No. 20-35472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ERISA INDUSTRY COMMITTEE,
Plaintiff-Appellant,

v.

CITY OF SEATTLE,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington (Hon. Thomas S. Zilly)
No. 2:18-cv-01188-TSZ

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION & RULE 35 STATEMENT

This case concerns a Seattle ordinance that requires large hotels, along with the retail shops and restaurants doing business on their premises, to make monthly healthcare benefits payments for "covered employee[s]." Seattle Municipal Code ("SMC") § 14.28.060.A. Employers must calculate the minimum required "healthcare expenditures" according to a detailed, city-mandated formula, and they must furnish the payment as a benefit either through an ERISA-covered healthcare benefit plan or as a new cash-payment benefit to the employee. *Id.* Regardless of what option an employer chooses, the ordinance could not be more clear: Large hotels doing business in Seattle, and the businesses operating on their premises, must provide healthcare benefits to their employees.

Ordinances of this sort are manifestly preempted by ERISA, which broadly forbids states from adopting regulations that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has said time and again that employers have "large leeway" under ERISA to "design . . . welfare plans as they see fit" and that local governments may not dictate benefit design. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). A state or local law that requires an employer to provide a specific benefit, or to design a benefit in a specific way, is "clearly" preempted by ERISA. *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983).

In light of this settled precedent, the outcome here should have been easy: The ordinance, which requires certain businesses to provide a healthcare benefit

designed in a particular way, is invalid and may not be enforced. And in any other circuit, that is just what a court would have held. But not in this circuit. Both the district court and the three-judge panel of this Court concluded that, under *Golden Gate Restaurant Ass'n v. City & Cnty. of San Francisco* ("*Golden Gate*"), 546 F.3d 639 (9th Cir. 2008)—an ERISA preemption challenge involving a San Francisco regulation purportedly similar to the one at issue here—the ordinance is *not* preempted.

Golden Gate was wrongly decided and should be revisited by the full Court. As Judge Milan Smith explained in an eight-judge dissent from the denial of *en banc* review in *Golden Gate*, it "creates a circuit split," "conflicts with [numerous] Supreme Court cases establishing ERISA preemption guidelines," "flouts the mandate of national uniformity in the area of employer-provided healthcare," and "creates a road map for state and local governments . . . to regulate employee health plans despite ERISA's preemptive mandate." *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco* ("*Golden Gate Dissent*"), 558 F.3d 1000, 1004 (9th Cir. 2009) (internal quotation marks and citations omitted).

In the years since *Golden Gate* was decided, the case for *en banc* review has only grown stronger. To begin with, it now conflicts with a binding decision not only of the Fourth Circuit (*Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007)), but also the First Circuit (*Merit Constr. Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014)). In contrast, no court outside of the Ninth Circuit, to

our knowledge, has expressed support for *Golden Gate*'s aberrational logic. That is unsurprising, given that *Golden Gate* turned largely on a presumption against preemption. As the Supreme Court has more recently clarified, when a "statute contains an express pre-emption clause," as ERISA does, courts must "not invoke any presumption against pre-emption." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted). The Fifth Circuit has thus concluded that no presumption against preemption applies in ERISA preemption cases like this one. *See Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019).

The question whether ERISA preempts local ordinances that require businesses to make minimum healthcare payments on behalf of employees is also a matter of tremendous practical importance on a national level. As the *Golden Gate* dissenters rightly recognized, the majority's reasoning is a "road map" for localities across the circuit to enact a patchwork of variable benefits regulations addressing varying local political interests—precisely the outcome that Congress, through ERISA, intended to prevent. Although municipalities' efforts to promulgate such ordinances were initially stalled after *Golden Gate* by the Affordable Care Act's enactment, that is no longer true. Indeed, a host of municipalities filed an *amicus* brief in this very case, proclaiming a need and intent to continue to proliferate varying local regulations similar to the one at issue here. And just weeks ago, a new lawsuit was filed in the Northern District of California

challenging yet another San Francisco ordinance, this one dictating the terms and scope of healthcare benefits for airline employees.

This is not a tolerable state of affairs. *Golden Gate* is an outlier decision. It was wrong when it was decided, and it is even more clearly so now. As a practical matter, it is encouraging a crazy-quilt of constantly shifting local regulation of healthcare benefits throughout the circuit. The time has come for the full Court to overrule *Golden Gate* and bring its ERISA preemption law in line with Supreme Court precedent and the decisions of the other circuits to consider challenges to similar local regulations.

BACKGROUND

A. ERISA Preemption & *Golden Gate*

1. To encourage employers to offer benefits, ERISA aims to establish a "uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Essential to achieving that objective is ERISA's "comprehensive" preemption clause. *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016). Congress sought to ensure that "employee benefit plan regulation would be 'exclusively a federal concern,'" *Davila*, 542 U.S. at 208 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)), because inefficient and highly variable local regulation of interstate benefit plans would discourage employers from offering benefits in the first place. *See Gobeille*, 577 U.S. at 321-23.

Congress therefore has specified that ERISA's "provisions . . . 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). So far as relevant here, a local ordinance impermissibly relates to ERISA plans if it "'bind[s] plan administrators to [a] particular choice'" concerning the substance of plan benefits or the identities of plan beneficiaries. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995)). In *Shaw*, for example, the Court "ha[d] no difficulty" holding that state laws requiring the provision of disability benefits and mandating that those disability benefits be provided to particular employees "related to" ERISA plans within the meaning of the statute's express preemption clause. 463 U.S. at 96-97.

"[S]tate laws dealing with the subject matters covered by ERISA" also are preempted. *Id.* at 98. For instance, "ERISA's reporting, disclosure, and recordkeeping requirements for welfare benefit plans are extensive." *Gobeille*, 577 U.S. at 321. Thus, state laws purporting to add to or subtract from an ERISA plan's reporting, disclosure, and recordkeeping obligations are preempted. *See id.* at 323-24.

2. *Golden Gate* involved a preemption challenge to a San Francisco ordinance "mandat[ing] that covered employers make 'required health care expenditures to or on behalf of' certain employees each quarter." 546 F.3d at 643

(quoting S.F. Admin. Code § 14.3(a) (2007)). Under the San Francisco ordinance, an employer could either make the required healthcare payments as contributions to ERISA-covered healthcare benefit plans, or it could pay the required amount to the city. *Id*. at 645. The ordinance also required employers to keep detailed records and comply with new reporting requirements. *Id*.

This Court held that ERISA did not preempt the San Francisco ordinance. *Id*. at 647. Relying on "a presumption against preemption," *id*., the Court concluded that, as long as an employer can comply with the law without granting employees an ERISA-covered benefit, the ordinance would not "relate to" ERISA plans within the meaning of the preemption clause. *Id*. at 647-56.

Applying that reasoning, the Court observed that the ordinance did not require employers "to provide specific benefits through an existing ERISA plan or other health plan" because "[a]ny employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures" to the city, instead. *Id*. at 655-56. Indeed, according to the Court, "even if the employers made the payments directly to the employees," "those payments would not be enough to create an ERISA plan." *Id*. at 650. And so far as recordkeeping and reporting obligations were concerned, the Court held that the ordinance "has no effect . . . unless an employer voluntarily elects to change those practices." *Id*. at 656. The Court thus upheld the ordinance against the plaintiff's preemption challenge.

The plaintiff petitioned for rehearing *en banc*, which the Court denied over an eight-judge dissent. *See Golden Gate Dissent*, 558 F.3d at 1004.

B. The Ordinance

This case concerns Seattle Municipal Code Chapter 14.28, which—similar to the ordinance at issue in *Golden Gate*—mandates that large hotels and businesses on the hotel premises make, each month, "[r]equired healthcare expenditures" for "covered employee[s]." SMC 14.28.060.A.1 (included in Addendum ("Add.") to Appellant's Br. (Dkt. 10-1)). Covered employees are those who work an average of 80 hours or more per month and are not managers, supervisors, or confidential employees. *See id.* § 14.28.030.A-B.1, .020. The mandatory healthcare benefit varies from $420 per month to $1260 per month, *see id.* § 14.28.060.A, and is "determined by the [covered] employee's family composition," regardless of whether the covered employee actually seeks the expenditures for his or her family or whether family members would be eligible for coverage. Regulatory Q&A 7 (Q. 31, 33) (included in Add.). "An employer must make reasonable efforts to obtain accurate information to determine the employee's rate" and "family status." *Id*. (Q. 33); Seattle Human Rights Rules ("SHHR") 190-230(2) (included in Add.).

Employers have three options to comply with Chapter 14.28's requirements: "They may choose to make those expenditures in 'connection with' an existing ERISA plan, establish a new ERISA plan, or make those expenditures directly to

the employee." Excerpts of Record ("ER") 15-16 (Dkt. 11). The ordinance also requires employers to retain, for three years, records documenting their compliance. SMC 14.28.110; SHRR 190-250(5).

C. Procedural Background

The ERISA Industry Committee challenged Chapter 14.28 as preempted by ERISA. ER22-43. The operative complaint raises a single claim for relief, alleging among other things that Chapter 14.28 "is preempted under ERISA's preemption provision" because "it requires, under each of its three options, the creation of ERISA plans" (ER36 (¶ 52)), "forces large hotel employers and ancillary businesses to adopt or maintain a certain scheme of substantive coverage" (ER39 (¶ 55)), and "imposes . . . administrative, recordkeeping, and reporting requirements" in excess of federal requirements. ER40 (¶ 56).

The district court dismissed. ER5-18. The court reasoned that, under *Golden Gate*, ERISA preemption does not apply so long as "the employer . . . [can] choose to make its required health care expenditures . . . to a non-ERISA entity." ER10-11. Applying the same "presumption against preemption" invoked in *Golden Gate*, the district court held that the ordinance here is not preempted because the option to make cash payments to employees "does not require the creation of an ERISA plan." ER13. It concluded that it was "bound by the Ninth Circuit precedent set more than a decade ago in *Golden Gate* determining that a nearly identical local ordinance was not preempted by ERISA." ER17.

A panel of this Court affirmed in an unpublished memorandum disposition. The panel reaffirmed *Golden Gate*'s conclusion that "'state and local laws enjoy a presumption against [ERISA] preemption'" in the context of health benefits. Slip op. 2 (quoting *Golden Gate*, 546 F.3d at 647). And it agreed with the district court that "[t]he outcome of this case is controlled by our decision in *Golden Gate*." *Id.* at 3.

REASONS FOR GRANTING REHEARING

The panel decision here illustrates the danger in allowing *Golden Gate* to stand: Large hotels in Seattle, and the retail shops and restaurants on their premises, now must offer city-dictated healthcare benefits for employees, but only those working within the limits of the city. Multistate employers subject to the ordinance will have to comply with a complex patchwork of such regulations throughout the circuit, varying their benefit plans city-by-city and county-by-county. This is precisely the scenario that ERISA preemption was intended to forestall.

The Court accordingly should grant the petition, discard *Golden Gate*, and bring its ERISA preemption law in line with Supreme Court precedent and the decisions of the other circuits to address ERISA preemption in similar circumstances.

A. *Golden Gate* Created a Circuit Split, Which Has Since Deepened

En banc rehearing is in order foremost because *Golden Gate* creates a well-recognized circuit conflict. This Court frequently grants *en banc* review in circumstances like this. *E.g.*, *S & H Packing & Sales Co. v. Tanimura Distrib., Inc.*, 850 F.3d 446, 451 (9th Cir. 2017) (Malloy, J. & Gould, J., concurring) (calling for *en banc* review to "eliminate [a] circuit split" by overruling a prior Ninth Circuit case that "was wrongly decided"), *on reh'g en banc*, 883 F.3d 797 (9th Cir. 2018). The same outcome is warranted here.

1. *Golden Gate* conflicts with the Fourth Circuit's decision in *Fielder*, which involved a Maryland law requiring large employers to spend at least 8% of their total payrolls on health insurance costs for their employees or to pay the difference to the State. The Fourth Circuit held that the Maryland law was preempted for two reasons: First, because no one would choose to pay a tax rather than fund an employee benefit, "the only rational choice employers" had to comply with the law was "to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold." 475 F.3d at 193. Second, even assuming a rational employer might pay the tax, the law still would be invalid because it would interfere with "uniform nationwide" plan administration by requiring employers "to keep an eye on conflicting state and local minimum spending requirements and adjust [their] healthcare spending accordingly." *Id*. at 196-97.

Golden Gate tried to distinguish *Fielder* based on *Fielder*'s first holding. But *Golden Gate* has produced significant academic attention in the intervening years, and few authorities have credited *Golden Gate*'s effort to deny a conflict with *Fielder*. *See, e.g.*, Samuel C. Salganik, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption*, 109 Colum. L. Rev. 1482, 1484 (2009) (arguing that "the *Golden Gate* court's effort to avoid a circuit split" was not persuasive and that *Golden Gate* "creates a split with the Fourth Circuit and diverges from Supreme Court precedent"); Alek Felstiner, Case Note, *The Ninth Circuit Limits ERISA Preemption, Expands Pay-or-Play Options*, 29 Berkeley J. Emp. & Lab. L. 473, 485 (2008) (noting that "[alt]hough the Ninth Circuit viewed its decision as conforming to *Fielder*," the decisions are in fact "in conflict"); Mazda K. Antia, et al., *Overcoming ERISA As an Obstacle: The Ninth Circuit's Approval of San Francisco's Fair Share Legislation*, 2 J. Health & Life Sci. L. 115, 135 (2009) (similar).

2. Since *Golden Gate* was decided, the First Circuit has sided with the Fourth. In *Merit Construction Alliance*, the First Circuit considered a municipal ordinance mandating the establishment of apprentice training programs by municipal contractors. Training programs are among the benefits covered by ERISA. In striking down the ordinance as preempted, the court adopted the reasoning in *Fielder*: Although it was conceivable that "a non-ERISA option might be available for compliance with the Ordinance, the availability of such an

option does not save the Ordinance" from preemption because "its mandate still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals." 759 F.3d at 131.

The First Circuit expressly declined to adopt this Court's reasoning in *Golden Gate*. To be sure, it concluded that *Golden Gate* did not necessarily call for a different outcome because, in its view, this Court had not "la[id] down a blanket rule that whenever compliance can come through a non-ERISA option, ERISA preemption is unavailable." *Id.* But as the outcome in this case has shown, this Court does, in fact, apply such a blanket rule. There is therefore no reconciling *Merit Construction Alliance* with *Golden Gate*.

B. The Question Whether *Golden Gate* Should Be Overruled Is a Matter of Tremendous National Importance

Rehearing is further warranted because the question presented here is profoundly important. A primary purpose of ERISA was to achieve uniformity in employee benefits regulation. *Davila*, 542 U.S. at 208. As the Supreme Court has explained, "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

Golden Gate invites just such a patchwork across this circuit. Census data shows that there are well more than 10,000 local government units throughout just

the nine states comprising the Ninth Circuit. *See* U.S. Census Bureau, *Statistical Abstract of the United States* § 8, Table 429 (2012), https://perma.cc/ZK2U-Q6DV. *Golden Gate* empowers each of these local entities to regulate employee benefit plans within their jurisdictions. If *Golden Gate* is allowed to stand, therefore, employers will have to establish plans and allocate benefits through a sprawling and inefficient system of haphazard person-by-person, location-by-location rules. Sponsors will constantly have to monitor for new local laws in every town and county, which will set contribution rates on varying terms and at varying levels that are constantly changing. And that is to say nothing of recordkeeping and reporting, the detailed requirements for which will also vary jurisdiction-by-jurisdiction. The result will be precisely the burden that gave rise to ERISA's preemption clause in the first place.

None of this is speculation. Seven of the nation's largest cities filed an *amicus* brief in this case, defending the importance of being able to "adopt local laws to promote healthcare access without running afoul of ERISA," including ordinances that "require[] employers to make certain payments for employee healthcare." Br. of *Amici Curiae* City & Cnty. of San Francisco, *et al*. 18, 24 (Dkt. 28). According to that brief, "[m]unicipalities across the country have studied the San Francisco model" following *Golden Gate*, "including Denver, Miami, New Orleans, and Pittsburgh," and "New York and Los Angeles, are also pursuing

[similar] local healthcare reforms." *Id*. at 29. ERISA was meant to prevent this kind of local variation in benefits regulation.

Setting aside their inconsistency with ERISA's aim of uniform federal regulation, moreover, these ordinances undoubtedly will continue to invite legal challenges, burdening courts and litigants alike. *See, e.g.*, Compl. ¶ 5, *Airlines for America v. City & Cnty. of San Francisco*, No. 21-cv-02341 (N.D. Cal. Mar. 31, 2021) (challenge to San Francisco ordinance that regulates "how airlines that operate at San Francisco International Airport ('SFO') provide healthcare benefits to their employees"). The time for the Court's intervention is now.

C. *Golden Gate* Conflicts with Numerous Supreme Court Precedents and Should Be Discarded

Finally, *en banc* review is warranted because *Golden Gate* conflicts with a bevy of Supreme Court precedents, confirming that it should be overruled.

1. To begin, *Golden Gate* conflicts with *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). That case concerned a Washington State law that purported to dictate the rules for determining pension plan beneficiaries in cases of divorce. Whereas plan documents established one set of rules for identifying beneficiaries, Washington law imposed a different set of rules. Like the ordinance at issue here and in *Golden Gate*, however, "the Washington statute allow[ed] employers to opt out" of the beneficiary-designation statute. *Id.* at 150. The State there argued that the law was not preempted because employers could "avoid changing their current ERISA

plans" by exercising their opt-out right. *Golden Gate Dissent*, 558 F.3d at 1007. The Court rejected that argument, holding the law preempted because it "dictate[d] the choices facing ERISA plans with respect to matters of plan administration," including whether or not to take the opt-out path. *Egelhoff*, 532 U.S. at 150 (internal quotation marks and citation omitted).

Golden Gate came to precisely the opposite conclusion, as did the panel in this case. Under *Golden Gate*, an ordinance designed to regulate the substance of ERISA-covered healthcare benefits can "sidestep[] [ERISA] preemption," simply by offering a right to pay cash directly to the employee. *Golden Gate Dissent*, 558 F.3d at 1006. That rationale cannot be squared with *Egelhoff*, under which an opt-out right does not save a regulation of ERISA-covered benefits from preemption.

The Fourth Circuit in *Fielder* based its decision on this very reasoning. "Even if a state law provides a route by which ERISA plans can avoid the state law's requirements," the court explained, "taking that route might still be too disruptive of uniform plan administration to avoid preemption." 475 F.3d at 193 (citing *Egelhoff*, 532 U.S. at 151). Under laws like Seattle's ordinance here, plan sponsors and administrators must constantly "keep an eye on conflicting state and local [laws]" and assess and choose whether they must alter their ERISA plans or instead implement non-ERISA "regulatory channel[s]." *Id.* at 197. That is about as clear-cut a case for ERISA preemption as the Court will ever see.

2. We showed in our panel merits briefing (Appellant's Br. 28-41; Reply Br. 13-20 (Dkt. 38)) that a business's decision to offer a cash benefit directly to its employees under Chapter 14.28 would require the establishment of a fully-formed ERISA-covered "welfare plan" within the meaning of 29 U.S.C. § 1002(1). *Golden Gate*'s contrary *dictum* was unreasoned and wrong, and it is worthy of reconsideration in its own right. But even if we are incorrect about that, it means only that *Golden Gate* conflicts further with *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992).

In *Greater Washington*, the Supreme Court considered a local law requiring the level of benefits under *non*-ERISA plans to mirror the level of benefits offered under employers' ERISA-covered plans. The Supreme Court struck the law as preempted. Here, Seattle's ordinance, and San Francisco's before it, bear the same basic feature as the law at issue in *Greater Washington*: Both determine the non-ERISA option's compliance by measuring whether the non-ERISA benefit matches the size and scope of an ERISA-covered benefit. That is to say, employers subject to either ordinance "can only determine their compliance by using their current ERISA plans as a reference." *Golden Gate Dissent*, 558 F.3d at 1008.

The panel in *Golden Gate* attempted to distinguish *Greater Washington* on the theory that the comparators in *Greater Washington* were "the level[s] of *benefits* provided by the" plans, whereas the comparators in the San Francisco ordinance were "the *payments* provided by the employer." *Golden Gate*, 546 F.3d

at 658. But this Court, in a decision affirmed by the Supreme Court, long ago rejected differential treatment, for ERISA preemption purposes, of state laws that "relate to [employer] *contributions* rather than the composition or administration of *benefits*." *Local Union 598 v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1218 (9th Cir.), *summarily aff'd*, 488 U.S. 881 (1988). The "'contribution/benefit' dichotomy, while perhaps superficially appealing, is unsupported by the law." *Id.* at 1219.

3. Finally, *Golden Gate* (and the panel's application of it in this case) further conflicts with intervening Supreme Court precedent concerning the presumption against preemption. *Golden Gate* started "by noting that state and local laws enjoy a presumption against preemption," 546 F.3d at 647, and the presumption figured prominently in the Court's rejection of preemption. *See id.* at 647-48, 654. The panel here uncritically repeated *Golden Gate*'s adoption of the presumption against preemption. *See* Slip op. 2.

But that position has since been rejected by the Supreme Court. In *Franklin*, the Court stated that, 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." 136 S. Ct. at 1946 (internal quotation marks and citation omitted). Although *Franklin* involved a bankruptcy statute, the Court cited for

support its then-most recent ERISA preemption case—*Gobeille*—for the anti-presumption proposition. *See id.*

Surveying this and related developments, the Fifth Circuit, in an ERISA case, recently held that the Supreme Court "has since changed its position on the presumption against preemption where there is an express preemption clause." *Dialysis Newco*, 938 F.3d at 258. "Given that *Franklin* specifically references *Gobeille*—an ERISA case—when holding that there is no presumption [against] preemption when the statute contains an express preemption clause, we conclude that holding is applicable here." *Id.* at 259. The conflict with the Fifth Circuit on the question whether the presumption against preemption applies in ERISA cases is another reason to grant rehearing.

CONCLUSION

The petition for rehearing *en banc* should be granted.

April 30, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 40-1, the undersigned counsel for appellant certifies that this petition:

(i) complies with the type-volume limitation of Rule 35(b)(2)(A) because it contains 4,186 words, including footnotes and excluding the parts of the petition exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

April 30, 2021 /s/ *Anthony F. Shelley*

CERTIFICATE OF SERVICE

I hereby certify that that on April 30, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

April 30, 2021 /s/ *Anthony F. Shelley*

FILED

MAR 17 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ERISA INDUSTRY COMMITTEE, Plaintiff-Appellant, v. CITY OF SEATTLE, Defendant-Appellee.	No. 20-35472 D.C. No. 2:18-cv-01188-TSZ MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted March 1, 2021
Seattle, Washington

Before: TASHIMA, RAWLINSON, and BYBEE, Circuit Judges.

The ERISA Industry Committee (ERIC) appeals the district court's Rule 12(b)(6) dismissal of its action against the City of Seattle (the City). In its complaint, ERIC asserted that the Employee Retirement Income Security Act of 1974 (ERISA) preempted Seattle Municipal Code (SMC) § 14.28, a health benefits

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ordinance requiring hotel employers and ancillary hotel businesses to provide money directly to designated employees, or to include those employees in the employers' health benefit plan.

Contrary to ERIC's argument, "state and local laws enjoy a presumption against [ERISA] preemption when they clearly operate in a field that has been traditionally occupied by the States." *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 546 F.3d 639, 647 (9th Cir. 2008) (citation and internal quotation marks omitted); *see also Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019). Even so, unlike the statute in *Gobeille v. Liberty Mutual Ins. Co.*, which required disclosure of health care information and payments, SMC § 14.28 does not "enter[] a fundamental area of ERISA regulation," such as reporting and disclosure of health care claims and payments. 136 S. Ct. 936, 940, 946 (2016); *see also N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) ("[N]othing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.") (citations omitted).

ERISA 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). We agree

with the district court that SMC § 14.28 does not relate to any employee benefit plan in a manner that triggers ERISA preemption. The outcome of this case is controlled by our decision in *Golden Gate*. *See* 546 F.3d at 661 (concluding that a San Francisco ordinance requiring business to make certain minimum health care expenditures on behalf of covered employees was not preempted by ERISA). As in *Golden Gate*, SMC §14.28 does not "relate to" employers' ERISA plans because an employer "may 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 [a third party]." *Id.* at 655-56.

ERIC argues that *Golden Gate* is distinguishable because the San Francisco ordinance did not include a direct payment option from the employer to the employee. However, we expressly noted in *Golden Gate* that there was no ERISA preemption "even if the payments are made by the employer directly to the employees who are the beneficiaries of the putative plan." *Id.* at 649 (internal quotation marks omitted). *Golden Gate* relied for this proposition on *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 3, 16 (1987), which explicitly addressed direct payment from the employer to the employee. *See Golden Gate*, 546 F.3d at 649.

Because ERIC failed to distinguish SMC § 14.28 on any meaningful point from the ordinance upheld in *Golden Gate*, dismissal in favor of the City was consistent with our precedent. *See* 546 F.3d at 661.

AFFIRMED.