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 THE RESTAURANT LAW CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, NATIONAL RETAIL FEDERATION, INTERNATIONAL FRANCHISE ASSOCIATION, AND ASIAN AMERICAN HOTEL OWNERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The City of Seattle enacted Municipal Code 14.28 (the "Ordinance"), which gives employers who own, control, or operate an "ancillary hotel business" in Seattle and have 50 or more employees worldwide the choice of either making minimum monthly healthcare expenditures on behalf of their covered employees, or making direct monthly payments to the covered employee. Whether municipalities can impose such burdensome, city-specific obligations on select businesses—in contravention of the national uniformity that Congress sought to achieve through the Employee Retirement Income Security Act of 1974 ("ERISA"), and in violation of ERISA's broad express preemption provision—is critically important to a broad and diverse array of businesses.

Many have been harmed already by the Ninth Circuit's controversial decision in *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), which found that play-or-pay laws were not barred by ERISA. If this Court permits Seattle to follow *Golden Gate*'s roadmap and circumvent ERISA that harm is poised to spread. Indeed, other major municipalities have already gone on

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[1] Counsel of record provided timely notice of this brief under Rule 37.2 and all parties have consented to this brief's filing. Pursuant to Rule 37.6, no counsel for a party authored this brief "in whole or in part," and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

the record to signal their intent to follow in Seattle's wake and enact their own policies to accomplish what ERISA prohibits.

It is critical that this Court recognize the potentially far-reaching consequences of this case. As businesses across the economic spectrum continue to address the unprecedented financial and operational challenges related to a pandemic, the mandates at issue could impact not only large national chains but also local independent operators and small, family-run companies that operate a range of businesses adjacent to large hotels. The coalition of *amici* listed below—representing the restaurant and hospitality industries as well as independent, retail, and franchise businesses—therefore submit this brief to encourage the Court to grant the petition for certiorari by the ERISA Industry Committee ("ERIC"), to overturn the Ninth Circuit's incorrect and harmful decision below, and to hold that the Ordinance is preempted.

The Restaurant Law Center is the only public policy organization created specifically to represent the interests of the food service industry in the courts. In the United States, the industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. The Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members. Specifically, the Restaurant Law Center highlights the potential industry-wide consequences of pending cases like this

one, through regular participation in amicus briefs on behalf of the industry.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 52 million employees and contributes $3.9 trillion annually to GDP. As the industry umbrella group, the NRF regularly submits amicus curiae briefs in cases raising significant legal issues that are important to the retail industry.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA works to protect, enhance and promote franchising. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development. IFA frequently files amicus briefs in cases raising critical legal matters of importance to franchising.

The Asian American Hotel Owners Association ("AAHOA") is the largest hotel owners association in the nation. AAHOA's nearly 20,000 members own 60 percent of the hotels in the United States and nearly 62 percent of the hotels in the State of Washington. AAHOA's members are responsible for 1.7 percent of the nation's GDP. With billions of dollars in property assets and over one million employees, AAHOA members are core economic contributors in communities across the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

ERIC ably explains in its brief why its petition should be granted—in particular, because the Ninth Circuit's decision finding the Ordinance is not preempted by ERISA squarely conflicts with decisions from other circuits and decisions of this Court. *See* Pet. 14-15 (citing S. Ct. R. 10(a), (c)). *Amici* write separately to emphasize the exceptional importance and practical impact of this issue, which is "an important question of

federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

In adopting ERISA, Congress sought to create a national, uniform system for regulating employee benefit plans. ERISA's text, its legislative history, and this Court's precedent all illustrate that ERISA's drafters were concerned with eliminating the financial burdens associated with conflicting state employee benefit laws.

The Ninth Circuit has permitted precisely what ERISA was meant to eliminate. By finding the Ordinance is not covered by ERISA's express preemption provision, which bars state and local laws that "relate to" employee-benefit plans covered by ERISA, 29 U.S.C. § 1144(a), the Ninth Circuit's decision heightens uncertainty that has and will continue to have very real economic consequences for businesses throughout the country. The resulting damper on economic activity will be particularly pronounced for restaurants and small businesses—which are still trying to persevere through the COVID-19 pandemic—as they attempt to grapple with a patchwork of locally imposed requirements that ERISA was designed to prevent.

In the wake of the decision below, both small and large businesses may now feel pressure to comply with two very different benefit regimes—a uniform framework authorized by Congress through ERISA, and a separate system in place wherever a municipality felt emboldened to impose its own additional obligations. That patchwork system of competing regulations would

be impermissible under any circumstance. But the Ordinance's obligations are particularly problematic in light of the toll the COVID-19 pandemic and resulting restrictions have taken on a wide variety of restaurant, hospitality, independent, retail, and franchise businesses. At a time when every level of government should be working to ease burdens on businesses for the benefit of their communities and employees, Seattle and others seek to engraft their own parochial preferences onto a national regulatory regime by adding additional burdens that many businesses simply will be unable to bear.

This Court should intervene. It should grant ERIC's petition for certiorari, reverse the decision below, and make clear that ERISA's broad express preemption provision bars states from imposing "play or pay" laws that require employers to either create new ERISA plans, alter existing ERISA plans, or make payments directly to their employees.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION SOWS UNCERTAINTY BY FLOUTING ERISA'S UNIFORM NATIONAL FRAMEWORK AND ALLOWING A PATCHWORK OF PLAY-OR-PAY REGIMES.

Congress enacted ERISA with the express purpose of creating a uniform regulatory scheme for employee benefits nationwide. Its intent, as this Court has recognized for decades, was "to ensure that plans and plan sponsors would be subject to a uniform body of

benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). In addition, this Court has explained, Congress intended to prevent "the potential for conflict in substantive law" that resulted from "requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Id.* To effectuate that intent, Congress included an express preemption clause, "[t]he basic thrust" of which was "to avoid a multiplicity of regulation in order 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 ignored these precedents and instead blessed a local ordinance that achieves precisely what ERISA was meant to preempt: the creation of burdensome local rules that differ depending on the jurisdiction and that govern the administration of employee benefit plans and relate to such plans.

Prior to ERISA's passage, employee benefit plans were in a state of regulatory confusion. For decades the federal government took a hands-off approach toward these plans, allowing private businesses, unions, and employees to negotiate for benefits freely. *See* James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 1*, 14 J. Pension Benefits 31, 32 (2006). But these privately negotiated benefit plans rarely lived up to their promise. Inadequate employer funding

coupled with lengthy vesting periods meant that employees routinely lost benefits they thought secure. *Id.* Despite the system's glaring deficiencies, both employers and unions resisted early federal efforts to legislate in this space. *Id.* at 32-33.

In the absence of adequate federal regulation, states began to pass their own employee benefit laws. *Id.* at 34. Unsurprisingly, these laws took vastly different forms. Some simply required that employers provide disclosures to state agencies or submit to periodic inspections. *Id.* Others demanded much more, some requiring specific vesting and funding practices that could vary wildly from state to state. *See id.* (describing New Jersey's particularly "poorly conceived law" that set burdensome vesting and funding standards).

This resulting patchwork of regulation exposed employers to incompatible state rules. *Id.* Without a national standard, employers were "required to keep records in some states but not in others; to make certain benefits available in some states but not in others; [and] to process claims in a certain way in some states but not in others." Howard Shapiro, et al., *ERISA Preemption: To Infinity and Beyond and Back Again? (A Historical Review of Supreme Court Jurisprudence)*, 58 La. L. Rev. 997, 999 (1998). These divergent requirements saddled employers with steep administrative costs that caused some to reduce benefits and others to forgo them entirely. *Id.*

At the request of both employers and unions (which had previously resisted any regulation of employee

benefit plans) in 1974 Congress passed ERISA, a "comprehensive statute" that "subjects to federal regulation plans providing employees with fringe benefits" like pensions and healthcare expenditures. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). Among other things, ERISA created uniform standards for "reporting, disclosure, and fiduciary responsibility" that applied to all employee benefit plans, *id.* at 91, and set strict standards for the administration of benefit plans should employers choose to provide them. *Travelers*, 514 U.S. at 650-51.

In passing ERISA, Congress aimed to replace the inconsistent state benefit plan laws with a single, uniform, national scheme, pushing for what has been described as "the most expansive pre-emption provision in any federal statute." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 327 (2016) (Thomas, J., concurring). In "terse but comprehensive" terms, *id.* at 319-20 (majority op.), the provision states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute, 29 U.S.C. § 1144(a). After the preemption clause was added to the bill, Pennsylvania Congressman John Dent celebrated it as the legislation's "crowning achievement," because it eliminated the "threat of conflicting and inconsistent state and local regulation." Daniel C. Schaffer & Daniel M. Fox, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 Am. J. Tax Pol'y 47, 49 (1988) (quoting 120 Cong. Rec. 29,197 (1974)).

This Court has long recognized Congress's interest in preserving a uniform, national system for regulating employee benefits. For example, more than thirty years ago this Court noted that preemption "is compelled" when "Congress' command is explicitly stated" and invalidated a state law that regulated employer sponsored healthcare benefits—as the Ordinance does here. *Shaw*, 463 U.S. at 95 (quotation marks omitted); *id.* 97, 108 (invalidating a provision of New York Human Rights Law that required employers to provide specific healthcare benefits); *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (invalidating Pennsylvania statute that prohibited healthcare "plans from … requiring reimbursement in the event of recovery from a third party").

Consistent with the text of ERISA and the purpose underlying its enactment, employers across the economy have come to rely on the predictability and uniformity that ERISA affords in administering employee benefit plans. This Court has recognized that "[d]iffering, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability." *See, e.g.*, *Gobeille*, 577 U.S. at 323. By contrast, ERISA allows employers of all sizes to create effective benefit plans for their employees regardless of where they live, work, or receive healthcare. ERISA also provides real advantages to smaller businesses, which may be constrained from attempting to understand, much less tailor, benefit and compliance programs to the proclivities of particular jurisdictions.

The Ninth Circuit's decision below, built on its prior decision in *Golden Gate*, undermines this predictability while conflicting with this Court's current teaching and with decisions from other circuits. Accordingly, this Court should grant certiorari to provide businesses with the predictability and uniformity that they have long relied upon and that Congress sought to achieve.

II. ESPECIALLY NOW, EMPLOYERS NEED ERISA'S NATIONAL UNIFORMITY.

Providing clarity and predictability is particularly important to protect the millions of restaurant, hospitality, retail, independent, and franchise businesses from unnecessary and burdensome attempts by localities to deviate from a uniform national regime like ERISA. This unpredictability comes during a particularly challenging time for businesses as they try to recover from the COVID-19 pandemic.

The restaurant and hospitality industries have been hit especially hard over the past two years. To varying degrees at different points, "[v]irtually every kind of restaurant [has been] suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[2] In April 2020, for example, over eight million restaurant employees—nearly two thirds of the restaurant workforce—had been laid off or

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[2] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

furloughed due to the pandemic.[3] By the end of 2020, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment had decreased in every state and the District of Columbia.[4] Meanwhile, more than 110,000 establishments—which were in business for over sixteen years, on average—were "closed permanently or long-term."[5]

These closures have negative consequences far beyond the individual business that shuts down. Closures can devastate neighborhoods as the impact reverberates; a restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[6] Restaurant closures also harm the economy more broadly, as every dollar spent at table-service restaurants returns roughly two dollars to the state's economy and boosts the state's tax revenue.[7] Restaurant closures can also harm local culture and

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[3] Nat'l Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), https://restaurantsact.com/wp-content/uploads/2020/04/Infographic-Impact-Survey-Natl-Restrnt-Assoc-4.20.20.pdf.

[4] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).

[5] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).

[6] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).

[7] Nat'l Restaurant Ass'n, *Washington Restaurant Industry at a Glance* (2019).

stability: restaurants help foster unique neighborhood identities, drive commercial revitalization, and anchor those focused on seeing their neighborhoods grow and thrive.

Washington State was ground zero for the pandemic in the United States, and two years later its restaurant industry has yet to recover. "Even after more than 18 months of economic recovery," as of January 2022 "Washington's leisure and hospitality business is still missing around 40,000, or 11.5%, of the workers it had in December 2019."[8] Although the industry had been adding jobs in fall 2021, the omicron variant "knocked out many restaurant workers while scaring away some diners," and in December 2021 "the industry suffered a net loss of 2,200 jobs, or 0.7% of its already undersized workforce."[9]

It is against this backdrop that Seattle passed the Ordinance, purporting to reach an "ancillary hotel business" with 50 or more employees worldwide. *See* SMC §§ 14.28.040, 14.28.020. For each qualified employee the law adds additional expense of between $459 and $1,375. SMC § 14.28.060.A (listing 2019 rates "subject to annual adjustments based on the medical inflation rate"); *see* Seattle Off. of Lab. Standards, *Improving Access to Medical Care for Hotel Employees Ordinance Fact Sheet* 2 (Sept. 15, 2021). To determine the proper amount, the employee must "make

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[8] Paul Roberts, *Restaurant Workers Go 'Missing' Again from Washington's Job Recovery*, Seattle Times (Jan. 20, 2022).

[9] *Id.*

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: Questions & Answers* 7 (revised Nov. 4, 2021). Those expenses must be paid through either (1) increased compensation given directly to the employees, (2) increased payments to the employees' health insurance carrier or a related healthcare account, or (3) increased monthly expenditures toward the employees' healthcare services if the employer self-insures. SMC § 14.28.060.B. The law further establishes a complex system of waivers and exemptions, *see id.* §§ 14.28.060.D, 14.28.030.B.2, 14.28.235.A, and an onerous set of record-keeping requirements, *see id.* § 14.28.110. In other words, the Ordinance requires small and large businesses alike to navigate a complex labyrinth of conflicting employee benefit rules—with all the attendant inefficiency.

What is more, the Ordinance imposes these requirements without even making clear what businesses are within its ambit. Whether a company is an "[a]ncillary hotel business" under the Ordinance depends on whether a business "routinely contracts with the hotel for services in conjunction with the hotel's purpose," "leases or sublets space at the site of the hotel for services in conjunction with the hotel's purpose," or "provides food and beverages, to hotel guests and to the public, with an entrance within hotel premises." *Id.* § 14.28.020. What constitutes "routine," how to discern a hotel's "purpose," and who a business is serving may be subject to different reasonable interpretations. As a result, business owners are left not only with questions

about whether the law can be enforced, but also whether it even applies to them in the first place.

That lack of certainty is especially problematic as applied to the restaurant and foodservice industry, which operates a wide variety of service models (including delivery, in-house, and third-party catering), in a wide variety of locations (including out of trucks or malls), and on a wide variety of platforms (including rented kitchens). Yet many businesses—especially small businesses and members of the beleaguered restaurant and hospitality industries—may feel compelled to comply with the Ordinance nevertheless. Potential fines, penalties, or unspecified other remedies loom large, *see id.* §§ 14.28.130, 14.28.150.E, 14.28.160.C.1, as does the possibility for being targeted by the class-action plaintiffs' bar wielding a private right of action, *see id.* § 14.28.230. The mere risk of facing a certified class "may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

In the midst of continuing challenges related to a global pandemic, the financial and other burdens created by Seattle's experiment may be simply too much to bear for even the hardest working members of the business community. Though there has been some improvement

in recent months, these gains remain precarious and unevenly distributed, with 92% of small businesses experiencing supply chain disruptions and 72% suffering from staffing shortages.[10] Employment levels in the restaurant industry remain roughly 650,000—or 5.3%--below pre-pandemic staffing levels.[11] Sales levels for nearly one-third of small businesses are still down considerably as compared to before the COVID-19 pandemic.[12] And business owners are preparing for yet another turbulent year.[13]

In these uncertain times, governments should be redoubling efforts to protect the businesses that create jobs and serve our communities. Seattle has instead pushed ahead with an ordinance that aims to encumber business owners and operators with the prospect of expensive new benefit requirements and steep administrative costs, in direct contravention of the predictability and uniformity that ERISA was intended to provide. And other municipalities are lying in wait to see if they, too, can impose their own jurisdiction-specific rules for employee benefits. If they can—and if

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[10] Nat'l Fed'n of Indep. Bus., *COVID-19 Small Business Survey* (Jan. 4, 2022), https://assets.nfib.com/nfibcom/Covid-19-Survey-21.pdf.

[11] Nat'l Restaurant Ass'n, *Most Restaurants Remained Understaffed in December* (Jan. 7, 2022), https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/most-restaurants-remained-understaffed-in-december/.

[12] *COVID-19 Small Business Survey*, supra.

[13] William C. Dunkelberg & Holly Wade, Nat'l Fed'n of Indep. Bus., *Small Business Economic Trends* 3 (Dec. 2021), https://assets.nfib.com/nfibcom/SBET-Dec-2021.pdf.

ERISA's express preemption provision is not enforced as Congress intended—the result could be a return to the pre-ERISA days when employers faced a dizzying patchwork of rules that imposed major economic and administrative burdens. Such a harmful result should not come to pass.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

February 18, 2022

Respectfully submitted,

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