No. 21-1019

In the
Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Seattle enacted the "Improving Access to Medical Care for Hotel Employees Ordinance" in 2019 in an avowed effort to improve access "to high-quality, affordable health coverage for the employees and their spouses or domestic partners, children, and other dependents." SMC 14.28.025. In service of that titular goal, the Ordinance requires employers to make minimum monthly "healthcare expenditures," which, like most employee-benefits provisions but unlike any valid wage law in Washington State, vary depending on employees' family composition. SMC 14.28.060.A. The Ordinance gives employers three options to comply with this healthcare mandate. The first two options—(1) making the minimum monthly payments to a third party, such as an insurance carrier (SMC 14.28.060.B.2); or (2) complying via a self-funded healthcare plan (SMC 14.28.060.B.3)—are plainly preempted under ERISA.

Indeed, no one, including the United States (hereinafter, "government") in its amicus brief, denies that those two options "relate to an[] employee benefit plan," 29 U.S.C. §1144(a), or that a law giving employers only those two options would be preempted. Nevertheless, the government asserts that the Ordinance evades ERISA preemption because it provides a third option, under which employers can make monthly payments in the required amounts directly to their covered employees. *See* SMC 14.28.060.B.1. In the government's current view—which reflects a 180-degree turn from its position in the Ninth Circuit a decade ago—no matter how obviously a local benefits law relates to ERISA plans, it can escape preemption altogether by the simple expedient of engrafting an "or-pay" option onto an otherwise hopelessly preempted law. That view is dangerously wrong and underscores that the circuits are divided.

First, the government's position cannot be reconciled with ERISA's text, this Court's cases, or common sense. ERISA contains arguably "the most expansive express pre-emption provision in any federal statute." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 327 (2016) (Thomas, J., concurring). The notion that it is also the most easily evaded has no foundation in the text, which reaches "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. §1144(a), or in this Court's cases, which repeatedly emphasize that provision's breadth. The idea that a local ordinance that directly mandates levels of employee health benefits offered in third-party or self-funded plans does not "relate to" ERISA plans because employers could provide the specified benefit levels in cash does not pass the straight-face test, but it is now the official position of the United States, which substantially strengthens the case for this Court's plenary review, especially with numerous jurisdictions nationwide on record as ready to follow Seattle's lead.

Second, the government's new position that an or-pay option obviates ERISA preemption underscores that the circuits are split. While the government tries to distinguish First and Fourth Circuit decisions on their facts, those decisions both expressly rejected the notion that the possibility of complying with the law via non-ERISA options was sufficient to avoid preemption. Simply put, a non-ERISA compliance option suffices to defeat preemption in Pasadena, but not in Boston or Richmond.

Finally, it is not just the circuits that are split. The government's brief reflects the third different view of this preemption issue across three different administrations. The answer to a question as basic as whether an otherwise obviously preempted local benefits law can survive based on the addition of an or-pay option should not vary across circuits or administrations. This Court should grant review and provide a clear, uniform, and obvious answer: The Nation's broadest preemption provision is not the easiest to circumvent.

I. The Decision Below Squarely Conflicts With This Court's Precedents And Decisions Of Other Circuits.

A. The Ordinance Is Preempted.

As its name suggests, Seattle's "Improving Access to Medical Care for Hotel Employees" Ordinance seeks to enhance Seattle hotel-workers' health benefits. SMC 14.28.025. It does so by imposing Seattle-specific benefits requirements for "employees and their spouses or domestic partners, children, and other dependents." *Id.* To comply, employers must make "monthly required healthcare expenditures" on behalf of covered employees "for the purpose of providing healthcare services." SMC 14.28.060. The Ordinance directly pegs the required expenditures to employers' cost of obtaining "gold-level" healthcare for employees. Reply.4. And the Ordinance's effective date explicitly depends on the terms of employers' existing ERISA plans. *See* SMC 14.28.260. That is a textbook benefits law that impermissibly references and "has an impermissible connection with ERISA plans." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001).

The government implausibly contends that "the Ordinance has no effect on plan administration," U.S.Br.13, because it allows employers to pay covered employees directly, rather than via their healthcare plans. In fact, that is the government's *only* argument that the Ordinance lacks an impermissible "connection with" ERISA plans. But that argument cannot be correct. Any employer who uses an existing ERISA plan (or creates a new ERISA plan) to satisfy this new obligation will obviously have their plan administration affected directly and profoundly. And even an employer who opts to provide cash benefits would need to consider its ERISA plan, if any, to determine the extent of its cash-payment obligation.

The government emphasizes that the employee is free to use funds provided under the or-pay option for any purpose they want, including expenditures having nothing to do with healthcare. U.S.Br.6. That ignores the Ordinance's promise that the increased expenditures are "for the purpose of providing healthcare services." SMC 14.28.060. Indeed, if employers give workers money that "need not be used for medical care at all," U.S.Br.6, then the Improving Access to Medical Care for Hotel Employees Ordinance *will not improve access to medical care*. In considering whether the Ordinance is preempted, it seems reasonable to focus on the only options that will allow Seattle to achieve its stated objectives. And Seattle plainly expects employers to comply with the

Ordinance by "tailor[ing] substantive benefits to the particularities of" its new health-benefits law. *See Rutledge v. Pharm. Care Mgt. Ass'n*, 141 S.Ct. 474, 480 (2020).

That undeniable reality belies any suggestion that Seattle added the or-pay option because it wanted to append a prevailing-wage law onto an Ordinance that otherwise mandates minimum levels of ERISA benefits. So too does the fact that a worker is entitled to *nothing* under the Ordinance if she already receives qualifying health coverage, even if she makes minimum wage.[1] In reality, the only reason Seattle added the or-pay option to a self-described medical benefits ordinance was to try to circumvent federal law under prevailing Ninth Circuit precedent. It is hard to believe that such a transparent stratagem could suffice to defeat ERISA's textually broad express

[1] The government does not dispute this. The very fact that an employer need not make any payment under the or-pay option if it provides compliant ERISA benefits would seem to give the whole Ordinance, including the or-pay option, an impermissible connection to ERISA plans. But, at a minimum, the failure of a low-paid worker with substantial ERISA benefits to gain anything from the Ordinance makes clear that it is not a prevailing-wage law. As to the well-paid workers with less-than-gold-standard health benefits who stand to gain from the Ordinance, the government suggests only that an employer theoretically could comply by reducing a covered employee's $100,000 salary to $85,000 and then devoting $15,000 to "required healthcare expenditures." U.S.Br.7 n.2. But even assuming an employer could convince employees to accept a $15,000 pay cut on the assurance that increased benefits will make them whole, the possibility of compliance via wage-reduction-plus-enhanced-benefits underscores that the Ordinance is nothing like a prevailing-wage law and nothing *but* a benefits law.

preemption provision. Yet that is exactly what the decision below held and the government embraces.

That position is indefensible on its own terms, and doubly so given the Ordinance's literal "reference to" ERISA plans. The Ordinance is explicit that its effective date varies by employer depending on the terms of employers' existing plans. SMC 14.28.260. The government acknowledges that this express reference to ERISA plans creates an apparent preemption problem, but dismisses it in a footnote by suggesting that the effective dates have come and gone. U.S.Br.11-12 n.4. That is wrong. The Ordinance has two different effective dates—one for hotels and another for "ancillary hotel business"—and the latter mandates compliance by the earliest "open enrollment period … *after July 1, 2025*." SMC 14.28.260.A (emphasis added). References to ERISA plans do not get more obvious (or of more ongoing significance) than that. Moreover, that Seattle tied something as fundamental as the law's effective dates to the terms of employers' ERISA plans underscores that Seattle fully expected employers to comply with the law via their ERISA plans. There is no expiration date for that preemption problem.

Nor is that the Ordinance's only impermissible reference to ERISA plans. Whether employers must increase per-employee healthcare spending depends entirely on what their existing ERISA plans provide. The government's only response is to suggest that "it *appears* that 'those provisions apply only if the employer chooses to make its payment through a plan.'" U.S.Br.11-12 n.4 (emphasis altered). It may "appear" that way to the government, but it is not apparent *on the face of the Ordinance*, which measures how much employers owe (via their plans or the or-pay option) based on what workers receive *under the employers' existing plans*. *See* SMC 14.28.060.C; Pet.27-28.

Seattle's effort to escape preemption faces one final obstacle: Given the Ordinance's benefits-related purpose and its decision to tie mandated healthcare expenditures to familial status, even the or-pay option requires employers to operate a "plan" under ERISA. *See* 29 U.S.C. §1002(1) (defining plan broadly as "any plan, fund, or program … established or … maintained for the purpose of providing [health benefits] for its participants or their beneficiaries"). The government asserts that the ongoing compliance burdens under the or-pay option do not constitute a "plan." But this is no one-time payment, as in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Even the government acknowledges that ongoing "administrative steps" will be "necessary to ensure that an employer correctly calculates" the mandatory "healthcare expenditures" each month. U.S.Br.8. That is an understatement, as the required amount varies depending on the employee's current family situation: An employee is owed more if she has a spouse and even more if she also has dependents. SMC 14.28.060.A. An employer cannot comply with the Ordinance without tracking this information on an ongoing basis. And a system that tracks beneficiary information in order to calculate and furnish funds designed for healthcare comes well within the statutory definition of a plan.

The government does not fully endorse respondent's effort to defend the Ordinance as a prevailing-wage law. Yet even its suggestion that the or-pay option is "similar" to such laws, U.S.Br.9, 13, 19, is mistaken. A law that pegs the amount of "required healthcare expenditures" to the cost of gold-level health insurance, while adjusting for spouses and/or dependents—something that is strictly verboten for wage laws, *see* Wash. Rev. Code §49.60.180(3)—is a benefits law, pure and simple. Cases upholding local prevailing-wage laws, *see* U.S.Br.9-10, are thus beside the point.

B. The Circuits Are Divided.

The need for this Court's review is particularly acute given that Ninth Circuit precedent conflicts with the decisions of other circuits. That used to be common ground. In 2008, the Labor Department supported en banc rehearing in *Golden Gate Restaurant Association v. San Francisco*, 546 F.3d 639 (9th Cir. 2008)—the precedent the panel here deemed binding—explicitly arguing that the "decision" was wrong and "conflicts with … the Fourth Circuit's decision in [*Retail Industry Leaders Ass'n v.*] *Fielder*[, 475 F.3d 180 (4th Cir. 2007)]." Br. for Sec'y of Labor 7, *Golden Gate Rest. Ass'n v. San Francisco*, Nos. 07-17370, 07-17372 (9th Cir. Oct. 2008) ("DOL.Br."). After a change in administration, the Solicitor General perceived an alternative holding in *Fielder*, but still acknowledged that the Ninth Circuit's "reasoning" conflicted with "the reasoning contained in *Fielder*" and the Fourth Circuit's main holding that, even with a non-ERISA option, the Maryland law interfered with ERISA's preference for uniform plan administration nationwide. Br. for U.S. 17, 19-20, *Golden Gate Rest. Ass'n v. San Francisco*, No. 08-1515 (U.S. May 26, 2010).

Now, however, a third administration has done a full 180: The government today endorses *Golden Gate* and denies any conflict with *Fielder*. The government had it right the first time—the laws may differ in the details, but their holdings are irreconcilable. But even if the circuits were not in conflict, the three-way split among administrations would itself strongly counsel in favor of review. Employers and municipalities alike deserve to know whether ERISA's notoriously broad preemption clause can be circumvented by adding an "or-pay" option. The answer should depend on the statutory text and this Court's precedents, not on who is running the Labor Department or whether the case is filed in Richmond or Pasadena.

The government's belated effort to deny the circuit split rests on the detail that the or-pay option in *Fielder* required employers to send money to the state rather than, as here, to employees. *See* U.S.Br.15. That is a detail without a difference. The government cannot explain why the destination of the check matters to "plan sponsors" no longer able to administer a single plan nationwide, but instead forced to shoulder "the administrative and financial burden of complying with [unique local] directives." *Rutledge*, 141 S.Ct. at 480. Nor does the destination of the check dictate whether the ordinance as a whole or the or-pay option in particular "relate[s] to any employee benefit plan." 29 U.S.C. §1144(a).[2] In fact,

[2] To the extent the government suggests that Seattle employers are more likely to use the or-pay option (relative to *Fielder*), its

the government does not cite §1144(a) *or any of this Court's precedents* in its five-page effort to distinguish *Fielder*. *See* U.S.Br.15-19. The government had it right back when *Golden Gate* and *Fielder* were freshly decided: The Ninth Circuit's caselaw "conflicts with … the Fourth Circuit's decision in *Fielder*." DOL.Br.7.

The one material development since the Labor Department first correctly identified that conflict is the First Circuit's deepening of the split in *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014). That decision held that the mere fact that "a non-ERISA option might be available for compliance … does not save the Ordinance" if "its mandate still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals." *Id.* at 131. Indeed, that was how the First Circuit "summarize[d]" its holding. *Id.* If that were the law in the Ninth Circuit, then the decision below would have come out the other way. The government ignores this holding and dismisses the conflict because the "non-ERISA option" under the Quincy ordinance was not strictly an or-pay option. U.S.Br.19. But an or-pay option is not magic; the only conceivable reason an or-pay option might allow an ordinance to escape ERISA preemption is because it is

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premise is highly doubtful given the substantial tax advantages of complying via ERISA plans. The government minimizes those advantages, but it forgets that ERISA makes establishing health plans voluntary and depends on the very tax benefits the government minimizes to incentivize employers to establish plans. In all events, both Maryland's law and Seattle's Ordinance interfere with employers' ability to administer their plans uniformly nationwide even if they adopt the non-ERISA option. That should render both laws equally preempted.

a non-ERISA option. That suffices in the Ninth Circuit, but not in the First (or Fourth) Circuit. That is the definition of a circuit split.

Finally, the government never disputes that the circuits are divided on whether a presumption against preemption applies to ERISA's express preemption clause. U.S.Br.22-23; *see* Pet.31-33. Instead, it asserts that the presumption was not "material to the outcome here." U.S.Br.23. But the panel below was explicit that "[t]he outcome of this case is controlled by … *Golden Gate*," and specifically invoked *Golden Gate*'s presumption-against-preemption language in its brief opinion. Pet.App.2-3. This case thus provides an opportunity to make clear that the presumption has no role in express preemption cases, as the Fifth and Eighth Circuits have held, *see* Pet.32-33.

II. This Court's Review Is Urgently Needed.

The government does not deny the importance of this issue. Nor could it; "national uniformity in the area of employer-provided healthcare" is plainly an "issue of exceptional national importance." *Golden Gate Rest. Ass'n v. San Francisco*, 558 F.3d 1000, 1008 (9th Cir. 2009) (M. Smith, J., dissenting from denial of rehearing). Instead, it simply ignores the elephant in the room. The government never acknowledges that a number of the Nation's largest cities went on record *in this case* to underscore that they want and intend to "adopt local laws to promote healthcare access," including by "requir[ing] employers to make certain payments for employee healthcare." Br. of Amici Curiae San Francisco, et al., 18, 24 (9th Cir. Nov. 4, 2020). And those jurisdictions are just the tip of the iceberg. *See* Chamber.Br.13-15. Now that the federal government has gone on record as saying that something as simple as adding an or-pay option will save an otherwise obviously preempted benefits mandate, these laws will plainly proliferate.

Unless this Court steps in now and reaffirms that ERISA's broad preemption provision means what it says, the "single uniform national scheme for the administration of ERISA plans" Congress envisioned will become a thing of the past. *Gobeille*, 577 U.S. at 326-27. Indeed, given that these laws emanate from municipalities, not even a 50-state survey will suffice to assure compliance with the resulting patchwork of benefits laws, and scarce resources will inevitably be diverted into plan administration costs.

To prevent those very results, Congress made ERISA's express preemption provision unusually broad. The Ninth Circuit and now the federal government would make that clause unusually—indeed, inexplicably—easy to circumvent. That is not a tenable combination. This Court should grant review.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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