No. 21-1019

IN THE

Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF appears as an amicus here because it believes that the Petition presents an issue of singular national importance. NELF therefore urges this Court to grant certiorari. The ERISA pre-emption issues presented to the Court in this case are of the utmost importance to businesses and other covered employers because the regulatory uniformity provided by ERISA's broad, express pre-emption provision ensures that multi-state and national employers who offer ERISA-covered plans may do so in a cost-effective and efficient manner. This uniformity enables employers to extend healthcare coverage and other employee benefits to workers

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), NELF has given timely 10 days notice to Paul Clement, counsel of record for Petitioner, as noted in the latter's February 4th letter to the Court; on behalf of Petitioner, Attorney Clement has also filed a blanket consent to the filing of amicus briefs. On February 7, undersigned counsel sent an email to Respondent's counsel to give notice and ask consent. On February 9, counsel responded by email and granted consent.

without regard to their place of residence or employment. The ordinance at issue here disrupts congressionally mandated ERISA uniformity. If the decision below is not corrected, the ordinance will serve as a model to cities and towns throughout the country, further jeopardizing the operation of ERISA as envisioned by Congress.

NELF has therefore filed this brief to assist the Court in deciding whether to grant certiorari in this important case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Lower courts do not agree on whether play-or-pay laws, like the Seattle ordinance in this case, are pre-empted by ERISA. Continued uncertainty will prove costly to covered employers and disruptive to their ERISA plans. As it has in the past, the Court should resolve the uncertainty surrounding this question before State laws of questionable legality spring up throughout the nation and disrupt the uniformity of thousands of ERISA plans.

The decision below erroneously relied on a presumption against pre-emption in favor of State laws that are exercises of the police power in "traditional" areas of State regulation. The presumption should not be adopted when, as here, pre-emption is express. As this case reveals, the presumption remains so ingrained in courts that only the clearest statement of this Court will end its misuse.

REASONS FOR GRANTING THE PETITION

I. The Issue Is One Of Urgent National Importance.

In enacting ERISA Congress sought to achieve the goals of uniformity and affordability in employer benefit plans as regards both their regulation and administration. The ruling of the lower court here undermines these goals. If the Seattle ordinance upheld below is not invalidated by this Court, the ordinance will surely become a model for other local governments to enact similar laws, greatly eroding Congress's twin goals nationwide.

Only a few years ago this Court observed of the effects that would flow from such a disruption of the uniformity so key to ERISA:

> Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of minimizing the administrative and financial burdens on plan administrators —burdens ultimately borne by the beneficiaries.

Gobeille v. Liberty Mutual Ins. Co., 577 U.S. 312, 321 (2016) (cleaned up).

Hence, in *Gobeille*, the Court ruled that "ERISA's express pre-emption clause require[d] invalidation . . . [of a] state statute [that] imposes duties that are inconsistent with the central design of ERISA." *Id.* at 326. *See* 29 U.S.C. §1144(a). The fact that the law in question might impose requirements "parallel" to those of ERISA itself did not alter the result. *Gobeille, 577* at 326-27.

Because of the strong likelihood that the Seattle ordinance will serve as a model for other local play-or-pay laws, the question of the correctness of the decision below is of urgent national significance and should be determined now. The decision below therefore amply warrants review by this Court.

In its attempt to defeat en banc review, the City sought to downplay the significance of the decision, however. Despite receiving the enthusiastic amicus support of eight local governments (cities and counties) from across the nation, the City declared to the court of appeals that it is "purely speculative whether any of these cities will enact legislation that might be subject to ERISA preemption challenges." Response Brief of Defendant-Appellee, No. 20-35472, Docket Entry 62, at 13 (July 15, 2021). The City concluded, "Such speculation does not create an issue of national importance." *Id*.

NELF begs to disagree. The City calls it "speculative"; NELF calls it the handwriting on the wall. The amici local governments could barely contain their enthusiasm for Seattle's victory in this case, and they made no secret of their intention to follow in that city's footsteps. "[S]uch ordinances," they told the Ninth Circuit, "play an integral role in the well-being of a locality's residents and the management of the healthcare costs these localities bear[.]" Brief of Amici Curiae City and County of San Francisco et al., No. 20-35472, 2020 WL 6682044, at *1-2 (Nov. 4, 2020). For that reason, they informed the appeals court, "[m]unicipalities across the country have studied the San Francisco model," which "paved the way for [the] Seattle Municipal Code" ordinance. *Id*. at *1, 29. They assured the court of appeals that "more [cities] will pursue innovative experiments in social responsibility like [that of San Francisco]." *Id*. at *29. In their closing words, the amici themselves

directly tied these emerging local reforms to the fate of this case, telling the court, "Invalidating Seattle's ordinance, as ERIC proposes, would devastate these reform efforts . . . . in *amici's* jurisdictions." *Id.* (also noting four other major cities interested in such reform).

Not only can the effects of the decision below not be contained geographically or by jurisdiction, they also cannot be confined to only certain industries. Here hotels and a variety of businesses "ancillary" to hotels are affected, but the decision below did not depend on features unique to those industries. Indeed, the lower courts relied on *Golden Gate Restaurant Ass'n v. City and Cty. of San Francisco*, 546 F.3d 639 (9th Cir. 2008), a case involving a play-or-pay law imposed on restaurants. The consequences of this case are therefore especially troubling because they are doubly far-reaching, extending both across the nation and across industries.

In addition, this Court can scarcely overlook the fact that this important issue comes before it at a pivotal moment for the economy. Over the past two years countless businesses in many industries have been financially strained close to the breaking point by the highly restrictive protocols put in place in response to the pandemic. Many now seem to be enjoying a fragile recovery from sharply curtailed operations and diminished bottom lines. Under the circumstances, new, costly local laws like the Seattle ordinance should not be imposed on them unless this Court has first pronounced authoritatively on their lawfulness under ERISA. Review a few years from now may come too late.

This last point strongly reinforces Petitioner's argument calling attention to the circuit split on this issue and the urgent need for this Court to resolve it.

Petition at 16-21. In the past, this Court has not hesitated to grant certiorari in order to clarify the lawfulness of a State law in relation to federally regulated employer benefit plans; it has thereby forestalled the nationwide problems that would arise from prolonged uncertainty about the relationship of State laws to such plans. Recognizing how widespread and how important to millions of employees these plans are, the Court has frequently required only a minimal split among lower courts. *See Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S.Ct. 1190 (2017) (split of two federal circuits versus one state court on pre-emption issue in Federal Employees Health Benefit Act); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316 (1997) (two to one split of federal circuits on ERISA pre-emption); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (two circuit split on ERISA pre-emption); *English v. General Electric Co.*, 496 U.S. 72 (1990) (same).

So, too, in *District of Columbia v. Greater Washington Board of Trade*, this Court granted the petition to resolve a simple two-circuit split on an ERISA pre-emption issue. 506 U.S. 125 (1992). There the D.C. Circuit and the Second Circuit disagreed about two different laws (one from the District of Columbia and the other from Connecticut) that were "substantially similar" in their workings as relates to ERISA plans. *Id*. at 128-29. One court of appeals found that such laws were pre-empted because they "'could have a serious impact on the administration and content of the ERISA-covered plan,'" while the other court of appeals ruled to the contrary. *Id*. (quoting lower court). This Court granted certiorari in order to resolve the issue before more statutes of uncertain validity could spring up,

and the Court ruled that the kind of laws at issue in that case were pre-empted. *Id*.

Indeed, so imperative has the Court deemed the uniformity and clarity of ERISA law to be that it has granted certiorari in the absence of any split at all. *See Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020); *Gobeille*, *supra*.

Contrary to the City's view, then, Petitioner is entirely justified in portraying this case as one of national importance:

> 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.
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> 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.

Petition at 4, 16.

The pre-emption issues presented in this ERISA case are of the utmost importance nationally, both to businesses and other covered employers that rely on ERISA's promise of regulatory uniformity. The Court should therefore grant certiorari.

II. The Decision Below Was Wrongly Decided Because It Relied On The Presumption Against Pre-emption.

A. The City and the Lower Courts Put the Presumption at Issue.

The presumption against pre-emption is a interpretive principle put centrally at issue in this case, and not just by Petitioner. *See* Petition at 4, 10-11, 15, 31-33. The City has made it a pillar of its defense. In its brief in the court of appeals, the City spent about fourteen pages arguing for the vitality and relevance of the presumption, discussing the traditional State powers at stake in this case and discounting any statement of this Court that may appear to limit use of the presumption. Response Brief of Defendant-Appellee, No. 20-35472, 2020 WL 6531093, at *17-30 (Oct. 28, 2020). In short, the City declared, "courts must read the express preemption provision so as not to tread on States' traditional authority to regulate safety and health and to provide for the general welfare." *Id.* at *19. Appearing as amici, the eight local governments from around the country echoed Seattle at even greater length. Brief of Amici Curiae City and County of San Francisco et al., 2020 WL 6682044, at *2-19 (Nov. 4, 2020).

The lower courts, too, emphasized the importance of the presumption. The district court declared that, as against the presumption, nothing in ERISA indicates Congress's intention to displace local regulation of such an area of traditional state concern as health care. *The ERISA Industry Comm. v. City of Seattle*, 2020 WL 2307481, at *3 (W.D. Wash. May 5, 2020). "Thus," the court concluded, "the Ordinance is entitled to a presumption against preemption by federal law." *Id.*

The Ninth Circuit, citing its decision in *Golden Gate*, stated bluntly that, "[c]ontrary to ERIC's argument," local laws like the ordinance enjoy the protection of the presumption. *The ERISA Industry Comm. v. City of Seattle*, 840 Fed. Appx. 248, 248 (9th Cir. 2021). Back in 2008, in *Golden Gate* itself, the Ninth Circuit was no less certain: "We begin by noting that state and local laws enjoy a presumption against preemption when they clearly operate in a field that has been traditionally occupied by the States. . . . This presumption informs our preemption analysis." 546 F.3d at 647 (cleaned up).

Even though defending the presumption in the face of an express pre-emption provision, none of these statements delved any deeper into the rationale behind it than to defend state sovereignty. Apparently, this Court's statement on the subject in *Gobeille*, an ERISA case, sounds to some too oblique to induce them to overcome an ingrained adherence to the presumption. 577 U.S. at 325-26. ("Any presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does."). Yet *Gobeille* was cited in *Puerto Rico v. Franklin California Tax-Free Trust*, where the Court was still clearer, though apparently not categorical enough for those who cavil that *Franklin* was not itself an ERISA case. 579 U.S. 115, 125 (2016) ("because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption") (cleaned up). Hence, both cases were cited in vain by Petitioner in the lower courts.

B. The Presumption Has No Application when Pre-emption is Express.

Pre-emption traces its constitutional source primarily to the Supremacy Clause, article VI, cl. 2 of the U.S. Constitution. This Court's earliest cases dealing with Supremacy Clause pre-emption were decided without recourse to, or even mention of, a presumption against the pre-emption of State laws regulating areas of traditional State concern. *See*, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). Rather, in those cases the Court recognized that "the acts of the State Legislatures . . . though enacted in the execution of acknowledged State powers, . . . though enacted in the exercise of powers not controverted, must yield to [the acts of Congress]." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824).

It was not until 1947 that this Court first acknowledged openly the working "assumption" that the "historic police powers of the States" should not be deemed to be superseded when "Congress legislate[s] . . . in [a] field which the States have traditionally occupied" unless to do so was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unfortunately, quickly lost sight of later was the fact that the *Rice* Court illustrated prior uses of the presumption with cases it described as based on various kinds of *implied* pre-emption. *See id*. at 230-31. In other words, the presumption may have a use when the Court must determine the meaning of a statute that fails to speak expressly on the question of pre-emption.

It has long been acknowledged by this Court that whether a law of Congress pre-empts the exercise of State lawmaking over a given subject is a question of

congressional intent. This Court has stated pointedly that "[p]re-emption fundamentally is a question of congressional intent and when Congress has made its intent known *through explicit statutory language*, the courts' task is an easy one." *English*, 496 U.S. at 78-79 (citing ERISA case *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95–98 (1983)) (emphasis added). That is to say, when Congress has included an express pre-emption provision in a statute, the provision obviates the need for the presumption because the provision peremptorily establishes the *fact* of pre-emption as Congress's intent.

It is for this reason that the presumption against pre-emption has no application outside cases of implied pre-emption. *Rice* limited the application of the presumption in this way for good reason. As the Court observed in *Egelhoff v. Egelhoff ex rel. Breiner*, an ERISA case, the presumption against pre-emption in areas of traditional State regulation is "overcome where . . . Congress has made clear its desire for pre-emption" by writing pre-emption into a statute expressly, as it did in ERISA. 532 U.S. 141, 151 (2001). Rather than "overcome," it might be more accurate to say that, in the face of an express pre-emption provision, use of the presumption is dispensed with from the start. As the Court stated in 2016, 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 (cleaned up).

From that point on, "the courts' task is an easy one" because the scope of the pre-emption may then be determined by the text itself. Addressing the presumption, Justice Scalia wrote that "it seems to me that assumption dissolves once there is conclusive evidence of intent to pre-empt in the

express words of the statute itself." *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 545 (1992) (concurring in the judgment in part and dissenting in part) (internal quotation marks and further citation omitted). He went on to observe:

> The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning. . . . When this suggests that the pre-emption provision was intended to sweep broadly, our construction must sweep broadly as well. . . . And when it bespeaks a narrow scope of pre-emption, so must our judgment.

Id. at 548; *see also id.* at 545. *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 293 (2012).

Of misuse of the presumption, one commentator has observed: "If the Court's normal rules of statutory interpretation are designed to give effect to congressional intent, then the Court's insistence on giving express preemption clauses a narrower-than-usual interpretation [through use of the presumption] will drive preemption decisions away from that intent." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 292 (2000).

The same author also remarks that because the judicially fashioned presumption against pre-emption narrows interpretation, it wrongly gives the "safeguards of federalism a kind of double weight" beyond that intended by Congress when it drafted and enacted the federal law.

> Once Congress has decided upon the proposal that it will enact, however, the

> political safeguards of federalism have done their work. For courts always to adopt narrowing constructions of the language that Congress enacts would be to give the political safeguards of federalism a kind of double weight.

Id. at 300. *Cf. South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity").

In short, when an express pre-emption provision is present, "[u]nder the Supremacy Clause, [a court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (Scalia, J. concurring in the judgment in part and dissenting in part) (citation omitted). Whatever scope of pre-emption Congress wishes to assert when it expressly declares federal pre-emption should be sought in the text of what Congress actually wrote rather than through use of a presumption better suited to statutory silence.

CONCLUSION

For the reasons given above, this Court should grant the petition for certiorari.

Respectfully submitted,

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