association representing sponsors of large ERISA-covered plans. Pet. 9. In the operative complaint, petitioner alleged that the Ordinance is preempted because it mandates that employers provide benefits through an ERISA-covered plan and subjects their benefit decisions to local regulation. Am. Compl. ¶¶ 49-57.

The district court granted respondent's motion to dismiss. Pet. App. 5-20. It held that ERISA does not preempt the Ordinance, reasoning that because employers can comply by making payments to employees under the direct-payment option, the Ordinance does not require that employers create an ERISA plan and functions irrespective of whether an employer has an ERISA plan. *Id.* at 12-19.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-3.

Relying on its decision in *Golden Gate Restaurant Ass'n* v. *City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), cert. denied, 561 U.S. 1024 (2010), the court of appeals held that the 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, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to [a third party].'" Pet. App. 3 (citation omitted; brackets in original).

Petitioner had argued that this case is distinguishable from *Golden Gate* because the San Francisco ordinance at issue there "did not include a direct payment option from the employer to the employee," whereas the Ordinance here does. Pet. App. 3. The court of appeals held that that difference did not support a finding of preemption here, observing that the court had "expressly noted in *Golden Gate* that there was no ERISA preemption 'even if the payments are made by the employer directly to the employees who are the beneficiaries of the putative plan.'" *Ibid.* (citation omitted).

The court of appeals denied rehearing en banc with no noted dissents. Pet. App. 4.

DISCUSSION

The unpublished decision of the court of appeals does not warrant review by this Court.

In order to establish that ERISA preempts the Ordinance, petitioner must show that the Ordinance either makes an impermissible "reference to" ERISA-covered plans or has a prohibited "connection with" such plans. *Rutledge* v. *Pharmaceutical Care Management Ass'n*, 141 S. Ct. 474, 479 (2020) (citation omitted). The court of appeals correctly determined that petitioner had not made either showing. And its decision sustaining the particular local ordinance at issue here does not implicate any circuit conflict warranting this Court's review because the laws involved in the cases on which petitioner relies differed in material respects from the one in this case.

The Ordinance here does not require employers to establish ERISA plans, nor does it single out ERISA plans or plan sponsors for differential treatment. Instead, as with state and local prevailing-wage laws that petitioner appears to concede are valid (see Reply Br. 3), employers can comply fully with the Ordinance by making direct monetary payments to individual employees. The fact that the Ordinance also gives employers flexibility to establish compliance through contributions to an ERISA-covered plan does not render the Ordinance invalid. The petition for a writ of certiorari should accordingly be denied.

A. Section 514(a) Of ERISA Does Not Preempt The Ordinance

1. The Ordinance does not make an impermissible "reference to" ERISA plans

A state law makes an impermissible "reference to" ERISA plans if the existence of ERISA plans is "essential to the law's operation," *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N. A., Inc.*, 519 U.S. 316, 325 (1997) (citation omitted); or if the law acts "immediately and exclusively" upon ERISA plans, *ibid.*; or if the law "impos[es] requirements" to provide "coverage that * * * is measured by" a comparison to an existing ERISA plan, *District of Columbia* v. *Greater Washington Board of Trade*, 506 U.S. 125, 130 (1992). The monthly expenditure obligation at issue here does not refer to ERISA plans in any of those prohibited ways. See SMC ch. 14.28.060.

a. An ERISA plan is not essential to compliance with the Ordinance

ERISA plans are not "essential to the [Ordinance's] operation." *Dillingham*, 519 U.S. at 325. Employers that do not maintain an existing ERISA plan and do not wish to establish one can fully comply with the Ordinance through the direct-payment option by making monetary payments to employees in at least the specified amounts on a monthly basis out of general funds. See SMC ch. 14.28.060(B). As with ordinary wages, employees are free to spend that money however they choose; "the direct payments need not be used for medical care at all." Pet. App. 14 n.5. Indeed, for employees who already receive wages that exceed the applicable minimum-wage thresholds by at least the amount

specified in the Ordinance, no further payments are required beyond those existing wages.[2]

Employers do not establish or maintain an ERISA plan by making the direct, unrestricted payments to employees contemplated by the Ordinance, any more than they establish an ERISA plan by making direct payments of their employees' wages. See 29 U.S.C. 1002(1); 29 C.F.R. 2510.3-1(b)(1) (providing that "the terms 'employee welfare benefit plan' and 'welfare plan'" do not include "payment by an employer of compensation on account of work performed by an employee").[3]

Petitioner contends (Pet. 29-30) that "if the Seattle Ordinance would otherwise escape preemption," then compliance with the direct-payment option itself

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[2] Petitioner asserts (Reply Br. 4) that even "an employee making six figures without health coverage" would receive increased compensation under the Ordinance. That appears to be incorrect. An employer could use a portion of the employee's existing wages to satisfy the direct-payment option (under which the maximum payment required is $1260 per month, or $15,120 per year), and the remaining wages would still be more than sufficient to satisfy applicable minimum-wage requirements. The fact that the portion of the employee's wages used to satisfy the direct-payment option cannot be counted toward minimum-wage requirements, see SMC ch. 14.28.060(E); Reply Br. 4, is therefore immaterial.

[3] The parties dispute whether payments under the direct-payment option are properly characterized as wages and, if so, what implications that may have under state law. Compare, *e.g.*, Br. in Opp. 26-27, with Reply Br. 1-5. That debate over nomenclature is immaterial for purposes of assessing preemption under ERISA. What matters for these purposes is instead that the payments are made directly to employees in exchange for their completion of a specified amount of work (here, an average of at least 80 hours per month, see SMC ch. 14.28.030(A)) and may be used by the employees for whatever purpose they choose.

"should be construed to * * * constitute [an] ERISA plan[]" because calculating the appropriate payment amounts is "not straightforward." On this view, petitioner maintains, ERISA plans should be regarded as essential to the Ordinance's operation because compliance would require an employer either to act through an existing ERISA plan or to create a new ERISA plan.

Petitioner is incorrect. Because the unrestricted monthly payments an employer makes to its employees are not "benefits" within the meaning of ERISA, see pp. 6-7, *supra*, the administrative steps necessary to ensure that an employer correctly calculates those non-benefit payments do not create an employee welfare benefit plan. Employers that utilize the direct-payment option accordingly do not thereby establish ERISA plans, any more than do employers that adopt administrative measures to ensure compliance with minimum-wage laws or other longstanding state and local compensation requirements.

b. The Ordinance does not single ERISA plans out for differential treatment

The Ordinance also does not operate "immediately and exclusively" upon ERISA plans. *Dillingham*, 519 U.S. at 325.

This Court addressed such a law in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988); see *Dillingham*, 519 U.S. at 325 (citing *Mackey*). *Mackey* involved a Georgia garnishment statute that explicitly exempted benefits under ERISA-covered plans from garnishment. 486 U.S. at 827-830 & n.4. Although the statute did not interfere with the operation of ERISA plans (because it referenced them only in an exemption), the Court observed that the exemption provision "single[d] out ERISA employee welfare

benefit plans for different treatment." *Id.* at 830. That treatment, the Court held, rendered the exemption invalid, because "*any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted." *Id.* at 838 n.12.

The Ordinance in this case does not single out ERISA plans. Rather than impose a separate set of rules for ERISA plans, the Ordinance imposes a general requirement on employers (expenditure of a specified amount) and is indifferent as to whether that requirement is satisfied through payment of ordinary wages or other direct payments to employees, through an ERISA-covered welfare plan, through other means (such as a health savings account), or by some combination thereof. A general requirement of that sort does not trigger preemption under ERISA. See *Dillingham*, 519 U.S. at 328 (finding a law not preempted where it was "indifferent to the funding, and attendant ERISA coverage, of apprenticeship programs").

In this regard, the Ordinance is similar to so-called "total package" prevailing-wage laws, under which employers may satisfy prevailing-wage requirements by aggregating cash wages with employer contributions for employee benefits. Courts of appeals have consistently held that such laws are not preempted, because they do not "force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even [offer] ERISA plans or employee benefits at all." *WSB Electric, Inc.* v. *Curry*, 88 F.3d 788, 793 (9th Cir. 1996), cert. denied, 519 U.S. 1109 (1997); see *Burgio & Campofelice, Inc.* v. *New York State Department of Labor,* 107 F.3d 1000 (2d Cir. 1997); *Keystone Chapter* v. *Foley,* 37 F.3d 945 (3d Cir. 1994), cert. denied, 514 U.S. 1032 (1995); *Minnesota Chapter* v. *Minnesota*

Department of Labor & Industry, 47 F.3d 975 (8th Cir. 1995). As petitioner acknowledges (Reply Br. 3), such laws give credit for ERISA-plan benefits in order to "ensure a level playing field between contractors who provide fringe benefits and those who do not." The Ordinance's structure here accomplishes the same purpose: It does not require employers to establish ERISA plans, but it ensures that those employers that have ERISA plans are not placed at a disadvantage vis-à-vis those who do not. Moreover, under the Ordinance, if the employer is already paying an employee an amount of wages that exceeds minimum-wage requirements by the specified amount of healthcare expenditures, the Ordinance does not require any additional expenditures. See pp. 6-7 & n.2, *supra*.

c. The Ordinance does not establish benefit obligations based on existing ERISA plans

Finally, the Ordinance does not measure its expenditure requirements by reference to employers' existing ERISA plans. See *Greater Washington Board of Trade*, 506 U.S. at 130.

In *Greater Washington Board of Trade*, this Court held that ERISA preempted a District of Columbia law that required "[a]ny employer who provides health insurance coverage for an employee" to also "provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits." 506 U.S. at 128 (citation omitted). The Court explained that "any state law imposing requirements by reference to [ERISA plans] must yield to ERISA." *Id.* at 130-131. The D.C. law was accordingly preempted because "[t]he health insurance coverage that" it required employers to provide to employees

receiving workers' compensation benefits was "measured by reference to 'the existing health insurance coverage' provided by the employer and 'shall be at the same benefit level.'" *Id.* at 130 (citation omitted).

The payment levels established by the Ordinance here, in contrast, are set without reference to employers' existing ERISA plans. The Ordinance itself establishes specific expenditure amounts that apply to all covered employers and employees, regardless of whether the employer has an ERISA plan or the employee participates in it. SMC ch. 14.28.060(A). And contrary to petitioner's contention (Pet. 27), the fact that contributions to an ERISA plan can be used to *satisfy* the uniform expenditure obligations independently established by the Ordinance does not trigger ERISA preemption. Indeed, if providing employers with that sort of flexibility were sufficient to trigger ERISA preemption, the total-package prevailing-wage laws discussed above would be called into question—a result that the lower courts have consistently rejected, see pp. 9-10, *supra*, and that even petitioner does not embrace, see Reply Br. 3.[4]

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[4] Petitioner separately observes that "[t]he Ordinance's 'effective date' [provision] for large hotels" allowed the effective date to be pushed back to as late as June 30, 2021, depending on the timing of the annual open-enrollment period for the employer's health plan, if the employer operated one. Pet. 28 (quoting SMC ch. 14.28.260(B)). To the extent that that effective-date provision applied to *all* employers, even those who chose to comply via the direct-payment option, that particular provision might have raised a preemption concern because it calculated the Ordinance's requirements by reference to ERISA plans. Because the Ordinance has now taken effect for all large hotels, however, petitioner's challenge to that provision is moot. And while petitioner points (*ibid.*) to several other provisions that tie the timing or effect of particular requirements to the

2. The Ordinance does not have an impermissible "connection with" ERISA plans

The Ordinance also lacks an impermissible "connection with" ERISA plans. See *Dillingham*, 519 U.S. at 328. To determine whether such a connection exists, "this Court asks whether a state law 'governs a central matter of plan administration or interferes with nationally uniform plan administration.'" *Rutledge*, 141 S. Ct. at 480 (citation omitted). The Ordinance does neither.

This Court expounded on "connection with" preemption in *Egelhoff* v. *Egelhoff,* 532 U.S. 141 (2001), which addressed a Washington statute under which "the designation of a spouse as the beneficiary of a nonprobate asset [wa]s revoked automatically upon divorce." *Id.* at 143; see Pet. 23-26 (discussing *Egelhoff*). The Court held that ERISA preempted application of that law to assets held in an ERISA plan (such as pension benefits), for two related reasons. First, the law sought to "bind[] ERISA plan administrators to a particular choice of rules for determining beneficiary status," which would interfere with "a central matter of plan administration" by requiring administrators to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Egelhoff*, 532 U.S. at 147-148. Second, the law would preclude "nationally uniform plan administration," because "[p]lan administrators [could not] make payments simply by identifying the beneficiary specified by the plan documents.

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terms of an employer's ERISA plan, it appears that "those provisions apply only if the employer *chooses* to make its payment through a plan," Br. in Opp. 24; see Reply Br. 10 (contradicting that assertion only with respect to the effective-date provision). For the reasons discussed in the text, the flexibility that those provisions afford to employers does not trigger ERISA preemption.

Instead they [would have to] familiarize themselves with state statutes so that they [could] determine whether the named beneficiary's status ha[d] been 're-voked' by operation of law." *Id.* at 148-149.

The Ordinance here does not raise those concerns. As discussed above, pp. 6-8, *supra*, employers can comply with the Ordinance through the direct-payment option alone without making any modifications to their existing ERISA plans (or having an ERISA plan at all). For employers that choose that course, the Ordinance has no effect on plan administration. The fact that the Ordinance requires those employers to identify which employees are covered, calculate the appropriate direct payments, and maintain records showing that those payments have been made, see Pet. 24-25, no more implicates ERISA than do the countless other state and local requirements, such as tax or minimum-wage laws, that impose similar requirements.

Preemption likewise is not triggered by the prospect that some employers will choose to comply through contributions to existing or new ERISA plans because such contributions receive favorable federal or state tax treatment. See Retail Litig. Ctr. Inc. & Retail Indus. Leaders Ass'n Amici Br. 17. ERISA does not preempt laws that "alter[] the incentives, but do[] not dictate the choices, facing ERISA plans." *Dillingham*, 519 U.S. at 334. The fact that an employer may choose to comply through an ERISA plan is not sufficient to trigger ERISA preemption, particularly when that choice is made voluntarily as one available mode of compliance. See *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645, 659-660 (1995) (observing that "[a]n indirect economic influence * * * does not bind plan administrators to any

particular choice and thus function as a regulation of an ERISA plan itself"); cf. *Greater Washington Board of Trade*, 506 U.S. at 132 ("The fact that employers could comply with the New York law [at issue in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983),] by administering the required disability benefits through a multibenefit ERISA plan did not mean that the law related to such ERISA plans for preemption purposes.").

B. The Question Presented Does Not Warrant This Court's Review

This case also does not implicate a conflict among the courts of appeals warranting further review by this Court. As the discussion above illustrates, the availability of the direct-payment option as a means of compliance plays an important role in assessing the Ordinance's compatibility with ERISA. None of the earlier cases on which petitioner relies involved a comparable option for direct, unrestricted payments to employees. Indeed, the law upheld in the Ninth Circuit's own prior decision in *Golden Gate Restaurant Ass'n* v. *City & County of San Francisco*, 546 F.3d 639 (2008), cert. denied, 561 U.S. 1024 (2010), also lacked such an option, as petitioner acknowledged below. Given the paucity of decisions addressing laws that share that central feature of the Ordinance here, petitioner's failure to identify any direct conflict over the compatibility of such laws with ERISA, and the fact that the court of appeals' decision is unpublished and non-precedential, this Court's intervention is not warranted.

1. Petitioner contends (Pet. 16-17) that "the decision below * * * squarely conflicts with the Fourth Circuit's decision" in *Retail Industry Leaders Ass'n* v. *Fielder*, 475 F.3d 180 (2007). That contention is incorrect.

a. In *Fielder*, the Fourth Circuit addressed a Maryland law, known as the Fair Share Act, that was designed to target a single employer (Wal-Mart) and that required that employer to spend at least "8% of the total wages paid * * * in the State on health insurance costs." 475 F.3d at 184 (quoting Md. Code Ann., Lab. & Empl. § 8.5-104(b) (LexisNexis 2016)). The law defined "health insurance costs" to include only expenditures on healthcare and health insurance that were deductible for federal tax purposes under 26 U.S.C. 213(d). See *Fielder*, 475 F.3d at 184. If Wal-Mart did not increase its qualifying spending to meet the eight-percent requirement, it would be required to "pay to the [State] an amount equal to the" shortfall. *Ibid.* (quoting Md. Code Ann., Lab. & Empl. § 85-104(b) (LexisNexis 2016)).

The Fourth Circuit held that the law imposed a "mandate[] on how employers structure their ERISA plans," and was therefore preempted. *Fielder*, 475 F.3d at 193. In reaching that conclusion, the court rejected two arguments about how Wal-Mart might comply with the law without modifying its existing ERISA plans. First, the court concluded that paying the shortfall to the State operated as a "fee or a penalty that gives the employer an irresistible incentive to provide its employees with a greater level of health benefits." *Id.* at 193-194. The court explained that an employer "would gain from increasing the [healthcare benefits] it offers employees through improved retention and performance of present employees and the ability to attract more and better new employees," whereas "an employer would gain nothing" by paying an equivalent amount to the State. *Id.* at 193. Accordingly, no "reasonable employer"

would "pay the State a sum of money that it could instead spend on its employees' healthcare." *Ibid.*

Second, the Fourth Circuit determined that Wal-Mart could not realistically satisfy the eight-percent requirement through healthcare expenditures that were not channeled through or coordinated with its existing ERISA plans. See *Fielder*, 475 F.3d at 196-197. Maryland had argued that rather than increasing contributions to its ERISA plans, Wal-Mart could make contributions to health savings accounts that its employees had established independently, or pay for on-site medical clinics to treat "minor injuries" suffered by employees or their family members. *Id.* at 196. The court concluded that those options were not "serious means by which employers could increase healthcare spending to comply with the Fair Share Act," because the amount of spending involved would fall well short of the eight-percent requirement. *Ibid.* The court further stated that "even if on-site medical clinics and contributions to Heath Savings Accounts were a meaningful avenue by which Wal-Mart could incur non-ERISA healthcare spending," the court "would still conclude that the Fair Share Act had an impermissible 'connection with' ERISA plans" because Wal-Mart "would need to coordinate those spending efforts with its existing ERISA plans." *Id.* at 196-197. "For example, an individual would be eligible to establish a Health Savings Account only if he is enrolled in a high deductible health plan," and therefore "[i]n order for Wal-Mart to make widespread contributions to Health Savings Accounts, it would have to alter its package of ERISA health insurance plans to encourage its employees to enroll in one of its high deductible health plans." *Id.* at 197.

b. *Fielder* does not conflict with the court of appeals' decision upholding the Ordinance here. The Fourth Circuit's analysis turned on the fact that Wal-Mart could not comply with the Fair Share Act without modifying its ERISA plans: Paying shortfall penalties to the State was not a "rational choice," and any increase in healthcare spending would either come directly through an ERISA plan or require Wal-Mart to "alter its package of ERISA health insurance plans" in order to coordinate with non-ERISA spending. *Fielder*, 475 F.3d at 193, 197. Moreover, Wal-Mart could not satisfy the requirements by paying its employees higher wages; doing so would have *increased* the amount it was required to spend on health insurance costs, since the law's requirement was expressed as a percentage of total wage costs. The direct-payment option in the Ordinance here, in contrast, allows petitioner's members to comply through unrestricted payments to their employees that do not require any alteration of, or benefits coordination with, existing ERISA plans. See pp. 6-8, *supra*. An employer can comply with the Ordinance by simply adding the requisite payment amount to its employees' existing paychecks, just as it would if Seattle had increased the local minimum wage. Unlike the Fair Share Act, therefore, the Ordinance does not establish an impermissible "mandate[] on how employers structure their ERISA plans." *Fielder*, 475 F.3d at 193.

In its complaint, petitioner alleged that the direct-payment option, like the shortfall payment to the State in *Fielder*, is not a "reasonable choice[]" for employers because it is "financially more onerous" than complying through an ERISA plan. Am. Compl. ¶ 55. In particular, petitioner observed that employers and employees "pay federal employment taxes and income taxes on the

direct payments," whereas qualifying contributions to and benefits from ERISA plans are generally not taxed. *Id.* ¶ 55(c); cf. Retail Litig. Ctr. Inc. & Retail Indus. Leaders Ass'n Amici Br. 17. Petitioner does not repeat that argument before this Court. In any event, petitioner has not shown that any difference in the federal tax treatment of those options is so stark as to make it irrational for any employer to choose the direct-payment option. Unlike the shortfall penalty paid to the State in *Fielder*, from which an employer "would gain nothing," 475 F.3d at 193, an employer would derive substantial advantages from increasing its employees' monetary compensation. Indeed, many employees might *prefer* to receive additional compensation in the form of unrestricted payments, particularly when (as with petitioner's members, see Pet. 26 n.2) they already receive some health coverage through the employer's existing ERISA plan. And employers that choose that option can thereby avoid the burdens of establishing or modifying an ERISA plan, which petitioner itself otherwise emphasizes (*e.g.*, Pet. 1, 4).

Accordingly, while the tax difference may "alter[] the incentives" for some employers, it "does not dictate the choices" they make in the way that the Fair Share Act's shortfall penalty did. *Dillingham*, 519 U.S. at 334. The mere existence of differential tax treatment, without more, is not sufficient to trigger preemption. To hold otherwise would call into question the legality of state tax laws that exempt contributions to employees' health benefit plans, but not ordinary wages, from income taxation, thereby giving employers a marginal incentive to provide additional compensation through ERISA plans rather than increased wages. See, *e.g.*, N.Y. Tax Law § 607 (McKinney Supp. 2022) (defining

terms by reference to the federal tax code, which excludes from taxable income employer contributions to a healthcare plan pursuant to 26 U.S.C. 106); see also pp. 9-10, *supra* (discussing total-package prevailing wage laws that implicate similar considerations).

2. The decision below also does not conflict with the First Circuit's decision in *Merit Construction Alliance* v. *City of Quincy*, 759 F.3d 122 (2014). Contrary to petitioner's contention (Pet. 21), *Merit Construction* did not involve a "play-or-pay" law. Instead, it involved a law requiring bidders on public-works projects to "engage[] in a bona fide apprentice training program" that met detailed requirements established by the municipality. 759 F.3d at 125 (citation omitted; brackets in original). The court held that ERISA preempted the law because, to comply, "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." *Id.* at 130. The possibility that the separate plan might not be governed by ERISA (if it was paid for through general funds) was not enough to save the law from preemption, the court concluded, because a plan administrator would "still [be] '[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines.'" *Ibid.* (quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 13 (1987)) (second set of brackets in original).

Petitioner erroneously contends (Pet. 21) that the First Circuit rejected what petitioner calls an "or-pay" option. There was no such option under the local law in *Merit Construction*. Indeed, the First Circuit

emphasized that its decision was "not * * * contrary" to the Ninth Circuit's holding in *Golden Gate*, *supra*, that ERISA preempts laws that "'require[] employers to have [benefit] plans'" but does not preempt laws that merely "requir[e] a certain level of health-care expenditures—which might, but need not, be spent through an ERISA plan." *Merit Construction*, 759 F.3d at 130 (citation omitted; second set of brackets in original). The First Circuit determined that the challenged law before it fell into the impermissible first category, because employers could comply only by using an existing ERISA apprentice plan or establishing a separate plan, which would interfere with uniform plan administration even if the separate plan was not itself governed by ERISA. See *ibid.* Under the direct-payment option available here, in contrast, employers can comply with the Ordinance without using, modifying, or even having a benefits plan, by paying unrestricted compensation directly to employees. See pp. 6-8, *supra*.

3. Petitioner also observes (Pet. 10, 13) that the Secretary of Labor filed briefs urging the Ninth Circuit to hold that ERISA preempted the San Francisco law challenged in *Golden Gate*. See Sec'y of Labor C.A. Amicus Br. Supporting Pet. for Reh'g at 8-13, *Golden Gate Restaurant Ass'n* v. *City & County of San Francisco*, No. 07-17370 (9th Cir. Oct. 31, 2008) (*Golden Gate* Labor Amicus Br.); Sec'y of Labor C.A. Amicus Br. Supporting Appellee at 8-28, *Golden Gate Restaurant Ass'n* v. *City & County of San Francisco*, No. 07-17370 (9th Cir. Mar. 28, 2008). The approach urged by the Secretary in those briefs, however, is consistent with the Ninth Circuit's decision upholding the Ordinance in this case.

As petitioner acknowledged below, "*Golden Gate* * * * is distinguishable" from this case because the "law there at issue did not concern an * * * employer-to-employee direct-payment regime." Pet. C.A. Br. 14. Instead, an employer's only options under the San Francisco law were to make contributions to an existing ERISA plan or instead to make contributions to a city-administered healthcare program from which its employees would then be eligible to receive care. See *Golden Gate*, 546 F.3d at 644-645.

The Secretary took the position that both of those options required "creating or altering an ERISA plan," and thus that ERISA preempted the law. *Golden Gate* Labor Amicus Br. at 8; see U.S. Br. at 10-11, *Golden Gate Restaurant Ass'n* v. *City & County of San Francisco*, No. 08-1515 (May 28, 2010) (*Golden Gate* U.S. Invitation Br.) (describing position taken in the Ninth Circuit). Making increased contributions to the employer's existing ERISA plan would obviously entail a modification of that plan. And the Secretary argued that the administrative undertakings an employer had to assume when contributing to the city-administered healthcare program would themselves likewise constitute "establish[ing] an ERISA-covered plan for its employees, just as an employer establishes an ERISA-covered plan when it provides health benefits for its employees through the purchase of insurance." *Golden Gate* Labor Amicus Br. at 10. On that understanding, the existence of an ERISA plan was "essential to the law's operation" regardless of which option an employer chose, and the law was therefore preempted. *Dillingham*, 519 U.S. at 325.

The Ordinance here is materially different. As discussed above, see pp. 6-8, *supra*, the direct-

payment option available under the Ordinance does not require the existence or creation of an ERISA plan. Unlike the contributions to San Francisco's city-administered healthcare program that the Secretary analogized to insurance premiums, the direct-payment option involves monetary payments to individual employees themselves, which the employees need not spend on health care. Such payments do not establish an ERISA plan, and the Ordinance accordingly would not be preempted under the approach urged by the Secretary in *Golden Gate*.[5]

4. Finally, petitioner contends (Pet. 31-33) that the decision below also implicates an asserted conflict over application of a presumption against preemption in the context of ERISA's express preemption clause. That contention is incorrect.

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[5] Petitioner also observes (Pet. 19; Reply Br. 5-6 & n.2) that the government described the Ninth Circuit's analysis in *Golden Gate* as "inconsistent," *Golden Gate* Labor Amicus Br. at 17, or at least "in tension with[,] reasoning" in the Fourth Circuit's *Fielder* decision, *Golden Gate* U.S. Invitation Br. at 17. Because of the direct-payment option, however, the court of appeals' decision upholding the Ordinance here is consistent with the decision in *Fielder*. See pp. 15-19, *supra*. The Secretary's en banc brief in *Golden Gate* ascribed to the Fourth Circuit a "conclusion that even if an employer has meaningful ways to comply with a healthcare spending requirement without affecting ERISA plans, the law is still preempted because of its interference with the employer's ability to administer a uniform nationwide healthcare plan." *Golden Gate* Labor Amicus Br. at 17. But as explained above, see pp. 15-16, *supra*, the Fourth Circuit's conclusion rested on the fact that the alternative ways of complying, even if not themselves ERISA plans, would affect ERISA plans because of a need to modify or otherwise coordinate with such plans. See *Fielder*, 475 F.3d at 196-197. That is not the case under the Ordinance here.

While the court of appeals did reference such a presumption in two sentences of its opinion, see Pet. App. 2, the court gave no indication that the presumption was material to the outcome here. And for the reasons discussed above, see pp. 6-14, *supra*, it is not: Even without application of a presumption against preemption, the Ordinance does not trigger preemption under ERISA because it neither makes an impermissible "reference to" ERISA plans nor has an impermissible "connection with" such plans. Accordingly, this case presents no occasion for the Court to revisit its prior decisions applying such a presumption in the context of ERISA. See, *e.g.*, *Travelers*, 514 U.S. at 661.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
BENJAMIN W. SNYDER
Assistant to the Solicitor General

SEEMA NANDA
Solicitor of Labor
WAYNE R. BERRY
Acting Associate Solicitor
JEFFREY M. HAHN
Counsel for Appellate and Special Litigation
GARRETT N. TRAUB
Senior Attorney

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