IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

THE ERISA INDUSTRY COMMITTEE,

Applicant,

v.

CITY OF SEATTLE,

Respondent.

APPLICATION TO THE HON. ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), The ERISA Industry Committee ("Applicant") hereby moves for an extension of time of 45 days, to and including Friday, January 14, 2022, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be Tuesday, November 30, 2021.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Ninth Circuit rendered its decision on March 17, 2021 (Exhibit 1), and denied a timely petition for rehearing on September 1, 2021 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(a).

2. This case concerns the extent to which states and local governments may enact "pay or play" laws that require employers to make additional expenditures on their ERISA plans or make direct payments in the same amount outside of those plans. The Seattle ordinance at issue here requires large hotels, along with the retail

shops and restaurants doing business on their premises, to make minimum monthly healthcare payments for each "covered employee." Seattle Municipal Code ("SMC") §14.28.060.A. Employers can satisfy the requirement by making monthly payments to third parties such as insurance carriers, by making average monthly per-capita expenditures for health care through a self-funded insurance plan, or by making direct, monthly payments to employees. SMC 14.28.060.B.1-3. Applicant sought to enjoin the Ordinance, arguing that it is preempted by ERISA, which "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. §1144(a). Among other things, Applicant argued that the Ordinance impermissibly relates to ERISA plans because it denies employers the ability to maintain nationwide plan uniformity. The Ninth Circuit disagreed, relying on its prior decision in *Golden Gate Restaurant Ass'n v. San Francisco*, 546 F.3d 639 (9th Cir. 2008), to hold that the Ordinance is not preempted because one of the three options—making direct payments to employees—purportedly can be achieved without creating or altering ERISA plans. Exh. 1 at 3.

3. The Ninth Circuit's decisions in this case and in *Golden Gate* directly conflict with the Fourth Circuit's decision in *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), which held that ERISA preempted a materially identical law because it denied the affected employer "the uniform nationwide administration of its healthcare plans by requiring it to keep an eye on conflicting state and local minimum spending requirements and adjust its healthcare spending accordingly." *Id.* at 197; *see also Merit Constr. All. v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014)

(holding that ERISA preempted a municipal ordinance even though it could be satisfied with non-ERISA funds because it "still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals"). Furthermore, this case "concerns an issue of exceptional national importance, *i.e.*, national uniformity in the area of employer-provided healthcare." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 558 F.3d 1000, 1008 (9th Cir. 2009) (M. Smith, Judge, dissenting from denial of rehearing en banc). This Court has recognized that "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). The decision below invites just such a patchwork by providing states and municipalities with a roadmap for how to impose local preferences on employers' benefit plans while avoiding ERISA preemption.

4. Applicant's Counsel of Record, Paul D. Clement, was not involved in the proceedings below and requires additional time to familiarize himself with the record, research the legal issues presented in this case, and prepare a petition that fully addresses the important and far-reaching issues raised by the decision below in a manner that will be most helpful to the Court. Furthermore, between now and the current due date of the petition, Mr. Clement has substantial briefing and oral argument obligations, including an opening brief in *Janvey v. GMAG*, No. 21-10483 (5th Cir.), oral argument in *New York State Rifle & Pistol Association Inc. v. Bruen*,

No. 20-843 (U.S.), a response brief in *Netchoice LLC v. Att'y Gen. of Fla.*, No. 21-12355 (11th Cir.), an opening brief in *Glenn v. Tyson Foods*, No. 21-40622 (5th Cir.), and an opening brief in *Keefer v. 3M Co.*, No. 21-13131 (11th Cir.).

For the foregoing reasons, Applicant requests that an extension of time to and including Friday, January 14, 2022, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

October 20, 2021

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com
Counsel for Applicant