No. 20-35472

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

BRIEF FOR THE AMERICAN BENEFITS COUNCIL, HR POLICY ASSOCIATION AND BUSINESS GROUP ON HEALTH AS AMICI CURIAE IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Benefits Council, HR Policy Association, and Business Group on Health have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

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INTEREST OF AMICI CURIAE[1]

The American Benefits Council (the "Council") is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world's largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

The HR Policy Association ("HRPA") is the leading organization representing chief human resource officers of over 380 of the largest employers in the United States. Collectively, their companies provide health care coverage to over 20 million employees and dependents in the United States and spend more than $120 billion annually on health care benefits and related taxes.

Business Group on Health (the "Business Group") represents 436 primarily large employers, including 73 of the Fortune 100, who voluntarily provide health, disability, leave, and other benefits to over 55 million American employees, retirees, and their families.

[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no party's counsel authored this brief either in whole or in part, and no one other than amici, amici's members, and their counsel, contributed money intended to fund preparing or submitting this brief.

This is a case of great significance for amici and their members, who are at the forefront of the employer-sponsored health coverage system and who offer many millions of American workers employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including comprehensive health coverage. As most specific to this case, the Seattle ordinance at issue, Seattle Municipal Code 14.28, ("SMC 14.28" or the "Ordinance" or the "Seattle Ordinance") will directly impact a number of Council, HRPA, and Business Group members. More generally, amici's interest is significantly amplified because the ERISA preemption issues before the Court are of the utmost importance, as the regulatory uniformity provided by ERISA's sweeping preemption provision ensures that multi-state and national employers offering their employees ERISA-covered benefits can do so efficiently. This reduces the overall burden of administration and costs that are borne by employers and, typically, shared in part by employees. Because of "the centrality of pension and welfare plans in the national economy and their importance to the financial security of the Nation's work force," *Boggs v. Boggs*, 520 U.S. 833, 839 (1997), the protection of uniform plan administration is essential to the interests of employers and employees alike. Equally importantly, ERISA preemption helps ensure that employers can fairly and equitably extend health coverage and other

employee benefits to workers without regard to their place of residence or employment.

Summary of Argument

Congress created ERISA not only to establish important procedural protections for participants and beneficiaries with respect to certain employer-sponsored benefits plans, but also to create a uniform regulatory structure to promote the offering of these benefit plans in the first place. When enacting ERISA, Congress recognized that many employers operate in more than one state or locality. Thus, to encourage the sponsorship and maintenance of these programs, Congress understood that the governing regulatory framework must ensure that employers are able to look to a single set of federal laws. If, instead, employers were confronted with myriad state and local laws, that could frustrate or impede an employer's establishment or maintenance of employee benefit plans.[2]

This case presents the question of whether ERISA's preemption provision permits state and local governments to mandate that private employers choose between providing coverage of a certain value through the employer's ERISA-governed plan or making certain enumerated payments to certain employees for the

[2] Employers that operate across multiple States have stressed the importance of pre-emption under ERISA. According to HRPA's February 2018 survey, when asked to select the top three factors out of seven that would serve as "tipping points" for their company, 37 percent selected, "Erosion of ERISA such that self-insured plans become subject to substantially differing state taxes and fees." American Health Policy Institute, *"Tipping Points" of Employer-Sponsored Health Insurance* 6 (2018) http://www.americanhealthpolicy.org/Content/documents/resources/AHPI_Tipping_Points_2018.pdf.

specified purpose of providing of health coverage. As is clear from both Congressional intent in drafting ERISA and the forty-some years of Supreme Court precedent that has followed, the answer is a resounding "No."

While the District Court relied on this Court's decision in *Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), in holding that the Seattle Ordinance is not preempted by ERISA, that reliance fails to distinguish the unique and prescriptive nature of the Seattle Ordinance, and ignores significant jurisprudential developments with respect to the scope of ERISA preemption since this Court ruled in *Golden Gate.* Furthermore, the potential disruptive effects of multiple states and localities adopting similar requirements with respect to ERISA-covered plans highlights the fact that upholding the District Court's ruling clearly frustrates Congress' intent in adopting the sweeping preemption provision included in ERISA.

The Seattle Ordinance requires certain hotel industry employers to establish new ERISA-covered plans or to modify the terms of existing ERISA-covered plans, in contravention of the over forty years of case law developed around ERISA preemption. While the terms of the Ordinance are cabined to a specific industry, the repercussions of the Court permitting a single locality to exercise this type of power over ERISA-covered plans reach much farther and threaten to alter the regulatory landscape materially and irreparably for employee benefit plans –

not solely health plans – in the United States, to the detriment of plans, participants, and beneficiaries.

Argument

I. The Ordinance Upsets a Key Component of ERISA's Design – Uniformity of Regulation.

By including a broad preemption provision in ERISA, Congress made a deliberate policy choice to render federal law the sole regulatory regime for employee benefit plans. "In enacting ERISA, Congress also intended to safeguard employers' interests by 'eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans.'" *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1501 (9th Cir. 1993) (internal citations omitted). One key sponsor of the bill characterized ERISA's preemption provision as its "crowning achievement" and declared that Congress "round[ed] out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent). "It should be stressed that with the narrow exceptions specified in [ERISA], the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments,

or any instrumentality thereof, which have the force or effect of law." H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), 1974 U.S.C.C.A.N. 5038, 5188.

In so doing, Congress was able to "minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government …, [and to prevent] the potential for conflict in substantive law … requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 558 F.3d 1000, 1007 (9th Cir. 2009) ("*Golden Gate II*") (Smith, M. dissenting) (alteration in original) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans. v. Travelers Ins. Co*., 514 U.S. 645, 656-57 (1995)).

Uniformity of regulation is essential for longevity of our employer-sponsored benefit plan system. Uniformity creates important administrative efficiencies that permit plans to provide more generous benefits tailored to the unique needs of employees. It ensures that employers face "'a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.'" *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). This structure permits employers to focus their efforts on providing appropriate and meaningful benefits that are best suited for their workforce based on their own unique business situations. Additionally,

uniformity also ensures that employers can equitably offer similarly-situated employees the same benefits regardless of where they live or work. As any employer will attest to, and as noted by this Court, "[u]niformity is essential to ensuring that employees understand what benefits they are entitled to and how to obtain them." *Golden Gate II*, 558 F.3d at 1009.

The benefits of uniformity are apparent in our health care landscape today. For more than 40 years, employers have proven to be the backbone of the American health coverage system. More than 178 million Americans, or 55 percent of the U.S. population, receive health insurance through employment-based benefit plans. Edward R. Berchick et al., *Health Insurance Coverage in the United States: 2018* 3 (U.S. Dept. of Commerce, Nov. 2019), https://www.census.gov/library/publications/2019/demo/p60-267.html. Congress enacted ERISA to safeguard "the continued well-being and security" of the "millions of employees and their dependents [who] are directly affected by these plans." 29 U.S.C. § 1001(a).

By the time of ERISA's enactment, "the operational scope and economic impact of such plans [was] increasingly interstate." *Id*. ERISA's broad preemption of related state laws serves as a principal means to accomplish the "congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Egelhoff v.*

Breiner ex rel. Egelhoff, 532 U.S. 141, 150 (2001) (alterations in original) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

The administrative burdens imposed by conflicting state laws are no mere theoretical concern. They have concrete consequences for the many Americans who depend on ERISA plans. Evidence shows that "each one percent increase in … plans' costs … results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers*: 1999-2003, at iii (1998). The cumulative effect of "[r]equiring ERISA administrators to master the relevant laws of 50 States" is to massively increase the costs of maintaining and operating a multi-state employee benefits plan. *Egelhoff*, 532 U.S. at 149.

Furthermore, the regulatory uniformity imposed by ERISA gives employers the flexibility both to provide the type of benefits best suited to the needs of their employees and to provide them in an expedient fashion. For example, in response to the COVID pandemic, large employer plans quickly pivoted to provide their participants and beneficiaries with increased access to telemedicine to ensure that

non-COVID-related care was available.[3] Without regulatory uniformity, these types of changes would be impossible to accomplish on the timeframes necessary.

A useful contrast that highlights the problems associated with the potential inconsistent and often contradictory regulation of employee benefits arises in the context of state and local paid leave laws. Unlike in the health benefits context, federal U.S. Department of Labor regulations[4] make it difficult for employers to establish their paid leave programs as ERISA plans. Consequently, multi-state employers generally are subject to a variety of leave laws at the local, state, and even federal level. In a recent survey of employers by the Business Group, 77 percent of respondents indicated that complying with state and local leave laws was their "greatest challenge" in administering their leave programs, with 70 percent of respondents preferring a uniform federal approach to leave laws.[5]

The following hypothetical illustrates the complexities and administrative burdens that can confront employers when they have to comply with a myriad of state, city and local laws. Assume a hypothetical Company is domiciled in New York City and has employees living and working not only in New York City, but

[3] Business Group on Health. *2021 Large Employers' Health Care Strategy and Plan Design Survey* at 14-15 (August 2020) https://ww2.businessgrouphealth.org/acton/attachment/32043/f-d3f18f25-55c4-4652-a3a3-f19082cf4819/1/-/-/-/-/2021 PDS - Full Report.pdf.

[4] 29 C.F.R. § 2510.3-1(b).

[5] Business Group on Health. *2020 Large Employers' Leave Strategy and Transformation Survey* at 7 (January 2020) https://ww2.businessgrouphealth.org/acton/attachment/32043/f-4cb01d6f-09d8-4dcf-8423-7c75a5a62f83/1/-/-/-/-/2020%20Large%20Employers%20Leave%20Strategy%20and%20Transformation%20Survey%20%282%29.pdf.

also in neighboring cities and towns across the states of New York, New Jersey, and Connecticut. For the Company to ensure compliance with applicable city, state, and other local leave laws, the Company must take account of at least fourteen state and local laws, including not only the New York City[6] paid leave law, but also the paid sick leave laws of Westchester County[7] and New York State[8], the Connecticut[9] and New Jersey[10] state laws, and at least nine local New Jersey[11] laws.

As this one example demonstrates, the burdens imposed on even a tristate employer can be severe. When extrapolated to the burdens imposed upon employers operating not just in the three states noted above, or the fifteen districts within the Ninth Circuit, but in all fifty states, the administrative and compliance burden becomes almost insurmountable, with material impacts both on the generosity of employee benefits that may be provided, and adverse and significant economic effects for employers and employees more generally.

[6] New York City, N.Y., Admin. Code § 20-911 – § 20-924.
[7] Westchester Cty., N.Y., Code of Ordinances § 585.01 – § 585.16.
[8] N.Y. Lab. Law § 196-b (McKinney 2020).
[9] Conn. Gen. Stat. Ann. § 31-57r – § 31-57x (West 2019).
[10] N.J. Stat. Ann. §§ 34:11d-1-11 – § 34:11d-11 (West 2018).
[11] Twp. of Bloomfield, N.J. Code § 160-1 – §160-16; City of East Orange, N.J. Code § 140-1 – § 140-15; Twp. Of Irvington, N.J. § 277-1-14; City of Jersey City, N.J. Ordinances § 4-1 – §4-10; Twp. Of Montclair, N.J., Gen. Legis. § 132-1 – §132-14; City of Newark, N.J., Ordinance 13-2010; City of Passaic, N.J., Gen. Legis. § 128-1 – § 128-14; City of Patterson, N.J., Gen. Legis. § 412-1 – § 412-13; City of Trenton, N.J., Code § 230-1 – § 230-13.

II. The Ordinance Mandates the Creation of an Employee Benefit Plan and Accordingly Violates ERISA's Preemption Provision.

ERISA, and thus its preemptive force, generally applies to those programs that provide benefits to employees in an employment relationship. *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc). The term "employee welfare benefit plan" means any plan, fund or program which is established by an employer to the extent that such program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical or hospital benefits or benefits in the event of sickness or disability. 29 U.S.C § 1002(1). Thus, under ERISA's coverage rules, an ERISA-covered welfare plan exists if the arrangement constitutes a (1) plan, fund or program, (2) "established or maintained" by an employer, and (3) its purpose is to provide one of the types of benefits enumerated in ERISA section 3(1) to participants and beneficiaries. "[A] 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373. "Very few offers to extend benefits will fail the test laid out in *Donovan*, which requires neither formalities nor elaborate details." *Winterrowd v. Am. Gen. Annuity Ins. Co*., 321 F.3d 933, 939 (9th Cir. 2003). The *Donovan* approach

reinforces, and is wholly consistent with, the dictionary definition of "plan, fund, or program" described in the Plaintiff-Appellant's brief. Pls.' Br. 28-30.

Key to the determination of whether an ERISA plan has been created is the presence of "an ongoing administrative program." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987). "While an employer's one-time grant of some benefit that requires no administrative scheme does not constitute an ERISA 'plan,' a grant of a benefit that occurs periodically and requires the employer to maintain some ongoing administrative support generally constitutes a 'plan.' *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987)." *Retail Indus. Leaders Ass'n v. Fiedler*, 475 F.3d 180, 190-91 (4th Cir. 2007); *accord Collins v. Ralston Purina Co.*, 147 F.3d 592, 597 (7th Cir. 1998) (finding an ongoing administrative scheme was required, and therefore an ERISA plan was established, when a company exercised discretion in determining eligibility for benefits). In short, "[b]ecause the definition of an ERISA 'plan' is so expansive, nearly any systematic provision of healthcare benefits to employees constitutes a plan." *Retail Industry Leaders Ass'n*, 475 F.3d at 190-91.

In *Golden Gate*, this Court held that a City of San Francisco ordinance mandating payment, to the City, by private employers that do not provide health coverage to their employees was not an ERISA plan. 546 F.3d at 647. Significantly, the San Francisco ordinance at issue in *Golden Gate* differs

materially from the one here. The plan, fund or program imposed on employers by the City of San Francisco resulted in payments to a City-run health care system that may or may not have provided health benefits to any employees of the contributing employer. In material contrast, SMC 14.28 mandates that the covered employer make specific financial payments in specific amounts *to a specific employee* for the purpose of providing health coverage to *that* specific employee. Thus, while the San Francisco ordinance indeed compelled action via the contribution of employer funds to a broader City-run entity, Seattle's requirement goes much further in requiring individualized assessment of employment and eligibility and the repeated payment of a specific amount by the employer to its own *employee* for the purpose of providing health coverage to the employee. *See* Pls.' Br. 41-46.

Notably, this Court in *Golden Gate* held that the payment to the City, as opposed to the employee, eliminated any doubt that no ERISA-covered plan existed. The Court analogized the San Francisco ordinance to the severance requirement in *Fort Halifax* as providing very limited discretion in the administration of the arrangement, which limited the potential for the types of abuses that ERISA was designed to prevent, *i.e.*, mismanagement of plan

resources.[12] Because the statute, not the employer, determined the benefit level and did not allow for the type of discretion ERISA was enacted to ensure was not abused, the Court determined that the San Francisco ordinance did not result in the creation of an ERISA-covered plan. *Golden Gate*, 546 F.3d at 651.

Unlike the state severance requirement in *Fort Halifax* and even the payment requirement in *Golden Gate*, the Seattle Ordinance requires each *employer* (*i.e.*, not the City) to conduct ongoing determinations regarding both the employee's *eligibility* for the payment as well as the *amount* of the payment. SMC 14.28.030 and 14.28.060. Additionally, the Seattle Ordinance requires that each employer (i) vary the benefit amount depending on the employee's family size, (ii) make ongoing payments to the specific employee, and (iii) modify those payments depending on whether or not the specific employee is enrolled in any other coverage. *Id*. These determinations that are required of Seattle employers, regardless of whether mandated by a local ordinance or the written terms of an

[12] While ERISA was enacted primarily to prevent the mismanagement of plan assets, that is but one aspect of its over-arching goal of protecting the benefits to which employees are entitled. Those benefits can be unavailable due to mismanagement of assets through the exercise of improper discretion by plan fiduciaries, but can also be rendered unavailable due to recordkeeping and accounting errors. The possibility of those errors exists just as much for an employer in meeting the requirements of the Ordinance as it does for any other employer offering a group health plan subject to ERISA. ERISA provides both notice and disclosure requirements as well as a claims and appeals process specifically designed by Congress and implemented by the Department of Labor to ensure that benefits owed are provided pursuant to the terms of the plan. *See* 29 U.S.C. §§ 1024(b), 1133; 29 CFR § 2560.503-1. In short, under the Ordinance, when an employer makes the required eligibility determinations, makes payments to employees for health coverage as set out in the Ordinance, and retains records related to those payments in the manner required by the Ordinance, the employer has sponsored an employee benefit plan under ERISA.

ERISA plan, constitute an ongoing administrative scheme sufficient to create an ERISA-governed welfare benefit plan. *Aloha Airlines*, 12 F.3d at 1505.

Moreover, Congress clearly understood in enacting ERISA that state-imposed benefit mandates might result in the creation of an ERISA plan. To preserve certain domains of state regulation from ERISA's preemptive power, Congress included a coverage provision that specifically excludes plans maintained by the employer "solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3). The presence of this provision provides clear evidence that ERISA contemplates a state-mandated benefits arrangement can meet the definitional requirements of an employee welfare benefit plan subject to ERISA. Only the exclusion provided in section 4(b)(3) of ERISA prevents these limited types of plans from being subject to the statute. Of course, Congress did not include any comparable exclusion for group health plans.[13]

While Plaintiff-Appellant ably explains that the Ordinance at issue in this case is preempted, amici also wish to emphasize the potential implications of this

[13] We note that Congress also provided in the statute an express savings clause for state regulation of insurance policies as well as multiple employer welfare arrangements (MEWAs), the latter of which was added in 1983. Act of Jan. 14, 1983, Pub. L. No. 97-473, 96 Stat. 2605, § 302. This clearly indicates that Congress has repeatedly considered the extent to which states and localities should be permitted to regulate ERISA-covered benefits. And while Congress provided exceptions from the scope of ERISA preemption for workers compensation, unemployment insurance, and disability insurance, it is clear that Congress stopped short of allowing states to regulate an employer's provision of benefits for the purpose of health coverage.

Court's ruling not only on employers in Seattle and with respect to health coverage, but more broadly, with respect to employers in other jurisdictions and all types of employer-provided benefits covered by ERISA.

If the Court fails to find the Ordinance is preempted, there is the very real possibility, if not likelihood, that other states, cities, towns, and other localities will follow suit in enacting similar laws. And those governing bodies may not stop merely at enacting laws regarding major medical coverage, but could enact similar laws with respect to numerous other types of ERISA-governed benefits, such as dental, vision, pension, retirement and more, merely by mandating that the employer make a statutorily-fixed payment "for the purpose" of providing a specific benefit or change the terms of the underlying benefit plan. The potential end result is not only inconsistent with ERISA's legal framework but also creates a confounding and disjointed patchwork of laws that will serve to increase costs and burdens on employers, and lead to disparate treatment of employees, with respect to many types benefits Congress intended to regulate under ERISA.

III. Even if the Court Holds that the Ordinance Does Not Require Creation of an ERISA-Governed Benefit Plan, ERISA Nonetheless Preempts the Operative Requirements of the Ordinance.

In section 514(a) of ERISA, Congress expressly preempted any state law that "relates to" an ERISA-covered employee benefit plan. 29 U.S.C. § 1144(a).

A state law "relates to" a plan, and implicates preemption, when it has a "connection with or reference to" an ERISA plan. *Egelhoff*, 532 U.S. at 147.

A state law has an impermissible reference to an ERISA plan and is preempted where it "acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). "ERISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" *Id*. (quoting *Egelhoff*, 532 U.S. at 148).

In the intervening years since this Court decided *Golden Gate*, the Supreme Court has further clarified the scope of ERISA preemption.[14] In *Gobeille,* the Court made clear that "plan reporting, disclosure, and—by necessary implication—recordkeeping . . . are fundamental components of ERISA's regulation of plan administration. Differing, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability." 136 S. Ct. at 945. Here, it is without argument that when employers comply with the Ordinance through existing group health plans, the

[14] Amici wish to echo Plaintiff-Appellant's clear explanation of the threshold matter that there is no presumption against ERISA preemption here, as well as Plaintiff-Appellant's discussion of the fact that the Ordinance is fully distinguishable from the San Francisco payment mandate in *Golden Gate*. Nevertheless, even if *Golden Gate* somehow had salience for the Ordinance, it would be ill-advised to extend *Golden Gate's* reasoning to the facts of this case, as it was built upon a presumption against ERISA preemption that no longer applies. *See* Pls.' Br 20-26, 45-46, and note 7.

Ordinance imposes a host of administrative requirements on those existing ERISA-covered group health plans, including recordkeeping requirements, reporting requirements, and disclosure requirements. SMC 14.28.100, 14.28.110, and 14.28.150.

In light of the foregoing, even if the Ordinance is not found to compel the establishment of an ERISA-governed plan through the direct-payment option, the Ordinance fits squarely within the type of "differing, or even parallel" state and local regulation the Supreme Court has held preempted by ERISA with regard to the other options for complying with the Ordinance (*i.e.*, expanding coverage under the employer's existing ERISA-covered group health plans). Accordingly, the Ordinance must fail for this reason as well.

IV. The Court Should Find the Ordinance Preempted by ERISA and Protect ERISA's Long-Standing Commitment to Uniformity in Plan Administration.

When Congress enacted ERISA in 1974, it established a regulatory framework premised upon the idea that nationally uniform plan administration is essential to enable multi-state employers to offer employee benefits. Congress understood that the principle of uniformity would necessarily limit the ability of states and localities to regulate ERISA-governed plans. This is best evidenced by Congress having provided for certain express exceptions from ERISA preemption when it enacted ERISA (specifically, with respect to workers compensation,

disability, and unemployment insurance benefits). Over the near 50-year period that has since followed, Congress has amended the scope of ERISA preemption, but has never wavered from its commitment to the core foundational principle of ERISA – that employers operating across a multitude of state and local jurisdictions need regulatory certainty and, thus, uniformity of laws.

Far from challenging the value of comprehensive health coverage, members of the Council, HRPA, and the Business Group are at the forefront of the employer-sponsored health coverage system. Our member companies are the model to be emulated in terms of providing comprehensive coverage for employees and their families. The COVID-19 pandemic has underscored the compelling need for health benefit coverage to protect individuals at the same time that employers are experiencing the economic strains of the pandemic. In the face of these challenges, many employers are maintaining furloughed employees on the company health plan (as evidenced by a recent informal Council survey which indicated all respondents were doing so), despite the severe financial challenges that caused those workers to be furloughed. The loss of ERISA preemption for employers will exacerbate the difficulty they face in continuing to extend and subsidize the costs of that coverage for their workforces. This brief conveys the importance of ERISA preemption in facilitating and reinforcing the employer-provided benefit system which is the source of health care coverage for the

majority of Americans – tens of millions more than those covered by government programs or individual insurance. *Health Insurance Coverage in the United States: 2018* at 3 (U.S. Dept. of Commerce, Nov. 2019).

Like many courts before it, this Court must give effect to the intent of Congress in adopting a nationally uniform regulatory framework for employee benefit plans established under ERISA. The failure to do so is all but certain to result in the proliferation of laws like the Ordinance, with severe and adverse consequences for employees and the employer-sponsored benefit system. As a result, both ERISA's legal framework and the inevitable policy implications require that the Ordinance be held preempted.

Conclusion

For the reasons above, the appeal should be granted in full.

September 3, 2020

/s/ Lars C. Golumbic
Lars C. Golumbic

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 3, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on the following:

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