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

REPLY BRIEF FOR PETITIONER

ANTHONY F. SHELLEY
THERESA S. GEE
MILLER & CHEVALIER CHARTERED
900 16th St., NW
Washington, DC 20006
(202) 626-5800

PAUL D. CLEMENT
Counsel of Record
CRAIG S. PRIMIS
K. WINN ALLEN
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

(*Additional counsel listed on inside cover*)

Counsel for Petitioner

May 10, 2022

MICHAEL B. KIMBERLY
SARAH P. HOGARTH
MCDERMOTT WILL & EMERY LLP
500 N. Capitol St., NW
Washington, DC 20001
(202) 756-8000

ANDREW C. LIAZOS
MCDERMOTT WILL & EMERY LLP
200 Clarendon Street
Boston, MA 02116
(617) 535-4038

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

Respondent's central claim is that the "Improving Access to Medical Care for Hotel Employees Ordinance" is not, in fact, about improving medical-care benefits. According to Respondent, despite its contrary labeling, the Ordinance is really just "a mandate to pay a certain wage." Opp.1. Selling this wage-law fiction is critical to Respondent's arguments against certiorari, which depend on precedents addressing (and upholding) wage laws rather than precedents addressing (and invalidating) laws that impermissibly regulate ERISA-covered benefits.

It is a fiction. The Ordinance is not a wage law. True to its name, it mandates different levels of medical-care benefits for employees depending on their marital status and without regard to how much they make. It treats an employee paid minimum wage exactly the same as one earning six figures. It pegs the amount of mandated expenditures to the employer's cost of obtaining gold-level health insurance, with adjustments for spouses and/or dependents. That is a benefits law, not a wage law. Indeed, not only does Seattle have a separate minimum-wage law, SMC 14.19.030-40, which Petitioner has never challenged, but Washington law prevents wage laws from drawing distinctions based on marital status. Thus, the Ordinance's validity depends on it being what it proclaims itself to be—*viz.*, a benefits law.

Once Respondent's fiction is debunked, the cases it invokes, upholding wage laws that merely account for benefits in assessing wage levels, distinguish themselves. In contrast, laws (like the Ordinance)

that directly regulate the provision of ERISA-covered benefits "relate to" ERISA plans, and do not escape preemption by the simple expedient of adding an or-pay option. The First and Fourth Circuits have held as much, and Respondent's insistence that neither court addressed the question presented here cannot withstand scrutiny. Respondent's merits arguments are likewise unsustainable and rely on mischaracterizations of the Ordinance and this Court's cases. Respondent's assertion that this case is unimportant and undeserving of attention is belied by their own *amici* below, who promised more of the same "reforms" in multiple jurisdictions, and by the wide range of *amici* urging this Court to grant review.

The ERISA context makes the circuit split particularly problematic and this Court's review imperative. Laws like the Ordinance prevent employers from providing benefits through uniform, nationwide plans. Unless this Court intervenes, other jurisdictions will adopt play-or-pay laws of their own, producing patchwork regulation in an area where Congress promised nationwide uniformity as a critical inducement for companies to offer benefits. The Court should grant certiorari to resolve the split of authority and rein in state and local efforts to undermine ERISA's design.

I. The Ordinance Is A Preempted Benefits Law, Not A Permissible Wage Law.

From literally its very first sentence, Respondent's brief strains to portray the Ordinance as an "employee compensation" law that regulates wages rather than a benefits law that regulates the provision of ERISA-covered healthcare benefits. Opp.1.

Respondent does so for an obvious reason: to wrap itself in the protective shroud of cases rejecting preemption challenges to prevailing-wage laws. Respondent's effort to pass the Ordinance off as a wage law should be rejected at the threshold.

The Ordinance bears no resemblance to the wage laws in the cases Respondent invokes. Those laws require public-works contractors to pay their workers a prevailing wage. To ensure a level playing field between contractors who provide fringe benefits and those who do not, the laws generally give credit for benefits when determining compliance. *See, e.g.*, *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945, 949 (3d Cir. 1994); *see also* Opp.12 (citing cases). Courts typically uphold prevailing-wage laws against ERISA preemption challenges, recognizing that they do not "cross the line from wage regulation to benefit regulation." *Keystone*, 37 F.3d at 963.

The Ordinance crosses that line, and then some. It has none of the features of a wage law, and all of the features of a benefits law. Most obviously, it does not establish a prevailing wage (or a minimum wage or any other kind of wage). Other laws do that. *See, e.g.,* SMC 14.19.030-40. The Ordinance, by contrast, directly regulates the provision of ERISA-covered benefits, requiring employers to make "monthly required healthcare expenditures" on behalf of covered employees, SMC 14.28.060, with the expectation that employers will comply by altering their ERISA plans. The Ordinance expresses no concern about actual wage levels or non-healthcare compensation; its sole purpose and sole directive, consistent with its title, is

to ensure that covered employees receive healthcare benefits. That is why an employee making only minimum wage (as little as $16,580 annually)[1] but already receiving qualifying health coverage receives nothing under the Ordinance, while an employee making six figures without health coverage stands to benefit. *See* SMC 14.28.060. No wage law would function in that manner.

The amounts of the "monthly required healthcare expenditures" confirm that the Ordinance is a benefits law, not a wage law. Unlike a wage law providing a minimum guaranteed wage to each individual employee, the required amount for an employee under the Ordinance varies based on whether she has a spouse and/or dependents. SMC 14.28.060.A. Consideration of marital status and dependents is standard for benefits laws, but wholly out of place in a wage law. Indeed, Washington law makes it illegal for employers to base employee wages on marital status. Wash. Rev. Code §49.60.180(3). Thus, the very legality of the Ordinance under Washington state law depends on it being a benefits law.

To remove any remaining doubt, the Ordinance pegs the required amounts to employers' cost of obtaining "gold-level" healthcare for their employees. *See Housing, Health, Energy, and Workers' Rights Committee*, Seattle Channel, at 1:33:11-1:35:44 (Aug. 15, 2019) https://bit.ly/38OGcMY. And the Ordinance expressly declares that "the required healthcare expenditure *will not* be considered as wages paid for

---

[1] Seattle's minimum wage is $17.27 and employees are "covered" under the Ordinance if they work 80 hours monthly. SMC 14.28.030.A.

purposes of determining compliance with hourly wage and hourly compensation laws." SMC 14.28.060.E (emphasis added).

In short, everything about the Ordinance, from its title on down, makes clear it is a benefits law and not a wage law. Respondent's felt need to argue otherwise underscores the stark circuit split and obvious preemption problems with a state law that directly regulates ERISA benefits. Despite Respondent's elaborate suggestion to the contrary, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia J., dissenting).

II. The Circuits Are Divided.

A. The Ninth Circuit did not treat the Ordinance as a wage law, but upheld it anyways on the ground that that its or-pay option saves it from preemption. That holding stands "in clear opposition" to and "create[s] a circuit split" with the Fourth Circuit's decision in *Fielder*, which held that even non-ERISA options for compliance with a benefits regulation interfere with uniform nationwide plan administration. *Golden Gate Rest. Ass'n v. San Francisco*, 558 F.3d 1000, 1004 (9th Cir. 2009) (M. Smith, J., dissenting from denial of rehearing).

Respondent accuses Petitioner of "fabricat[ing]" *Fielder*'s uniformity holding. Opp.15. That is a bold accusation, given that it must be equally leveled at eight Ninth Circuit judges, the Secretary of Labor, the plaintiff in *Fielder*, and numerous commentators—all of whom read *Fielder* the same way and recognize the conflict with *Golden Gate*. *See Golden Gate*, 558 F.3d at 1006 (M. Smith, J., dissenting from denial of rehearing); Br. for the Secretary of Labor as Amicus

Curiae 16-17, *Golden Gate* (9th Cir. Oct. 2008) ("DOL Br."); RILA.Br.10-13; Pet.19-20.[2]

As everyone else recognizes, Respondent's one-holding-only reading is untenable. Respondent selectively quotes *Fielder* as saying that an employer could not comply with the challenged law without "'altering its package of ERISA health insurance plans.'" Opp.16. In reality, that language refers only to Maryland's suggestion that employers could comply by contributing to employees' Health Savings Accounts. *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 197 (4th Cir. 2007). But the court allowed for the possibility that *other* non-ERISA options would be viable and considered whether *those* options would save the law from preemption. *Id.* at 194-97. Its conclusion was clear: "even if" employers could comply without altering their ERISA plans, the court "would still conclude" that ERISA preempted the law because compliance would deny employers "the uniform nationwide administration of [their] healthcare plans." *Id.* at 196-97. That holding squarely conflicts with the decision below.

---

[2] Respondent touts the Solicitor General's statement that *Fielder* does not "direct[ly] conflict" with *Golden Gate*. Opp.4. The Solicitor General's point was that the *judgment* in *Fielder* was independently supported by the court's alternative holding, so it did not directly conflict with the *judgment* in *Golden Gate*. *See* Br. for the United States 19-20, *Golden Gate Rest. Ass'n v. San Francisco*, No. 08-1515 (U.S. May 26, 2010) ("SG Br."). But with respect to the holding at issue here—which remains binding precedent in the Fourth Circuit, Pet.18 n.1—the Solicitor General stood by the Labor Secretary's conclusion that *Golden Gate* "is inconsistent with the Fourth Circuit's correct analysis." DOL Br.17; *see* SG Br.19.

B. Respondent's effort to deny a conflict with *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014), is even less convincing. Respondent claims that *Merit* did not address whether ERISA would preempt the challenged ordinance if employers could comply through non-ERISA spending. Opp.18. In support, Respondent quotes the following passage: "To comply with the [o]rdinance, an employer with an ERISA-governed apprentice training program either would have to modify that program … *or would have to establish and coordinate a separate plan*." Opp.18 (emphasis added) (quoting *Merit*, 759 F.3d at 130).

Respondent conceals that the word "plan" in the italicized clause explicitly refers to a "plan" *not covered by ERISA*. The court was directly responding to the city's argument that "the availability of [a] *non-ERISA* avenue to compliance ought to pretermit a finding that the Ordinance relates to ERISA plans." *Merit*, 759 F.3d at 130 (emphasis added). Rejecting that argument, the court refused to "attach decretory significance to an employer's ability to comply with the Ordinance by means of a *non-ERISA plan*." *Id.* (emphasis added). "Even though *a non-ERISA option* might be available," that "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 (emphasis added). That holding squarely conflicts with the decision below.

III. The Ordinance Is Preempted Several Times Over.

A. The Ordinance has an impermissible "connection with" ERISA plans because it imposes Seattle-specific benefits requirements on employers, preventing them from administering benefits nationwide through a single, uniform plan. *See* Pet.23-26; *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). Respondent's primary response is to again treat the Ordinance like a wage law, repeatedly citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997), and *Rutledge v. Pharmaceutical Care Management Association*, 141 S.Ct. 474 (2020), and invoking the framework applicable to laws that affect ERISA plans only indirectly.

The Ordinance is not that kind of law. It does not regulate hospital rates or wages or prescription-drug middlemen; its effects on ERISA plans are not indirect or incidental. The Ordinance directly regulates employers' provision of ERISA-covered benefits to their employees. Accordingly, as *Fielder* recognized, "the laws involved in *Travelers* and *Dillingham* are inapposite because they dealt with regulations that only *indirectly* regulated ERISA plans." 475 F.3d at 195. The Ordinance (like the law in *Fielder*) is "much more analogous to the regulations at issue in *Shaw* and *Egelhoff,* both of which were found to be preempted." *Id.* at 195-96; *see* Pet.21-26; AHLA.Br.16-19.

When Respondent finally addresses *Egelhoff*, it pointedly does not defend *Golden Gate*'s reasoning. *See* Pet.25-26. Respondent instead tries to rewrite *Egelhoff*, claiming that the challenged law was preempted because compliance required employers to alter their ERISA plans. Opp.21. Respondent is wrong. The law in *Egelhoff* did not require employers to alter their plans to match the law's beneficiary criteria; those criteria applied *notwithstanding* a plan's terms. 532 U.S. at 147-48. ERISA preempted the law not because compliance required alterations, but because compliance created the disuniformity ERISA was designed to prevent: administrators could determine plan beneficiaries in 49 states by looking at the plan documents, but not in Washington. *Id.* at 148. The same is true here: administrators can pay benefits at self-determined levels in accordance with plan documents everywhere else, but must make extra calculations and pay extra amounts with respect to their Seattle employees. Pet.24-25.

B. The Ordinance also makes forbidden "reference to" ERISA plans. *See* Pet.26-29. Respondent contends that the Ordinance's "expenditure obligation … does not depend on what an ERISA plan provides." Opp.24. That is incorrect. Whether the Ordinance requires an employer to increase its per-employee healthcare spending depends entirely on what its existing ERISA plan provides. An employer whose existing plan provides $2,000 per employee each month need change nothing, while an employer whose existing plan provides only $200 must increase payments on a specified date (which itself depends on the existing plan's terms, SMC 14.28.260).

Respondent claims that the Ordinance's various provisions referencing existing ERISA plans "apply only if the employer *chooses* to make its payments through a plan." Opp.24. That is incorrect. The Effective Date provision, for example, depends on the existing plan's terms, without regard to how the employer fulfills the mandate: "[T]he provisions … shall take effect upon the later of July 1, 2020 or the earliest annual open enrollment period for health coverage, if offered, after July 1, 2020." SMC 14.28.260.B.[3]

C. If the Ordinance would otherwise escape preemption, then compliance with the or-pay option should itself be construed to constitute an ERISA plan. Respondent asserts that complying with the Ordinance does not require the type of "ongoing administrative program" that *Fort Halifax* treated as an ERISA plan, Opp.26-28, but Respondent omits that case's description of what obligations justified that classification: "determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). The Ordinance requires employers to do all of those things. *See* Pet.30-31.

---

[3] Respondent contends that employers can comply "whether or not [they have] an ERISA plan." Opp.23. That observation gets Respondent nowhere in this as-applied challenge, as Petitioner's member companies all have ERISA plans. Pet.26 n.2.

Respondent repeatedly invokes a supposed rule that an administrative scheme is not an ERISA plan unless it requires "discretionary" judgments about, *e.g.*, whether to grant or deny benefits. Opp.27, 28, 29. That "rule" appears nowhere in this Court's cases and Respondent does not explain its provenance. This Court's analysis has focused on the complexity and burdens of the required administrative scheme, not the amount of discretion vested in the employer or the plan.

D. This case also provides an opportunity to make clear that the presumption against preemption has no role in interpreting express preemption provisions. Respondent does not dispute that the courts of appeals are divided on this issue. *See* Pet.31-33. Instead, Respondent claims that the court below said the case would come out the same way even without the presumption. Opp.29. Not so. The "even so" sentence that Respondent quotes distinguished *Gobeille v. Liberty Mutual Insurance Co.,* 577 U.S. 312 (2016), where this Court *declined* to apply the presumption. The sentence thus confirms the panel's reliance on the presumption, as does its view that "[t]he outcome of this case is controlled by … *Golden Gate*," which undisputedly relied on the presumption. Pet.App.2.

IV. This Court's Review Is Urgently Needed And This Is An Ideal Vehicle.

Respondent's doubts about the importance and urgency of review are hard to credit given the statements of its own *amici* below, and the number and range of *amicus* groups urging this Court to grant review and explaining that they "are gravely concerned" about the proliferation of laws like

Seattle's. Council.Br.4; *accord* AHLA.Br.19-22; RILA.Br.19-21; Chamber.Br.13-18; Restaurant.Br.11-17; NELF.Br.3-7.

Respondent's so-called "vehicle" argument, Opp.34-35, does not claim to identify anything that would prevent this Court from resolving the question presented, but instead speculates about how severability might play out on remand *after* this Court grants certiorari and reverses. Respondent's prediction is dubious, as a severed ordinance that simply demanded cash payments from employers even if they already provide employees with gold-level coverage would hardly accord with legislative intent or Washington law.[4] In all events, this Court routinely grants certiorari notwithstanding a respondent's self-serving prediction about what might happen on remand. *See, e.g.*, *Badgerow v. Walters*, 141 S.Ct. 2620 (2021) (granting petition despite respondent's argument that it would prevail on remand).

Respondent dismisses the stated intentions of its own *amici* who went to the trouble of filing below as "pure speculation." Opp.31. But Petitioner is not guessing what those jurisdictions will do, it is taking their representations to the court below at face value. *See* Pet.35-36. If they did not intend to follow Seattle's lead, they would not have warned that the Ordinance's invalidation would "devastate" their "reform efforts." Br. of Amici Curiae San Francisco, et al. 29 (9th Cir. Nov. 4, 2020). That they are awaiting the disposition of this Petition before effectuating those reforms only

[4] Such a reconfigured post-severance ordinance would clearly violate the state's prohibition on varying employee compensation by marital status. Wash. Rev. Code §49.60.180(3).

underscores the need for review. Nor is there any reason to doubt those municipalities will follow through if their promised reform efforts are green-lighted. As the Ordinance here underscores, raising the benefits of local workers by burdening out-of-state employers in industries where out-of-state visitors will bear any price increases is an opportunity too tempting for municipalities to pass up. This Court should grant review to prevent such efforts and make clear that simply tacking an or-pay option on an obviously preempted local effort to regulate ERISA benefits is no panacea.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANTHONY F. SHELLEY
THERESA S. GEE
MILLER & CHEVALIER CHARTERED
900 16th St., NW
Washington, DC 20006
(202) 626-5800

MICHAEL B. KIMBERLY
SARAH P. HOGARTH
MCDERMOTT WILL & EMERY LLP
500 N. Capitol St., NW
Washington, DC 20001
(202) 756-8000

ANDREW C. LIAZOS
MCDERMOTT WILL & EMERY LLP
200 Clarendon Street
Boston, MA 02116
(617) 535-4038

PAUL D. CLEMENT
Counsel of Record
CRAIG S. PRIMIS
K. WINN ALLEN
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

May 10, 2022