No. _____

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

PETITION FOR WRIT OF CERTIORARI

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January 14, 2022

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) preempts all state and local laws that "relate to" employee-benefit plans covered by ERISA. 29 U.S.C. §1144(a). This broad preemption provision encourages employers to offer employee benefit plans by eliminating the costs and complications of tailoring plans to the local policy preferences of every jurisdiction in which they operate. State and local governments, however, have tried to circumvent ERISA preemption by enacting what are commonly called "play-or-pay" laws. These laws unapologetically dictate the content of ERISA plans, but they purport to avoid preemption by deeming employers in compliance if, instead of altering their ERISA plans, they cut a check in the same amount directly to their employees or the local government.

The Seattle ordinance here is just such a law; it mandates that primarily out-of-state employers in the hotel sector make specified monthly healthcare expenditures on behalf of their covered local employees. Employers can comply by creating new ERISA plans, increasing contributions to their existing ERISA plans, or making payments directly to their covered employees. In the decision below, the Ninth Circuit reaffirmed an entrenched circuit split by holding that the direct-payment option saves Seattle's employee-benefits law from preemption.

The question presented is:

Whether state and local play-or-pay laws that require employers to make minimum monthly health-care expenditures for their covered employees relate to ERISA plans and are thus preempted by ERISA.

CORPORATE DISCLOSURE STATEMENT

The ERISA Industry Committee is a District of Columbia non-profit corporation with no parent company or subsidiaries and no publicly or privately issued stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the Western District of Washington and the U.S. Court of Appeals for the Ninth Circuit:

- *The ERISA Industry Committee v. City of Seattle*, No. 18-cv-1188 (W.D. Wa.), judgment issued May 11, 2020
- *The ERISA Industry Committee v. City of Seattle*, No. 20-35472 (9th Cir.), judgment issued March 17, 2021

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

ERISA reflects a compromise designed to protect the integrity of employee-benefit plans while not dissuading employers from offering those plans in the first place. To achieve these dual ends, ERISA pairs comprehensive federal rules concerning fiduciary responsibility, reporting, and disclosure with a broad preemption provision designed to free employers from the burden of tailoring their plans and their conduct to the local policy preferences of each jurisdiction in which they operate. In particular, ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a). ERISA thus enables employers to administer uniform and comprehensive nationwide benefit plans.

ERISA plainly preempts state and local laws that mandate the ongoing provision of ERISA-covered benefits. A law that simply told national employers to increase their plan's health benefits for local employees would be a non-starter. Such laws obviously "relate to" those plans and contravene Congress' judgment that employers should remain "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). But the temptation to advance the interests of local workers at the expense of national employers remains a strong one. Thus, several states and localities have turned in recent years to what are commonly called "play-or-pay" laws. These laws brazenly mandate the provision of certain levels of ERISA-covered benefits, but they also deem employers in compliance if they cut

a check in the same amount directly to their employees or to the government (the "or-pay option"). These laws purport to escape preemption because they provide employers with one option for compliance that supposedly does not require creating or altering an ERISA plan (*i.e.*, making direct cash payments).

The argument that merely offering an or-pay option suffices to render such laws unrelated to ERISA plans seems fanciful, but it nonetheless has given rise to an entrenched circuit split. In *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), the Fourth Circuit held that ERISA preempted a Maryland play-or-pay law, explaining that even the direct-payment option interfered with uniform nationwide plan administration by requiring employers "to keep an eye on conflicting state and local minimum spending requirements and adjust [their] healthcare spending accordingly." *Id.* at 196-197. Shortly thereafter, in *Golden Gate Restaurant Association v. San Francisco*, 546 F.3d 639 (9th Cir. 2008), the Ninth Circuit found a materially identical San Francisco law not preempted. That decision prompted an eight-judge dissent from denial of *en banc* review, observing that "[t]he holdings of *Fielder* and *Golden Gate* stand in clear opposition, and create a circuit split on the issue of whether ERISA preempts 'fair share' or 'play-or-pay' ordinances." *Golden Gate Rest. Ass'n v. San Francisco*, 558 F.3d 1000, 1004 (9th Cir. 2009) (M. Smith, J., dissenting from denial of rehearing).

The *Golden Gate* decision prompted a petition for certiorari, a call for the views of the Solicitor General, and a brief for the United States acknowledging the

circuit conflict but urging denial because it opined that the just-enacted Affordable Care Act (ACA) would make state and local governments unlikely to enact new employer spending requirements. Like many predictions about the ACA, this one proved mistaken. After an initial lull, play-or-pay laws have returned, as the incentives to enhance the health benefits of local employees by imposing new requirements on employers principally headquartered elsewhere have proven irresistible. Exhibit A is the Seattle play-or-pay ordinance upheld by the Ninth Circuit here, which requires large hotels and related businesses to make minimum monthly expenditures for their Seattle employees' healthcare, either by altering their ERISA plans or directly paying their employees an equivalent amount. Exhibit B is the amicus brief filed below by a group of major cities—including Los Angeles, San Francisco, Chicago, Austin, and St. Paul—who confess that "[t]he ACA has not reduced" their desire to regulate health benefits and proclaimed their intent to follow Seattle's lead. Br. of Amici Curiae San Francisco, et al. 28 (9th Cir. Nov. 4, 2020) ("Cities Brief"). And Exhibit C is the expansion of play-or-pay laws to other ERISA-covered benefits, which has caused the circuit split to deepen. *Merit Constr. All. v. City of Quincy*, 759 F.3d 122, 131 (1st Cir. 2014) (holding that ERISA preempts regulation of apprentice training programs).

This entrenched circuit split is especially problematic given that national uniformity is the *raison d'être* of ERISA's broad preemption provision and the Ninth Circuit's reasoning is so obviously flawed. No one doubts that state and local laws forcing national employers to provide greater benefits

to local employees via ERISA plans relate to those ERISA plans and are preempted. States and localities cannot avoid preemption through the simple expedient of adding an or-pay option. Such laws still prevent employers from administering uniform and comprehensive national benefit plans and still impermissibly reference ERISA plans given the reality that most covered employers have pre-existing ERISA plans that localities expect them to modify to come into compliance. Congress' purposefully broad "relates-to" standard for express preemption plainly covers such obvious efforts to thwart Congress' will. Indeed, it is no accident that the Ninth Circuit invoked the presumption against preemption to reach its misguided conclusion, even though this Court and other circuits have made clear that the presumption provides no grounds to narrow the sweep of an express preemption clause. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 124-25 (2016).

The importance of this issue cannot be overstated. By allowing Seattle to impose burdensome, locality-specific obligations on employers, the decision below threatens a return to the pre-ERISA state of affairs, when employers faced the prospect of overlapping and conflicting regulations across the country. Congress recognized that such patchwork regulation was unacceptable, and it responded with a uniform federal regulatory scheme and "what may be 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 Ninth Circuit's continued refusal to properly enforce that provision renders ERISA's promise of uniformity illusory. This Court should grant certiorari to correct

that deeply flawed interpretation and restore much-needed uniformity to this area of the law.

OPINIONS BELOW

The Ninth Circuit's opinion is available at 840 F.App'x 248 and is reproduced at App.1-3. The district court's opinion is available at 2020 WL 2307481 and is reproduced at App.5-20.

JURISDICTION

The Ninth Circuit entered its judgment on March 17, 2021, and denied a timely petition for rehearing on September 1, 2021. On October 22, 2021, Justice Kagan granted an application to extend the deadline for filing a petition for certiorari to January 14, 2022. This Court has jurisdiction under 28 U.S.C. §1254(a).

STATUTORY PROVISIONS INVOLVED

ERISA's preemption provision provides, in relevant part: "[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).

Seattle Municipal Code 14.28 is included in the appendix.

STATEMENT OF THE CASE

A. Statutory Background

ERISA comprehensively regulates employers' provision of benefits to their employees. Instead of mandating certain minimum benefits, ERISA creates a uniform regulatory scheme to govern whatever benefits employers choose to provide. Congress recognized that employers who commit to paying employee benefits must "undertake[] a host of obligations, such as determining the eligibility of

claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). The "most efficient way" for an employer to satisfy these obligations "is to establish a uniform administrative scheme" for all of its employees nationwide, but establishing a comprehensive and uniform scheme is impossible if benefits are "subject to differing regulatory requirements in differing States." *Id.*; *see id.* at 13 (discussing importance of allowing employers to "maintain[] a single administrative scheme" for employee benefits). Accordingly, Congress included in ERISA an express preemption provision that broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a). This preemption provision ensures that employers are not subject to conflicting regulations across multiple jurisdictions and that plan resources are devoted to the provision of benefits rather than to administrative compliance.

This Court has repeatedly emphasized the "expansive" nature of this preemption provision, noting that its "relate to" language sweeps with extraordinary breadth. *E.g.*, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Under ERISA's preemption provision, a law "relate[s] to" an employee-benefit plan if it "has a connection with or reference to such a plan." *Id.* at 656. A law has an impermissible "connection with" ERISA plans if it "mandate[s] employee benefit structures or their administration," *id.* at 658, or if it "interferes with nationally uniform plan

administration," *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). A law makes forbidden "reference to" ERISA plans when it "acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation." *Gobeille,* 577 U.S. at 319-20.

B. Factual Background

In September 2019, the Seattle City Council passed SMC 14.28 (the "Ordinance"), which requires covered employers to make minimum monthly healthcare expenditures on behalf of their covered employees. Covered employers are those who own, control, or operate a hotel in Seattle with more than 100 guest rooms, or who own, control, or operate an "ancillary hotel business" in Seattle and have 50 or more employees worldwide. SMC 14.28.020, 14.28.040. An "ancillary hotel business" is one that "(1) routinely contracts with the hotel for services in conjunction with the hotel's purpose; (2) leases or sublets space at the site of the hotel for services in conjunction with the hotel's purpose; or (3) provides food and beverages, to hotel guests and to the public, with an entrance within the hotel premises." SMC 14.28.020. Covered employees are those who work for a covered employer "for an average of 80 hours or more per month" and are not managers, supervisors, or "confidential employee[s]." SMC 14.28.030.A, 14.28.030.B. The Ordinance's stated intent is to "improve low-wage hotel employees' access, through additional compensation, to high-quality, affordable health coverage for the employees and their spouses or domestic partners, children, and other dependents." SMC 14.28.025.

The mandated minimum monthly contributions vary depending on each covered employee's family composition. Subject to adjustments for inflation, the mandated monthly amounts for 2022 range from $459 for employees with no spouse and no dependents to $1,375 for employees with a spouse and one or more dependents. SMC 14.28.060.A; *see* Seattle Off. of Lab. Standards, *Improving Access to Medical Care for Hotel Employees Ordinance Fact Sheet* 2 (Sept. 15, 2021), https://bit.ly/3Gk50IT. To determine which rate applies to which employees, employers must "make reasonable efforts to obtain accurate information" about their employees' family composition. Seattle Off. of Lab. Standards, *Improving Access to Medical Care for Hotel Employees Ordinance Q&A* 7 (June 22, 2020), https://bit.ly/3Gk1Nci ("Seattle Q&A").

The Ordinance's relation to employee benefits and ERISA plans is obvious. Covered employers have three options to comply with the mandate. First, employers may make the minimum monthly payments to a third party, such as an insurance carrier, "for the purpose of providing healthcare services" to covered employees. SMC 14.28.060.B Second, employers may include covered employees in a self-funded healthcare plan such that average per-capita monthly expenditures for the covered employees matches or exceeds the mandated minimum. *Id.* Third, employers may make direct monthly payments in the required amounts to their covered employees. *Id.* The first two options pre-suppose an existing ERISA plan, whether provided by an insurance carrier or self-funded, and the third option envisions a direct payment outside such existing plans. In other words, employers can comply

either by making expenditures in connection with their existing ERISA plans or by making ongoing payments to employees in an equivalent amount. The employer may combine more than one of these options, *e.g.*, by making a portion of the mandated expenditures into an ERISA plan and paying the remainder directly to covered employees. *Id.*

Consistent with the ongoing obligations imposed by the Ordinance, employers must retain, for three years, records documenting their compliance, including "[p]roof of each required healthcare expenditure made each month to or on behalf of each current and former employee," "[c]opies of waiver forms," and "other records that are material and necessary." SMC 14.28.110. If the employer fails to retain those records, "there shall be a presumption, rebuttable by clear and convincing evidence, that the employer violated this Chapter 14.28." SMC 14.28.110. Employers who violate the Ordinance are subject to an array of remedial measures, including "payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest." SMC 14.28.170.

C. Procedural History

Petitioner is a national nonprofit organization advocating exclusively for large plan sponsors that provide health, retirement, paid leave, and other benefits to their nationwide workforces. Petitioner challenged the Seattle Ordinance, arguing that it is preempted by ERISA as applied to Petitioner's member companies. Among other things, Petitioner argued: 1) the Ordinance impermissibly relates to

ERISA plans because all three options, including the or-pay alternative, require altering or creating ERISA plans; 2) the Ordinance has an impermissible "connection with" ERISA plans because its requirements interfere with nationally uniform plan administration; and 3) the Ordinance makes numerous forbidden "reference[s] to" ERISA plans. The district court and the Ninth Circuit both held that Petitioner's claims were foreclosed by the Ninth Circuit's earlier decision in *Golden Gate*, 546 F.3d 639. App.2, 20.

Like this case, *Golden Gate* involved a preemption challenge to a local ordinance that required employers to make mandatory minimum healthcare payments on behalf of their covered employees. *Golden Gate*, 546 F.3d at 643. Employers could comply by making the mandatory payments as contributions to ERISA-covered healthcare plans, by making payments in the same amounts directly to the city, or through any combination of the two. *Id.* at 645. The city would use any direct payments to fund a city-administered healthcare program for which the employees would be eligible. *Id.* at 642-43.

The Golden Gate Restaurant Association challenged the ordinance as preempted by ERISA. The district court agreed and enjoined the employer spending requirement. *Golden Gate Rest. Ass'n. v. San Francisco*, 535 F.Supp.2d 968 (N.D. Cal. 2007). The city appealed, and notwithstanding the Secretary of Labor's amicus participation on behalf of the employers, the Ninth Circuit reversed. The *Golden Gate* panel began its analysis by stating that "[t]he presumption against preemption applies in ERISA

cases." 546 F.3d at 647. Relying on the presumption, the panel held that ERISA did not preempt the San Francisco ordinance. The panel first held that the ordinance did not require employers to alter or create ERISA plans, explaining that the city-payment option "do[es] not create an ERISA plan" because "an employer has no responsibility other than to make the required payments for covered employees, and to retain records to show that it has done so." *Id.* at 650. This burden, the court opined, "is not enough, in itself, to make the payment obligation an ERISA plan." *Id.*

The challenger also argued that the ordinance was preempted because it had both a "connection with" ERISA plans and made "reference to" ERISA plans. The panel rejected those arguments as well. According to the panel, the ordinance did not have a "connection with" ERISA plans because an employer "may fully discharge its expenditure obligations by making the required level of employee health care expenditures … to the City" outside of its existing ERISA plan. *Id.* at 655-56. The panel opined that the ordinance did not undermine plan uniformity because even though it imposes locality-specific obligations to "make expenditures on behalf of covered employees and … maintain records to show that they have complied with the Ordinance," those burdens fall "on the employer rather than on an ERISA plan." *Id.* at 657.

The panel then held that the ordinance does not have a forbidden "reference to" ERISA plans. The district court had held that the ordinance "is akin to the statute the Supreme Court found preempted in *District of Columbia v. Greater Washington Board of*

Trade[, 506 U.S. 125 (1992),] which required the employer to provide the same amount of health care coverage for workers eligible for workers compensation" as it provided for its other workers. *Id.* at 658. But the panel distinguished *Greater Washington* because the scope of the employer's obligations there "were measured by reference to the level of *benefits* provided by the ERISA plan to the employee," whereas the scope of the employer's obligations under the San Francisco ordinance were "measured by reference to the *payments* provided by the employer to an ERISA plan." *Id.* Relying on that benefits-payments distinction, the panel held that the ordinance's obligations were not determined "by 'reference to' an ERISA plan." *Id.*

The panel denied that its holding created a circuit split with the Fourth Circuit's decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), which had found a similar Maryland law preempted. The panel deemed *Fielder* distinguishable because in that case, no rational employer would ever choose the state-payment option (which did not directly inure to the employees' benefit), meaning that any employer's only meaningful choice for compliance was to alter or create ERISA plans. *Golden Gate*, 546 F.3d at 659-60. The panel did not, however, address *Fielder*'s alternative holding that the law was preempted because it would interfere with "uniform nationwide" plan administration by requiring employers "to keep an eye on conflicting state and local minimum spending requirements and adjust [their] healthcare spending accordingly." *Fielder*, 475 F.3d at 196-97.

The employers petitioned for rehearing *en banc*, again with the Labor Department's support. The court denied rehearing over an eight-judge dissent. The dissenting judges explained that the panel's decision "creates a circuit split with the Fourth Circuit Court of Appeals, renders meaningless the tests the Supreme Court set out in [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)], conflicts with other Supreme Court cases establishing ERISA preemption guidelines, and, most importantly, flouts the mandate of national uniformity in the area of employer-provided healthcare that underlies the enactment of ERISA." *Golden Gate*, 558 F.3d at 1004 (M. Smith, J., dissenting from denial of rehearing). According to the dissenting judges, the panel's decision allowed "San Francisco to create an ordinance that effectively requires ERISA administrators to master the relevant laws of 50 States—which in turn undermines the congressional goal of minimizing the administrative and financial burdens on plan administrators." *Id.* (alterations omitted).

The challenger petitioned for certiorari, and this Court called for the views of the Solicitor General. *Golden Gate Rest. Ass'n v. San Francisco*, 558 U.S. 811 (2009). The Solicitor General acknowledged that the Labor Department supported the challengers in the court of appeals by arguing both that "an employer utilizing the city-payment option establishes an ERISA-covered plan for its employees" and that the ordinance's spending requirements "interfere with the uniformity of plan administration." Br. for the United States 10-11, *Golden Gate Rest. Ass'n v. San Francisco*, No. 08-1515 (U.S. May 26, 2010). The Solicitor General further acknowledged that "the

reasoning contained in [the Fourth Circuit's decision] is in tension with reasoning in the decision below." *Id.* at 17. However, because of the belief that the just-enacted Affordable Care Act would "reduce substantially the likelihood that state and local governments will choose to enact new employer spending requirements like those contained in San Francisco's [ordinance]," the Solicitor General opined that "[t]he preemption issue does not warrant this Court's review at this time." *Id.* at 13-14. This Court denied certiorari. *Golden Gate Rest. Ass'n v. San Francisco*, 561 U.S. 1024 (2010).

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle to resolve an entrenched and increasingly relevant split of authority over whether ERISA preempts state and local efforts to regulate employee-benefit plans through play-or-pay laws. In the decision below, the Ninth Circuit held that local governments can transform obviously preempted regulations of ERISA plans into valid mandates for additional benefits for local workers by the simple expedient of adding an or-pay option. The Ninth Circuit's decision squarely conflicts with the Fourth Circuit's decision in *Fielder*, which held that ERISA preempts a materially identical play-or-pay law because the law relates to ERISA plans and would interfere with uniform nationwide plan administration. The Ninth Circuit's ruling likewise conflicts with the First Circuit's decision in *Merit Construction*, which held that ERISA preempted a play-or-pay law regulating apprentice programs. Certiorari is thus warranted because the decision below conflicts with "the decision of another

United States court of appeals on the same important matter." S. Ct. R. 10(a).

Certiorari is also warranted because the decision below "conflicts with relevant decisions of this Court," S. Ct. R. 10(c); indeed, it does so three times over. First, like the law this Court invalidated in *Egelhoff*, the Ordinance has an impermissible "connection with" ERISA plans because it interferes with nationally uniform plan administration. Instead of directing their plan administrators to provide self-determined benefits in accordance with their nationwide plan documents, employers must now do Seattle's bidding and create Seattle-specific administrative schemes to ensure compliance with the Ordinance's complex and detailed requirements. Second, just like the law this Court invalidated in *Greater Washington*, the Ordinance makes forbidden "reference to" ERISA plans. The Ordinance cannot ignore that virtually all of the national hotel chains and related national employers targeted by the law have existing ERISA plans. Thus, the Ordinance explicitly ties mandated expenditures, effective dates, waiting periods, waiver procedures, and more to the terms of the employer's existing ERISA plan, meaning that covered employers cannot determine their compliance without referencing their existing ERISA plans. Third, the decision below conflicts with this Court's recent precedents regarding the presumption against preemption, *see Franklin*, 579 U.S. at 124-25, which have made clear that no such presumption applies in cases, like this one, involving an express preemption provision.

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but it is especially problematic in the context of ERISA's preemption provision—the entire purpose of which is to provide nationwide uniformity for plans and plan sponsors. The lack of uniform and settled law about whether and when ERISA preempts play-or-pay laws leaves plans and plan sponsors in an intractable bind, as they are left to guess which such laws will be enforced (and therefore must be followed) and which such laws will be preempted (and therefore can be ignored). Moreover, circuit split aside, the viability of play-or-pay laws is immensely important to employers across the nation. The temptation for localities to benefit local workers at the expense of national employers is real, and municipalities across the nation have not been bashful about their interest in joining Seattle's efforts. If the decision below is left standing, it will portend a return to the "bad old days" before ERISA's enactment, when an emerging patchwork of state and local regulation threatened to saddle employers with massive administrative costs that would inevitably lead to a reduction in overall benefits. This Court's intervention is necessary to restore a uniform interpretation of ERISA and to rein in state and local efforts to undermine ERISA's uniform nationwide scheme.

I. The Ninth Circuit's Decision Entrenches A Longstanding Split Of Authority Over Whether ERISA Preempts State And Local "Play or Pay" Laws.

The Ninth Circuit's application of ERISA's preemption provision in the decision below and

Golden Gate squarely conflicts with the Fourth Circuit's decision in *Fielder*, 475 F.3d 180. In *Fielder*, the Fourth Circuit held that ERISA preempted a Maryland law that was materially identical to the ordinances at issue here and in *Golden Gate*. Maryland's law, the Fair Share Health Care Fund Act ("Fair Share Act"), required covered employers "to spend at least 8% of their total payrolls on employees' health insurance costs." 475 F.3d at 183. Covered employers could comply either by altering their ERISA plans or by directly paying the State "an amount equal to the difference between what the employer spends for health insurance costs and an amount equal to 8% of the total wages paid to employees in the State." *Id.* at 184. Thus, like the Ordinance at issue here and in *Golden Gate*, covered employers could comply either by altering their ERISA plans or by making direct payments in equivalent amounts, or through some combination of those options.

The Fourth Circuit held that ERISA preempted the Fair Share Act, for two independent reasons. First, the Act had a "connection with" ERISA plans because the only realistic options for compliance required creating or altering ERISA plans. In the court's view, no rational employer would choose the direct-payment option, so "the only rational choice employers have … is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold." *Id.* at 193. Second, the court held in the alternative that even if there were a "meaningful avenue" by which employers could comply without creating or altering ERISA plans, the law would still have an impermissible "connection

with" ERISA plans. *Id.* at 196. That was so, the court explained, because "the Fair Share Act and a proliferation of similar laws in other jurisdictions" would interfere with "uniform nationwide" plan administration by requiring employers "to keep an eye on conflicting state and local minimum spending requirements and adjust [their] healthcare spending accordingly." *Id.* at 196-197.[1]

As the *Golden Gate* dissenters made clear, and as the Government acknowledged in its *Golden Gate* briefs, the second of *Fielder*'s two bases for judgment directly conflicts with the Ninth Circuit's decision in *Golden Gate*, and thus with the decision below. *See Golden Gate*, 558 F.3d at 1007 (M. Smith, J., dissenting from denial of rehearing) ("The holdings of *Fielder* and *Golden Gate* stand in clear opposition, and create a circuit split on the issue of whether ERISA preempts 'fair share' or 'play-or-pay' ordinances."); Br. for the Secretary of Labor as Amicus Curiae 16, *Golden Gate Rest. Ass'n v. San Francisco* (9th Cir. Oct. 2008) ("DOL Br.") ("[T]he panel's decision conflicts with the Fourth Circuit's analysis of the uniformity issue in *Fielder*."). Whereas the Fourth Circuit held that ERISA preempts a law imposing mandatory minimum healthcare spending even though the mandate could be satisfied through non-ERISA spending, the decision below rejected that reasoning and held that the existence of a non-ERISA option for compliance saved the Ordinance from preemption.

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[1] When a court of appeals offers two independent grounds for its judgment, both grounds are holdings of the court and are binding in future cases. *See United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924).

The *Golden Gate* court purported to distinguish *Fielder*, but it addressed only *Fielder*'s first basis for judgment—*i.e.*, the determination that no employer would choose the direct-payment option: "Unlike the Maryland law, the San Francisco Ordinance provides employers with a legitimate alternative to establishing or altering ERISA plans." *Golden Gate*, 546 F.3d at 660. The *Golden Gate* panel never even tried to explain how its holding could be reconciled with *Fielder*'s second basis for judgment—*i.e.*, its determination that even if a non-ERISA option for compliance existed, the law still relates to ERISA plans by interfering with uniform nationwide plan administration. As the Labor Department explained in supporting rehearing in *Golden Gate*, "the panel failed to address the Fourth Circuit's 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." DOL Br.17; *see also Golden Gate*, 558 F.3d at 1004 (M. Smith, J., dissenting from denial of rehearing). The same thing is true here, *see infra* Part II.

Adding to the chorus, numerous commentators contemporaneously recognized that *Golden Gate* created a circuit split. *See, e.g.*, Landon Wade Magnusson, *Golden Gate and the Ninth Circuit's Threat to ERISA's Uniformity and Jurisprudence*, 2010 B.Y.U. L. Rev. 167, 181 (2010) ("[T]he Ninth Circuit … create[d] a split among the circuits."); Samuel C. Salganik, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption*, 109 Colum. L. Rev. 1482, 1484 (2009)

("[T]he *Golden Gate* ruling creates a split with the Fourth Circuit."); Mazda K. Antia, et al., *Overcoming ERISA As an Obstacle*, 2 J. Health & Life Sci. L. 115, 135 (2009) (discussing "the apparent conflict between the Fourth and Ninth Circuits").

That widely recognized conflict has only deepened since *Golden Gate*, and it now extends beyond the healthcare space, as local governments have used similar models to regulate other types of employee benefits. In *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014), the First Circuit addressed a city ordinance that required bidders on local public works projects to operate a state-approved apprentice training program. *Id.* at 125; *see* 29 U.S.C. §1002(1) (defining "employee welfare benefit plan" to include "apprenticeship or other training programs"). Relying on *Golden Gate*, the city attempted to defend its mandate against a preemption challenge by arguing that contractors could comply without altering or creating ERISA plans if they funded their city-specific apprentice program through their general assets instead of a dedicated fund. *Merit*, 759 F.3d at 130.

Like the Fourth Circuit in *Fielder*, the First Circuit held that this possibility did not save the ordinance from preemption: "Even though a non-ERISA option might be available for compliance with the Ordinance, the availability of such an option does not save the Ordinance: its mandate still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals." *Id.* at 131. As the court explained, regardless of how the city-specific apprentice program was funded, "the employer's hope

of uniform administration would be dashed by the Ordinance's demands." *Id.* at 130. "Such balkanization of benefit administration is exactly the sort of outcome ERISA was designed to prevent." *Id.*; *see also Retail Indus. Leaders Ass'n v. Suffolk Cnty.*, 497 F.Supp.2d 403, 418 (E.D.N.Y. 2007) (holding that ERISA preempted a "play or pay" law like the one at issue in *Fielder* because even the non-ERISA options for compliance "would inhibit the administration of a uniform plan nationwide" and "disrupt uniform plan administration").

In sum, two federal courts of appeals have addressed play-or-pay laws and reached the seemingly obvious conclusion that adding the or-pay option does not save such laws from preemption. The Ninth Circuit stands alone in reaching a contrary conclusion, and the decision below makes clear that the circuit split is entrenched and not going away absent this Court's intervention. While the *Golden Gate* decision prompted an eight-judge dissent from the denial of *en banc* review, the decision below was accepted as the straightforward application of circuit law, prompting not a single recorded dissent from the denial of *en banc* review. The responsibility now falls to this Court to restore a correct interpretation of federal law and to eliminate the division of authority on this important nationwide issue on which uniformity is critical.

II. Seattle's Ordinance Is Plainly Preempted.

Certiorari is also warranted because Seattle's Ordinance is plainly preempted and the decision below is irreconcilable with this Court's cases. At the outset, there is no dispute that the Ordinance would be preempted if it did not include the or-pay option.

Absent that option, the Seattle Ordinance—which requires a targeted group of employers overwhelmingly headquartered elsewhere to enhance the benefits provided to local workers via ERISA plans and regulates the details of how those enhanced benefits are administered—would be indisputably preempted.

The simple expedient of adding an or-pay option does not suffice to save Seattle's Ordinance from preemption. It remains a law that relates to ERISA plans. It has an impermissible connection with ERISA plans and undermines the ability of employers to administer uniform and comprehensive nationwide plans. It also impermissibly references ERISA plans in recognition of the realities that most covered employers have ERISA plans and Seattle expects most employers to comply with its law via those plans. Finally, it imposes the kind of ongoing obligations to provide healthcare benefits that would make any effort to comply, including the or-pay option, constitute an ERISA plan. In short, whether employers comply by altering their existing plans or creating Seattle-specific appendages to those plans, the Ordinance precludes them from administering benefits nationwide through a single, uniform plan. Given how clearly the Seattle Ordinance is preempted, it is no accident that the Ninth Circuit invoked the presumption against preemption to read an express preemption clause narrowly in further derogation of this Court's precedents. In sum, Seattle's Ordinance is preempted and the Ninth Circuit's conclusion otherwise cannot be reconciled with this Court's precedents.

A. The Ordinance is Preempted Because it has an Impermissible "Connection With" ERISA Plans.

To determine whether a state law has an impermissible "connection with" ERISA plans, this Court looks "both to the objectives of the ERISA statute … as well as to the nature of the effect of the state law on ERISA plans." *Egelhoff*, 532 U.S. at 147. The core objective of ERISA's preemption provision is to ensure that "plans and plan sponsors [are] subject to a uniform body of benefits laws, thereby minimizing the administrative and financial burden of complying with conflicting directives and ensuring that plans do not have to tailor substantive benefits to the particularities of multiple jurisdictions." *Rutledge v. Pharm. Care Mgt. Ass'n*, 141 S.Ct. 474, 480 (2020). In light of that objective, this Court has held that a state law has a prohibited "connection with" ERISA plans if it "interferes with nationally uniform plan administration" by, *e.g.*, imposing "different legal obligations in different states." *Egelhoff*, 532 U.S. at 148. The whole point of the Seattle Ordinance is to enhance the benefits of local workers by imposing additional benefit requirements on employers that Seattle correctly understands are overwhelmingly likely to administer their benefits through ERISA plans. The resulting disuniformity is inevitable and the intended effect of Seattle's Ordinance.

The Ordinance's impermissible "connection with" ERISA plans follows *a fortiori* from this Court's analysis of the preempted law addressed in *Egelhoff*. That case concerned a Washington State law that voided the designation of a spouse as the beneficiary

of a pension plan upon divorce and established rules for determining a new beneficiary. Although compliance did not require altering ERISA plans, the law still had "a prohibited connection with ERISA plans because it interfere[d] with nationally uniform plan administration." *Id.* at 148. Plan administrators could determine plan beneficiaries in 49 other states solely by looking at the plan documents, but they were required to take extra steps with respect to their Washington employees—*i.e.*, to determine "whether the named beneficiary's status has been 'revoked' by operation of law," and if so, to identify the new beneficiary. *Id.* That state-specific requirement undermined ERISA's goal of enabling employers to establish a "set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* Furthermore, even if the burden imposed by the Washington law alone were not enough, allowing states to enforce such laws would require plan administrators to "master the relevant laws of 50 States" and pay plan benefits in a different manner in each one, undermining "the congressional goal of minimizing the administrative and financial burdens on plan administrators—burdens ultimately borne by the beneficiaries." *Id.* at 149-50 (alterations omitted).

The Ordinance is preempted here *a fortiori*. Hotel chains and ancillary hotel businesses with Seattle locations now face an intractable Seattle-specific benefits-administration problem: The employee-benefit plans they administer in 49 other States and in other parts of Washington might not be good enough for Seattle. Instead of directing their plan administrators to pay benefits in accordance with their nationwide plan documents at self-determined

levels, employers must take extra steps with respect to their Seattle employees and do Seattle's bidding—*i.e.*, they must, on an ongoing basis, determine which employees are covered; investigate each covered employee's family composition; calculate their existing per-employee expenditures under their existing ERISA plan; pay the difference to every covered employee (whether through the plan or outside the plan); and create and maintain records of those payments. Requiring employers to stack city-specific rules and processes atop their uniform nationwide plans "interferes with nationally uniform plan administration," *id.* at 148, and deprives employers of "the benefits of maintaining a *single* administrative scheme" for providing benefits to their employees. *Fort Halifax*, 482 U.S. at 13 (emphasis added).

The *Golden Gate* court's basis for distinguishing *Egelhoff* is untenable. The Ninth Circuit recognized that the city-payment option there (like the direct-payment option here) imposed burdens on employers, 546 F.3d at 657, but it deemed those burdens permissible because they fall on employers rather than on plans: "[T]hese burdens … are burdens on the employer rather than on an ERISA plan." *Id.* But this Court has repeatedly rejected any such distinction, explaining that ERISA's preemption provision is "intended to ensure that plans *and plan sponsors* would be subject to a uniform body of benefits law." *Travelers*, 514 U.S. at 656 (emphasis added). What "is fundamentally at odds with the goal of uniformity that Congress sought to implement" is not just the necessity of tailoring *plans* to comply with conflicting local regulations, but also the necessity of "tailoring … *employer conduct* to the peculiarities of

the law of each jurisdiction." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

Furthermore, as *Egelhoff* recognized but *Golden Gate* ignored, the problem is not limited to disuniformity in one jurisdiction. If a law like this is permissible in Seattle, similar laws are permissible everywhere else, including in all the cities that supported Seattle as amici below. Even if the administrative burden imposed by a single law were tolerable, the cumulative burden could be staggering. Accordingly, the Ninth Circuit should have held that ERISA preempted the law because the burden it and similar laws like it impose on employers interfere with their ability to maintain nationwide plan uniformity. *See, e.g.*, *Fielder*, 475 F.3d at 197.[2]

B. The Ordinance is Preempted Because it Makes Forbidden "Reference To" ERISA Plans.

The Seattle Ordinance also impermissibly relates to ERISA plans and is preempted because it makes repeated "reference to" ERISA plans. Congress broadly preempted such laws because the interaction of those laws with ERISA plans is likely to affect employer conduct and the content of ERISA plans. *See Ingersoll-Rand*, 498 U.S. at 142.

For example, in *Greater Washington*, 506 U.S. 125, this Court considered a District of Columbia law that required employers who provide health insurance

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[2] Whether the Ordinance would be preempted as applied to employers who do not offer ERISA plans is not at issue here, as Petitioner's member companies all offer ERISA-covered benefit plans.

for their employees to provide equivalent health insurance for any employee who becomes eligible for workers' compensation. *Id.* at 127-28. Even though employers did not need to amend their ERISA plans to comply with the law—they could provide the mandated benefits through a separate plan or a non-ERISA plan—this Court held that the law made a forbidden "reference to" ERISA plans. This was so, the Court explained, because the coverage it required "is measured by reference to the existing health insurance coverage provided by the employer" under its ERISA plan. *Id.* at 130. Accordingly, "every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation," which could lead the employer to "choose to forego such an increase altogether." *Greater Wash. Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1325 (D.C. Cir. 1991), *aff'd*, 506 U.S. 125 (1992).

The same is true here. The expenditures required to comply with the or-pay option are measured by reference to the contributions the employer makes to its existing ERISA plan. Employers must calculate their per-employee contributions to their existing ERISA plans, compare that amount to the mandated minimum for each employee, and then cover the difference by either altering their ERISA plans or making a direct cash payment in the same amount. *See* SMC 14.28.060.C (employer who does not already pay the mandated minimum through an existing ERISA plan "is required to satisfy *the remaining portion* of the monthly health expenditure rate" (emphasis added)). Either way, employers subject to

the Ordinance "can only determine their compliance by using their current ERISA plans as a reference." *Golden Gate*, 558 F.3d at 1008 (M. Smith, J., dissenting from denial of rehearing). Just like the law in *Greater Washington*, the Ordinance makes a forbidden "reference to" the employer's ERISA plans.

The references to ERISA plans do not stop there. The Ordinance's "effective date" for large hotels depends on the employer's existing ERISA plan's "earliest annual open enrollment period for health coverage, if offered, after July 1, 2020." SMC 14.28.260.B. The date on which the employer must begin making monthly healthcare expenditures for a new hire is measured by the waiting period in any existing "employer-sponsored plan." SMC 14.28.060.C. And an employee's voluntary declination of an employer's offer of monthly healthcare expenditures discharges the employer's duties with respect to that employee only if the employer's existing ERISA plan has a 20% or lesser cost-sharing requirement. SMC 14.28.060.D.1.

While laws that reference ERISA plans are preempted regardless of their actual effect on such plans, *see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988), the references here are particularly likely to affect the content of ERISA plans. Through its repeated references to existing ERISA plans, the Ordinance encourages employers to increase their contribution levels to avoid having to establish a separate scheme for direct payments; make their open seasons as late as possible to delay the Ordinance's effective date; adopt waiting periods in their ERISA plans to delay the Ordinance's

application to new hires; and set employee cost-sharing rates below 20% to ensure that the Ordinance gives effect to employee waivers. The Ordinance directly and expressly references ERISA plans several times over, including in provisions that cannot be applied without first referring to ERISA plans.

C. The Ordinance Is Preempted Because It Requires Employers to Alter or Create ERISA Plans.

Finally, if the Seattle Ordinance would otherwise escape preemption, then or-pay options, especially Seattle's, properly should be construed to themselves constitute ERISA plans. The vast majority of healthcare benefits that employers extend to their employees qualify as "employee welfare benefit plan[s]," which ERISA defines as "any plan, fund, or program … established or … maintained for the purpose of providing [health benefits] for its participants or their beneficiaries." 29 U.S.C. §1002(1). That aptly describes the payments mandated by the Seattle Ordinance even for employers who choose the or-pay option. To be sure, in *Fort Halifax*, this Court held that a one-time mandated severance payment when a plant closed did not constitute an ERISA "plan" because it did not require "an ongoing administrative program for processing claims and paying benefits." 482 U.S. at 12. Similarly, in *Massachusetts v. Morash*, 490 U.S. 107 (1989), this Court held that a policy of making a one-time payment to discharged employees for unused vacation time did not constitute an ERISA "plan." But the ongoing health benefits mandated by the Seattle Ordinance are fundamentally different. Even in the

unlikely event that an employer chose to make the payments outside its existing ERISA plan, the need for ongoing payments and calculations would itself constitute an ERISA plan.

Unlike the one-time payments in *Fort Halifax* and *Morash*, the or-pay option requires an administrative program through which the employer must determine which employees are covered; investigate covered employees' family composition to determine the Ordinance-mandated expenditures; calculate existing per-employee expenditures; pay the difference to every covered employee; and maintain Ordinance-mandated records of those payments. These determinations are not straightforward. For example, to determine whether an employee is covered, employers must predict "the average monthly hours that the employee will work over the course of the calendar year," including hours on paid leave for "vacation, illness, legally required paid leave, incapacity (including disability), layoff, jury duty, military duty, or leave of absence." Seattle Q&A 3-4. Furthermore, while conducting the mandated investigation into their employees' family composition, employers must walk a precarious tightrope, as Seattle is quick to point out that "inquiries about family status during the hiring process and in some other employment contexts may constitute unlawful discrimination." *Id.* at 7-8. Employers must satisfy equally burdensome requirements for employees who decline coverage, as the Ordinance mandates an intricate system for obtaining, verifying, and retaining records of an employee's declination, with differing requirements depending on why and how the employee declines

coverage. *See* SMC 14.28.060.D; *id.* 14.28.030.B.2; *id.* 14.28.050; Seattle Q&A 9-10.

It would be impossible to accomplish these tasks without "an ongoing administrative program." *Fort Halifax*, 482 U.S. at 12. For that reason, even the or-pay option can be construed to constitute an ERISA-covered plan. And because, under this view, all three options for compliance would require employers to create or alter ERISA plans, the Ordinance would be preempted. One way or the other, a municipality cannot evade ERISA preemption by the simple expedient of adding an or-pay option to an otherwise plainly preempted ordinance.

D. The Ninth Circuit Improperly Relied on a Presumption Against Preemption.

Given that play-or-pay ordinances like those imposed by San Francisco and Seattle relate to ERISA plans, it is no surprise that the Ninth Circuit reached its anomalous no-preemption conclusion only by invoking the presumption against preemption. That presumption has no legitimate role to play in the context of a broad express preemption like that in ERISA, as this Court's precedents make clear. That conflict with this Court's precedents on the proper (and properly limited) role of the presumption and the opportunity to eliminate continuing circuit court confusion on the role of the presumption are additional reasons for this Court to grant plenary review.

In *Golden Gate*, the Ninth Circuit began its analysis "by noting that state and local laws enjoy a presumption against preemption," and made clear that the presumption would "inform[] [its] preemption analysis." 546 F.3d at 647. The court then proceeded

to hold that ERISA did not preempt San Francisco's ordinance. While *Golden Gate* at least had the excuse of pre-dating this Court's more recent decisions underscoring that the presumption has no role to play in the face of an express preemption provision, the decision below doubled down on *Golden Gate*'s anachronistic reliance on the presumption before holding that the Seattle Ordinance was not preempted. App.2-3.

The Ninth Circuit's continuing reliance on the presumption in this context is error. Whatever role such a presumption might play in *implied* preemption cases, when a statute "contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Franklin*, 579 U.S. at 125. While *Franklin* involved the Bankruptcy Code rather than ERISA, the inapplicability of the presumption would seem to apply *a fortiori* to ERISA's notoriously broad express preemption provision. Indeed, *Franklin* confirmed that the principle applies broadly by citing cases involving other express preemption provisions, including *Gobeille*, its then-most-recent ERISA preemption case. *Id.*

Several circuits have since recognized that the presumption against preemption does not apply in *any* case involving an express preemption provision, including ERISA's. *See Pharm. Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956, 967 (8th Cir. 2021) (refusing to apply presumption in ERISA case); *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d

246, 258-59 (5th Cir. 2019) (same); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (same for Airline Deregulation Act); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (same). The Third Circuit, in contrast, has twice declined to extend *Franklin* outside the bankruptcy context. *See Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (applying presumption in FAAAA case); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (applying presumption in FDCA case). And litigants, including Seattle and the amici cities below, insist that "federal appellate courts must" continue applying the presumption in ERISA cases until this Court expressly says otherwise. Cities Brief at 3.

Thus, granting review here will not only provide an opportunity to address the entrenched circuit split on whether play-or-pay provisions are preempted and correct the Ninth Circuit's erroneous view, but also to make clear beyond cavil that the presumption against preemption has no role to play in interpreting express preemption provisions. As with other statutory texts, "there is no reason to give" express preemption provisions "anything other than a fair (rather than a 'narrow') interpretation." *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 363 (2012)).

III. The Question Presented Is Important And This Court's Review Is Urgently Needed.

Whether states and municipalities may impose burdensome, locality-specific obligations on employers is critically important. The temptation of local governments to benefit local employees at the expense

of national employers (and employers' interest in administering uniform and comprehensive nationwide benefit plans) is profound. Indeed, that was the dynamic that motivated Congress to enact ERISA in the first place. In the pre-ERISA days, when there was little to no federal regulation of employee-benefit plans, a patchwork of state and local regulation left employers scrambling to monitor and comply with an array of incompatible rules. Congress recognized that without a uniform national standard, employers would "be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others." *Fort Halifax*, 482 U.S. at 9. Congress further recognized that the associated administrative costs could "lead those employers with existing plans to reduce benefits." *Id.* at 11. Accordingly, with the support of both employers and labor unions, Congress cleared the field of such state and local regulation by enacting "what may be the most expansive express pre-emption provision in any federal statute." *Gobeille,* 577 U.S. at 327 (Thomas, J., concurring).

ERISA's uniform regulatory scheme has allowed employers of all sizes to create effective benefit plans for their employees regardless of where they live, work, or receive healthcare—and to do so without the headache and expense of tailoring those plans to the idiosyncratic policy preferences of every jurisdiction in which they operate. The decision below, however, kicks open the door to state and local regulation of employee-benefit plans by the simple expedient of

adding an or-pay alternative, threatening to unravel the uniformity that ERISA has long provided and imperil the baseline level of benefits on which many employees rely. And this threat is hardly limited to laws mandating minimum monthly contributions. Under the logic of the decision below, there is no reason why a state or locality could not require plans and plan sponsors to adopt specific vesting rules, funding practices, fiduciary responsibilities, leave entitlements, record-keeping processes, disclosure rules, or anything else. As long as the law nominally provides employers with a way to pay their way into compliance (*i.e.*, to comply without directly altering their ERISA plans), the decision below gives state and local lawmakers free rein.

This is no theoretical concern. While the government optimistically suggested that the ACA would eliminate the incentive for states and localities to demand special healthcare benefits for local workers, the ensuing decade has proven that optimism unfounded. Indeed, this Court need look no further than the docket *in this case* to confirm as much: A host of municipalities—including Los Angeles, San Francisco, Chicago, Austin, St. Paul, and Sacramento—filed an amicus brief below, defending the importance of being able to "adopt local laws to promote healthcare access without running afoul of ERISA," including laws that "require[] employers to make certain payments for employee healthcare." Cities Brief 18, 24. According to that brief, "[m]unicipalities across the country have studied the San Francisco model" since *Golden Gate*, "including Denver, Miami, New Orleans, and Pittsburgh," and "New York and Los Angeles … are also pursuing

[similar] local healthcare reforms." *Id.* at 29. That is precisely the outcome that Congress, through ERISA, intended to prevent.

The existence of an entrenched circuit split underscores the need for review. ERISA's preemption provision was designed specifically to provide nationwide uniformity for plans and plan sponsors. But the circuit split means that plans and plan sponsors must now deal not only with disuniformity in their administration of benefits (by creating bespoke administrative schemes to comply with local play-or-pay laws), but also with the disuniformity created by conflicting interpretations of ERISA. In addition to monitoring employee-benefit laws in every jurisdiction in which they operate, plans and plan sponsors must now also study judicial decisions in those jurisdictions to determine whether each play-or-pay law is likely to be deemed enforceable. That sort of legal uncertainty is problematic in any context, but it is especially troubling when the subject of the circuit split is a law whose very reason for being is to provide certainty, predictability, and nationwide uniformity.

In short, this case presents an entrenched circuit split on an "issue of exceptional national importance, *i.e.*, national uniformity in the area of employer-provided healthcare." *Golden Gate*, 558 F.3d at 1008 (M. Smith, J., dissenting from denial of rehearing). It was a lack of uniformity that prompted Congress to enact ERISA in the first place, and this Court's intervention is now needed to restore that uniformity and prevent further state and local efforts to interfere with the federal regulatory scheme.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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January 14, 2022