No. 21-1019

IN THE

Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE RETAIL INDUSTRY LEADERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
RETAIL INDUSTRY LEADERS ASSOCIATION
99 M Street, S.E.
Washington, D.C. 20003
(202) 869-0088
deborah.white@rila.org

EUGENE SCALIA
Counsel of Record
JACOB T. SPENCER
PHILIP HAMMERSLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Counsel for Amici Curiae

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[*]

The Retail Industry Leaders Association ("RILA") is a public policy organization consisting of the country's largest retailers. RILA's members account for more than $1.5 trillion in annual sales, employ millions of Americans, and operate more than 100,000 stores, manufacturing facilities, and distribution centers around the world. RILA has brought two lawsuits successfully challenging play-or-pay laws, resulting in the Fourth Circuit's decision in *Retail Industry Leaders Ass'n* v. *Fielder*, 475 F.3d 180 (4th Cir. 2007), and the district court decision in *Retail Industry Leaders Ass'n* v. *Suffolk County*, 497 F. Supp. 2d 403 (E.D.N.Y. 2007).

In 2010 RILA established the Retail Litigation Center, Inc. ("RLC") as a separate association to provide courts with the retail industry's perspective on important legal issues, and to highlight the potential industry-wide consequences of pending cases. Like RILA, the RLC's membership includes many of the country's largest and most innovative retailers. Since its founding, the RLC has participated as an *amicus* in nearly 200 judicial proceedings. Its briefs have been cited favorably by multiple courts, including this Court. *See*, *e.g.*, *South Dakota* v. *Wayfair, Inc.*, 138

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[*] Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or its counsel made a monetary contribution to fund this brief's preparation or submission. Consistent with Rule 37.2, *amici* notified counsel of record for all parties of its intent to file an *amicus* brief at least ten days prior to the brief's due date. All parties have consented in writing to the filing of this brief.

S. Ct. 2080, 2097 (2018); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

Together, RILA and the RLC share a unique perspective on the question presented in the petition in this case. Accordingly, *amici* appear here to explain their members' considerable interest in uniform application of the Employee Retirement Income Security Act of 1972 ("ERISA"), and to provide their experienced insights on the application of the relevant caselaw.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about "play-or-pay" laws, which typically require that an employer either "play" by providing a minimum level of healthcare benefits to its employees, or "pay" that minimum amount directly to its employees or the state. Many states and municipalities across the country have enacted such laws or expressed an interest in doing so. *See* Samuel C. Salganik, Note, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption*, 109 Colum. L. Rev. 1482, 1484–85 (2009) ("in the past few years, dozens of state governments have officially proposed [play-or-pay] schemes"); Pet. at 35–36.

Congress enacted ERISA in part to ensure that employers could administer their employee benefit plans on a nationwide basis without worrying about inconsistent state and local requirements. The Ninth Circuit's decision upholding the City of Seattle's play-or-pay ordinance jeopardizes that important goal and further cements a circuit split about the scope of ERISA's preemption clause. The Court should grant review to address that split and answer the question

presented, which the Department of Labor has previously recognized is recurring and exceptionally important.

I. This Court should grant review to resolve the circuit split on whether ERISA preempts play-or-pay laws like the Seattle Ordinance. The Fourth Circuit, in a case brought by RILA challenging a Maryland law, held that the play-or-pay provision was preempted because it had an impermissible "connection with" ERISA plans. The Ninth Circuit, by contrast, has on multiple occasions upheld similar laws after concluding that they lacked any "connection with" ERISA plans. Those decisions are in sharp conflict, as the Department of Labor—the agency tasked with administrating ERISA—has previously explained.

II. This Court should also grant review because the question presented is recurring and exceptionally important. In the two most consequential play-or-pay cases prior to this, the Department of Labor took the position that ERISA preempted the challenged laws. That conclusion is correct and rooted in ERISA's first principles—namely, that employers are free to choose whether and how to offer employee health benefits, without interference from state and local laws. The Ninth Circuit's approach defies those principles and clashes with the Department of Labor's longstanding views. Prompt review is especially important because other jurisdictions have expressed interest in enacting play-or-pay laws. Absent intervention, this pressing question will recur with increasing frequency.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RECONCILE CONFLICTING CIRCUIT COURT DECISIONS ABOUT WHETHER ERISA PREEMPTS PLAY-OR-PAY LAWS.

When asked whether ERISA preempts a Maryland play-or-pay law for having a "connection with" ERISA plans, the Fourth Circuit provided a clear answer—"yes." And when the Ninth Circuit was asked the same question about laws in San Francisco and Seattle, it provided an equally clear answer—"no." Because these circuit decisions squarely conflict on an important question under a statute that was enacted in part to provide national uniformity, the Court should grant the petition.

A. The Fourth Circuit held that Maryland's play-or-pay law was preempted because it had an impermissible "connection with" ERISA plans.

The Fourth Circuit adopted its position on the question presented in litigation that was brought by RILA, challenging a Maryland play-or-pay statute.

In 2006, at the urging of organized labor, the Maryland General Assembly enacted the Fair Share Health Care Fund Act. *See* Amy Joyce & Matthew Mosk, *Unions Hope Wal-Mart Bill Has Momentum; Other States Consider Similar Measures*, Wash. Post (Jan. 14, 2006), https://wapo.st/36nF7uA. That law's stated purpose was to ensure that the state's large employers contributed their "fair share" towards their employee's healthcare costs. *Retail Indus. Leaders*

Ass'n v. *Fielder*, 475 F.3d 180, 183 (4th Cir. 2007). The Fair Share Act pursued that goal by mandating that a covered employer make per-employee expenditures on health care that equaled at least eight percent of the employee's total wages. The employer could do so either by spending that amount directly on employee health care for its workers or by paying to 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." Md. Code, Lab. & Empl. § 8.5-104(b) (2007); *see also Fielder*, 475 F.3d at 185 (explaining that the law was crafted so Wal-Mart was the only employer subject to this minimum spending requirement). Any funds collected by the state were to be used to support the Maryland Medical Assistance Program. *See* Md. Code, Health-Gen. § 15-142(f) (2007).

RILA brought suit on behalf of its members challenging the Fair Share Act under ERISA's preemption clause. ERISA broadly preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). A law "relate[s] to" an ERISA plan "if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). RILA argued that ERISA preempted the Fair Share Act because the Act had an impermissible "connection with" ERISA plans. The district court agreed and granted RILA's motion for summary judgment. *See Retail Indus. Leaders Ass'n* v. *Fielder*, 435 F. Supp. 2d 481, 493–98 (D. Md. 2006).

On appeal, the Fourth Circuit described two ways in which a state law can have an impermissible "connection with" an ERISA plan. *First*, a "state law has

an impermissible 'connection with' an ERISA plan if it directly regulates or effectively mandates some element of the structure or administration of employers' ERISA plans." *Fielder*, 475 F.3d at 192–93 (footnote omitted). And, *second*, even if "state law provides a route by which ERISA plans can avoid the state law's requirements," that law "might still be too disruptive of uniform plan administration to avoid preemption." *Id.* at 193.

Consistent with those principles, the Fourth Circuit held that the Fair Share Act was preempted for two independent reasons. The first was because "the only rational choice employers ha[d] under the Fair Share Act [wa]s to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold." *Fielder*, 475 F.3d at 193. No reasonable employer would opt to pay money to the *state* when it could pay that same amount to its *employees*—doing so could hurt employee morale and spark public condemnation. *Id.* Because the Maryland play-or-pay law "effectively mandate[d] that employers structure their employee healthcare plans to provide a certain level of benefits, the Act ha[d] an obvious 'connection with' employee benefit plans and so [was] preempted by ERISA." *Id.* at 193–94.

The second reason ERISA preempted the Fair Share Act was because the Act violated ERISA's promise of uniformity. The Fourth Circuit made clear that, even if—as Maryland claimed—some meaningful choice to administer benefits did exist, "[the court] would still conclude that the Fair Share Act had an impermissible 'connection with' ERISA plans." *Fielder*, 475 F.3d at 196. If a covered employer satisfied the spending requirement through non-ERISA

means, it would still "need to coordinate those spending efforts with its existing ERISA plans." *Id.* at 196–97. On top of that, "a proliferation of similar laws in other jurisdictions" would force employers to "monitor these varying laws and manipulate [their] healthcare spending to comply with them, whether by increasing contributions to its ERISA plans or navigating the narrow regulatory channel between the Fair Share Act's definition of healthcare spending and ERISA's definition of an employee benefit plan." *Id.* at 197. These obligations would seriously disrupt "the uniform nationwide administration of [an employer's] healthcare plans." *Id.*

For both alternative reasons, the Fourth Circuit held that ERISA preempted the Fair Share Act.

B. The Ninth Circuit held that San Francisco's and Seattle's play-or-pay laws were *not* preempted because they had no "connection with" ERISA plans.

The Ninth Circuit reached the opposite conclusion with respect to the San Francisco play-or-pay law challenged in *Golden Gate Restaurant Ass'n* v. *San Francisco*, 546 F.3d 639 (9th Cir. 2008), and the Seattle Ordinance at issue here.

The San Francisco Ordinance required covered employers to make "health care expenditures to or on behalf of" certain employees. S.F. Admin. Code § 14.3(a). The amount the employer owed varied depending on the number of hours each employee worked, as well as whether the employer was a for-profit or non-profit entity. *See id.* §§ 14.1, 14.3. To satisfy the expenditure requirement, the employer

could make payments to an ERISA plan or make an equivalent payment to the City (or some combination of both). *Golden Gate*, 546 F.3d at 645.

Although the challengers argued the law bore a "connection with" ERISA plans, the Ninth Circuit upheld the Ordinance. The court recognized that ERISA was designed "to provide a uniform regulatory regime over employee benefit plans." *Golden Gate*, 546 F.3d at 655 (citation omitted). But the court concluded that the Ordinance "[did] not require any employer to adopt an ERISA plan," or "to provide specific benefits through an existing ERISA plan or other health plan." *Id.* at 655–56. Instead, it gave "[a]ny employer covered by the Ordinance" the option to "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 the City." *Id.* (emphasis added). For that reason, the panel concluded, the law "preserve[d] ERISA's 'uniform regulatory regime,'" *id.* (citation omitted), and avoided preemption.

The Ninth Circuit reached the same result with the Seattle play-or-pay ordinance at issue in this case. The provision first appeared as a ballot initiative in 2016. Initiative Measure No. 124, which was drafted and promoted by a local labor union, proposed an array of employment requirements on hotels operating in the City. One requirement forced covered employers to provide monthly healthcare contributions if they did not already provide a specified level of health insurance benefits. *See* Eric Shannon, Wash. Pol'y Ctr., *Citizens Guide to Seattle's Initiative 124*, at 3 (2016). Although advocates portrayed Initiative 124

as necessary for hotel workers' health and safety, it included an exemption that enabled unionized employers to ignore many of its requirements. *See* Part 7, Initiative Measure No. 124. Even the Initiative's supporters recognized the "faintly disguised self-interest" animating the "union-exemption clause"—namely, that "employers might find the law onerous, leading them to encourage unionization in hopes of a better deal." Editorial Board, *Vote Yes on I-124 to Protect Seattle Hotel Workers*, Seattle Weekly (Oct. 21, 2016), https://bit.ly/34TIhFQ. Despite these concerns, voters passed Initiative No. 124 by a popular vote.

That Initiative did not survive judicial scrutiny. Hotel associations challenged the measure, which included provisions ranging from protections against sexual assault and exposure to hazardous chemicals to requirements governing worker compensation and healthcare benefits, on the ground that it violated single-subject rules set forth in state statute and the City's charter. The Washington Court of Appeals agreed that the Initiative violated those rules and held that it was "invalid in its entirety." *Am. Hotel & Lodging Ass'n* v. *City of Seattle*, 432 P.3d 434, 445 (Wash. Ct. App. 2018).

Undeterred, the City broke the Initiative down into single-subject ordinances and tried again. That is how Seattle Municipal Code § 14.28, the ordinance at issue here, came to be—as "the successor to Initiative Measure No. 124." Pet. App. 5 n.2. And like its predecessor, § 14.28 includes an exemption for unionized employers. *See id.* at 56. The relevant provisions in the Code require non-exempt employers to make monthly "healthcare expenditures" for each covered employee. *Id.* at 29. Those expenditures can be made

through ERISA plans or as "compensation paid directly" to the employees. *Id.* at 29–30.

Relying on *Golden Gate*, the court below in this case held that ERISA did not preempt the Seattle Ordinance. Pet. App. 2. The Ninth Circuit concluded that the law was materially indistinguishable from the one in *Golden Gate*, and thus summarily held in an unpublished opinion that it "does not relate to any employee benefit plan in a manner that triggers ERISA preemption." *Id.*

C. The Fourth Circuit and Ninth Circuit decisions are in direct conflict on a discrete question concerning the scope of ERISA's preemption clause.

The decision of the Fourth Circuit in *Fielder*, and the decisions of the Ninth Circuit in *Golden Gate* and this case, directly conflict on the question of whether play-or-pay laws have an impermissible "connection with" ERISA plans—a circuit split that the Department of Labor and eight judges of the Ninth Circuit have already recognized.

Shortly after the *Golden Gate* decision, the Labor Department urged the Ninth Circuit to rehear the case en banc precisely because the panel decision conflicted with the Fourth Circuit's decision in *Fielder*. *See* Br. for the Sec'y of Labor as *Amicus Curiae* at 1–2, *Golden Gate Rest. Ass'n* v. *San Francisco*, 558 F.3d 1000 (9th Cir. 2009) (Nos. 07-17370, 07-17372), 2008 WL 6722745 ("*DOL Golden Gate Rehearing Br.*") ("Rehearing en banc is also appropriate because the panel's decision conflicts with preemption principles applied * * * by the Fourth Circuit in *Retail Industry Leaders Ass'n v. Fielder*."). The Department of Labor

correctly recognized that *Fielder* included two alternative holdings: one about the Fair Share Act's mandate to provide benefits, and another about the Act's effect on uniform plan administration. *Id.* at 16. The Secretary concluded that the *Golden Gate* decision "conflict[ed] with the Fourth Circuit's analysis of the uniformity issue in *Fielder*." *Id.*

When the Ninth Circuit rejected the Labor Department's views and decided not to rehear *Golden Gate* en banc, it prompted a forceful dissent that drew attention to the newly formed circuit split. *See Golden Gate Rest. Ass'n* v. *San Francisco*, 558 F.3d 1000, 1004 (9th Cir. 2009) (M. Smith, J., dissenting from the denial of rehearing en banc). Even assuming the San Francisco law differed from Maryland's in some respects, the dissenters said, the decisions nevertheless "stand in clear opposition" and "create a circuit split," *id.* at 1007, on whether the play-or-pay laws were preempted because of how they affect uniform plan administration, *see id.* at 1006–07.

This Court sought the United States's views on whether to grant review in *Golden Gate,* and the Solicitor General (in a new presidential administration) opposed certiorari principally on the ground that the Affordable Care Act's recent enactment could make states and locales less likely to adopt mandates like San Francisco's, rendering review "premature at this time." Br. for the United States as *Amicus Curiae* at 8, *Golden Gate Rest. Ass'n* v. *San Francisco*, 561 U.S. 1024 (2010) (No. 08-1515), 2010 WL 2173776 ("*Golden Gate SG Br.*"); *id.* at 8, 14, 17 (repeatedly stating that review was not necessary "at this time"). Avowing that the court of appeals's "extensive analysis" and "rejection" of the Department of Labor's position had

caused it to "beg[i]n to reexamine" its repeatedly expressed views in the case, the government also adopted the position that the Ninth Circuit's decision was merely "in tension" with *Fielder* and that "the two cases do not present a direct conflict." *Id.* at 12, 17. The government explained that *Fielder*'s uniformity analysis depended in part on the Fourth Circuit's "conclusion that the state-payment option was not a realistic alternative." *Id.* at 19. And because the San Francisco law *did* offer a realistic alternative, the government reasoned, it was "not clear" the Fourth Circuit would find a law like San Francisco's preempted. *Id.*

In truth, the Fourth Circuit deliberately expressed that it "would still conclude" that ERISA preempted the Act on uniformity grounds "even if" employers could satisfy the spending requirements by non-ERISA means. *Fielder*, 475 F.3d at 196. Plainly, the uniformity holding did not depend on the court's earlier determination that the Maryland law gave employers no meaningful alternatives. The Department of Labor had it right the first time when it recognized the split.[1]

The Ninth Circuit's decision below further entrenches the circuit split. When presented with yet

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[1] It is of course true, as the United States pointed out in its *amicus* brief, that the Court "reviews judgments, not statements in opinions." *Golden Gate SG Br.* at 19 (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). That casts no doubt on the existence of the circuit split here. The Fourth Circuit's *judgment* was that the district court appropriately granted summary judgment to RILA. The uniformity holding, an integral part of that judgment, conflicts with the Ninth Circuit's judgment that ERISA does not preempt the San Francisco play-or-pay law.

another play-or-pay law, the court mechanically applied *Golden Gate* and concluded that the Seattle Ordinance was not preempted by ERISA. Pet. App. 3.

II. THE COURT SHOULD GRANT REVIEW BECAUSE PLAY-OR-PAY LAWS THREATEN ERISA'S IMPORTANT GOAL OF UNIFORM PLAN ADMINISTRATION, AS THE DEPARTMENT OF LABOR HAS REPEATEDLY RECOGNIZED.

The purpose of ERISA's preemption clause is to "permit the nationally uniform administration of employee benefit plans." *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 657 (1995). The Ninth Circuit's approach jeopardizes that critical goal and clashes with the Department of Labor's repeatedly stated position on play-or-pay laws. Because the issue whether ERISA preempts such laws presents a recurring question of exceptional importance, the Court should grant review.

A. The decision below conflicts with the Department of Labor's longstanding position that ERISA preempts play-or-pay laws.

ERISA vests the Secretary of Labor with the primary authority to administer and enforce Title I of its provisions, 29 U.S.C. §§ 1002(13), 1136(b), which includes the preemption clause. The Department of Labor therefore routinely files *amicus* briefs setting forth the Secretary's views on whether ERISA preempts various state and local laws, including its view that play-or-pay laws impermissibly "relate to" "employee benefit plan[s]." *Id.* § 1144(a). The Ninth Circuit's approach is plainly inconsistent with that position.

For decades, the Department of Labor has filed *amicus* briefs presenting the Secretary's views about whether ERISA preempts certain laws. These briefs, filed across multiple presidential administrations, regularly defend ERISA's preemptive effect on state and local laws that target employee benefit plans. *See*, *e.g.*, Br. for the Sec'y of Labor as *Amicus Curiae* at 5–6, *Howard Jarvis Taxpayers Ass'n* v. *Cal. Secure Choice Ret. Sav. Program*, 997 F.3d 848 (9th Cir. 2021) (No. 20-15591), ECF No. 10 ("*HJTA Br.*"); Br. for the United States as *Amicus Curiae* at 7–9, *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (No. 99-1529), 2000 WL 1168615; Br. for the United States as *Amicus Curiae* at 7–9, *District of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (No. 91-1326), 1992 WL 12012049. An overarching principle advanced by the Department of Labor in these briefs is that state or local laws that interfere with the uniform administration of employee benefit plans are preempted by ERISA. *See*, *e.g.*, *HJTA Br.* at 5 (arguing that the California statute is preempted because it "interferes with nationally uniform plan administration of retirement benefits").

So it should come as no surprise that the Department of Labor has weighed in similarly on play-or-pay laws. In two of the most important play-or-pay cases to date—*Fielder* and *Golden Gate*—the Secretary filed *amicus* briefs urging the courts to find the laws preempted. Br. for the Sec'y of Labor as *Amicus Curiae*, *Golden Gate Rest. Ass'n* v. *San Francisco*, 546 F.3d 639 (9th Cir. 2008) (Nos. 07-17370, 07-17372), ECF No. 39 ("*Golden Gate Panel Br.*"); Br. for the Sec'y of Labor as *Amicus Curiae*, *Retail Indus. Leaders*

Ass'n v. *Fielder*, 475 F.3d 180 (4th Cir. 2007) (Nos. 06-1840, 06-1901), ECF No. 128 ("*Fielder Br.*").

The Department of Labor adopted that position for two reasons:

First, the play-or-pay laws impermissibly regulated the provision of employee benefits. The Maryland law required covered employers to make healthcare expenditures equal to eight percent of employee payroll. *Fielder*, 475 F.3d at 184. By doing so, the Department of Labor reasoned, the law stripped the "employer['s] fundamental authority over whether, and on what terms to sponsor a plan," *Fielder Br.* at 13—an outcome that ran afoul of ERISA's fundamental principle that employers may choose to establish their own plan, "or even choose to provide no benefits at all," *id.* at 11; *see also id.* at 6 ("ERISA allows employers to determine *whether* and *when* to establish health care benefit plans for their employees and the level of benefits to be provided." (emphases added)). The San Francisco law likewise "require[d] employers 'to make reasonable health care expenditures on behalf of their employees,' and thereby intrude[d] upon a core aspect of ERISA's regulatory framework." *Golden Gate Panel Br.* at 12 (citation omitted); *see also Golden Gate Rehearing Br.* at 8 ("The San Francisco law * * * plainly relates to ERISA covered plans because whether and how much an employer is required to pay into the City program is directly related to whether the employer has an ERISA plan and if so the level of benefits under that plan."). Both laws shared the fatal characteristic of compelling employers to provide certain benefits.

Second, the play-or-pay laws prevented employers from administering their benefit plans uniformly. "A state law is * * * independently preempted if 'it interferes with nationally uniform plan administration.'" *Golden Gate Panel Br.* at 10 (quoting *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001)). The San Francisco law imposed requirements *on top of* the baseline benefits otherwise provided by the employer. As a result, the law put employers in the very position that ERISA was designed to prevent: They could either change the benefits plan so that all employees across the country "receive benefits in the manner dictated by San Francisco," *id.* at 26, or give *only* their San Francisco employees "different or additional benefits" as required by law, *id*. Whichever path an employer chose, it "would have to adjust its administrative practices to reflect the unique administrative requirements, terms, and prohibitions of the San Francisco law." *Id*. That obviously prevents employers from administering benefit plans uniformly—and that is just *one* city's ordinance; the problem compounds when other jurisdictions adopt similar laws. *Id.* at 27. Maryland's law suffered from the same problem: Insofar as employers provided healthcare through a nationwide ERISA plan, they would at minimum need to coordinate those benefits with the spending required by the Fair Share Act. *See Fielder Br.* at 21–22 (relying upon *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 13 (1987)). ERISA does not tolerate such disruption.

For each of those independently sufficient reasons, the Department of Labor determined that the play-or-pay laws in *Fielder* and *Golden Gate* had a "connection with" ERISA plans and were therefore

preempted under settled Supreme Court precedent. *See Golden Gate Panel Br.* at 5; *Fielder Br.* at 9 & n.4.

The Secretary's reasoning applies with equal force to the Seattle Ordinance. Like the Fair Share Act and the San Francisco law, the Seattle Ordinance forces covered hotel employers to provide a minimum level of benefits and thus "intrudes upon a core aspect of ERISA's regulatory framework." *Golden Gate Panel Br.* at 12. In addition, as was true in *Fielder*, there are strong incentives to make the contributions through an ERISA plan. Seattle's non-ERISA option allows employers to make direct payments in the form of additional "ordinary income." Seattle Off. of Lab. Standards, *Improving Access to Medical Care for Hotel Employees Ordinance Questions and Answers* 10 (June 22, 2020). Of course, that income is subject to taxes, whereas contributions made through third-party plans receive more favorable tax treatment. *Id.* at 8. Employers that opt for the former option thereby face a stigma as discussed in *Fielder*. A further disincentive to the non-ERISA option is that payments made as regular compensation must be included in the "regular rate of pay" used to determine the amount of the "time-and-a-half" payments due under the Fair Labor Standards Act to employees working more than 40 hours a week. *See* 29 U.S.C. § 207(e) (defining the "regular rate" generally to include "*all* remuneration for employment paid to, or on behalf of, the employee" (emphasis added)). By increasing the "regular rate," the non-ERISA option could obligate employers to make yet further payments, in the form of increased overtime pay.

The Ordinance also unquestionably interferes with ERISA's uniformity goal. "The Supreme Court

has repeatedly stated that ERISA preempts state laws that require plans 'to calculate benefit levels' in one state based on conditions that differ from those in other states." *Golden Gate Panel Br.* at 24 (quoting *Travelers*, 514 U.S. at 657–58). The Ordinance requires employers to do just that. Moreover, as in *Fielder* and *Golden Gate*, the Seattle provision effectively forces covered employers either to abandon a nationwide benefits plan or to "level-up" so that *every* employee across the country receives at minimum the amount of benefits that one city deems appropriate. Either option impermissibly burdens an employer's ability to establish and administer a nationwide plan, *id.* at 26, and thus triggers ERISA preemption.

By concluding otherwise, the decision from the court below—and the Ninth Circuit's approach more generally—conflicts with the Department of Labor's traditional position about the legality of play-or-pay laws. That conflict brings into focus the need for this Court's review. *See*, *e.g.*, *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) (granting certiorari where court of appeals rejected the Secretary of Labor's longstanding interpretation of ERISA); *see also* Pet. for Writ of Cert. at 14–15, *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615 (June 22, 2018) (No. 17-1712), 2018 WL 3142011 (discussing the importance of the question presented by highlighting how the court of appeals's decision was inconsistent with the views of the Labor Department as expressed "[i]n amicus briefs across multiple administrations").

B. Whether play-or-pay laws are preempted is a question of "exceptional importance" that will recur as states and municipalities attempt to skirt ERISA.

The Secretary of Labor has stated that whether ERISA preempts play-or-pay laws is "a recurring issue of exceptional importance." *Golden Gate Rehearing Br.* at 7. *Amici* agree.

The issue the petition presents is not limited to the Fourth and Ninth Circuits. For example, RILA spent considerable time and resources challenging a play-or-pay law on Long Island. In the mid-2000s, Suffolk County adopted a "Fair Share" law which required retail grocery stores to make "health care expenditures" to their employees. *Retail Indus. Leaders Ass'n* v. *Suffolk County*, 497 F. Supp. 2d 403, 406 (E.D.N.Y. 2007). The stated purpose was to "require that all covered employers spend a minimum level of funding on health care for employees." Suffolk County Reg. Local Law § 325-1(F) (2005). Like the Seattle Ordinance, the law originally contained an express carve out for unionized employers. *Suffolk County*, 497 F. Supp. 2d at 406 (discussing the exemption and noting that it was removed through a subsequent amendment).

The district court held that ERISA preempted the county law. The court reasoned that, similar to the Maryland law that RILA successfully challenged in *Fielder*, the county law was expressly designed "to mandate that covered employers * * * increase spending on healthcare coverage for Suffolk County employ-

ees." *Suffolk County*, 497 F. Supp. 2d at 417. Moreover, the law "interfere[d] with employers' administration of their ERISA plans because employers would have to vary benefits for New York employees," and it "inhibit[ed] the administration of a uniform plan nationwide" and "disrupt[ed] uniform plan administration." *Id.* at 418.

By all accounts, municipalities plan to replicate laws like those at issue in *Suffolk County*, *Fielder*, *Golden Gate*, and here. *See* Pet. at 35–36. San Francisco, for example, recently enacted another play-or-pay measure—this one targeting airlines and airline service providers. *See generally* Off. of Lab. Standards Enf., *San Francisco Healthy Airport Ordinance (Amendment to Health Care Accountability Ordinance) Implementation Guidance* (Apr. 30, 2021). This ordinance requires covered employers either to provide free health insurance or to pay an hourly $9.50 per-employee tax (up to $380 a week) to fund the City's plan. *Id.* at 3. It is currently under judicial review.

Litigation about whether ERISA preempts such play-or-pay laws thus threatens to explode in the coming years, further frustrating ERISA's goal of "nationally uniform administration of employee benefit plans." *Travelers*, 514 U.S. at 657; *see also*, *e.g.*, *Golden Gate Rest. Ass'n*, 558 F.3d at 1008 (M. Smith, J., dissenting from the denial of rehearing en banc) ("[M]ost importantly, I dissent because this case concerns an issue of exceptional national importance, *i.e.*, national uniformity in the area of employer-provided healthcare.").

In short, inaction on the question presented would leave employers scrambling to contend with the very "patchwork scheme of regulation" that prompted Congress to enact ERISA in the first place. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987). That would impose substantial compliance costs on *amici*'s members because, as new laws are enacted, employers must recalibrate their benefit plans to account for variations in state and local laws. A proliferation of lawsuits like this would be sure to follow.

CONCLUSION

Now is an opportune time for the Court to decide the question presented. There is an irreconcilable difference between the circuits on an exceptionally important question about a federal statute that affects employers and employees across the nation. For the forgoing reasons, *amici* respectfully ask this Court to grant review and reverse the decision below.

Respectfully submitted,

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
RETAIL INDUSTRY LEADERS ASSOCIATION
99 M Street, S.E.
Washington, D.C. 20003
(202) 869-0088
deborah.white@rila.org

EUGENE SCALIA
Counsel of Record
JACOB T. SPENCER
PHILIP HAMMERSLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Counsel for Amici Curiae

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