IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 20-35472

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 OF THE RESTAURANT LAW CENTER, WASHINGTON HOSPITALITY ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND AMERICAN HOTEL & LODGING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No public held company has a 10% or greater ownership interest in *amici curiae.*

/s/ Gabriel K. Gillett

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

The Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. 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 Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the 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 Washington Hospitality Association is the state's leading hospitality trade group, representing more than 6,000 members of the hotel, restaurant and hospitality industry. The Washington Restaurant Association (established 1929) and the Washington Lodging Association (established 1920) joined forces in 2016 to create

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

the Washington Hospitality Association that supports and advocates for restaurateurs, hoteliers and related hospitality industry professionals in the state capitol, communities statewide, and, when needed, in court filings on issues of great importance to the industry, such as this one.

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. The National Federation of Independent Business ("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.

For more than a century, the American Hotel & Lodging Association ("AHLA") has been the sole national organization representing all segments of the U.S. lodging industry, including global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. The hotel industry is vital to the nation's economic health. With over 8 million employees across the country, the industry

provides $75 billion in wages and salaries to our associates and generates $600 billion in economic activity from the five million guestrooms at more than 54,000 lodging properties nationwide. This is an industry comprised largely of small businesses, with nearly 60 percent of all hotels falling under the Small Business Administration's definition of what constitutes a small business in the lodging sector.

Amici and their members have a significant interest in the issues raised by the ERISA Industry Committee ("ERIC") on appeal: namely, whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts Seattle's 2019 healthcare ordinance, Seattle Municipal Code 14.28 ("SMC 14.28" or "Ordinance"). SMC 14.28 imposes new, burdensome obligations on large hotel employers and certain so-called "ancillary hotel businesses" with 50 or more employees worldwide. Given the diversity of the restaurant and hospitality industries—which include many small, family-run businesses, with a wide range of service models, including many operating in, around, or as partners with large hotels—and the diversity of small businesses more generally, *amici* submit this brief to encourage the Court to invalidate SMC 14.28 and to ensure that the City of Seattle (and other municipalities that may seek to follow in Seattle's wake) cannot impose improper mandates on restaurants and hotels. Especially now, as businesses are facing unprecedented economic and operational challenges posed by government shutdown orders and

adapting to a post-COVID world, it is critical that the Court not allow SMC 14.28 to stand to avoid further strain on an important American industry.

SUMMARY OF ARGUMENT

ERIC ably explains in its opening brief why this Court should reverse the District Court's decision finding that SMC 14.28 is not preempted. To complement those arguments, *amici curiae* write separately to highlight the fundamental legal errors that underlie the District Court's decision, and the very real economic impact it will have on already struggling restaurant and hospitality industries and on small businesses throughout the economy.

I. The District Court's decision ignores ERISA's underlying purpose: the creation of a national, uniform system for regulating employee benefit plans. ERISA's text, its legislative history, and the Supreme Court precedent interpreting it all illustrate that ERISA's drafters were chiefly concerned with eliminating the financial burdens associated with conflicting state employee benefit laws. By preserving SMC 14.28, the District Court has recreated precisely what ERISA was meant to eliminate, as both small and large businesses operating in Seattle may feel pressure to comply with two very different benefit regimes—one sanctioned by ERISA, the other operating in its shadow. This system of competing regulations would be impermissible under any circumstance. But SMC 14.28 is particularly problematic in light of the toll the COVID-19 pandemic and government shutdown

orders have taken on the restaurant and hospitality industries, as well as other small businesses. Thousands of businesses have closed and millions of their employees are out of work. At a time when every level of government should be working to protect the restaurant and hospitality sectors as well as small businesses economy-wide, Seattle's ordinance adds an extra burden that, faced with the prospect of either complying or risking fines or other penalties, many businesses will not be able to bear.

II. In reaching its erroneous decision, the District Court misapplies the presumption against preemption and this Court's decision in *Golden Gate Restaurant Ass'n v. City of San Francisco*, 546 F.3d 639 (9th Cir. 2008), which is founded on that now-outmoded presumption and inapposite in any event. The Supreme Court's recent cases *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016) and *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016) undermine the very foundation of the District Court's decision—that a presumption against preemption counsels against striking down SMC 14.28—and therefore *Golden Gate* should be deemed overruled. Recognizing that an express statutory preemption provision overrides a judge-made presumption is critical for the restaurant and hospitality industries, which could face a patchwork of laws and regulations if ERISA's certainty and uniformity were undermined. To avoid higher costs for employers—and to discourage other cities from attempting to engraft their

own (misguided) preferences onto a national regulatory regime—this Court should emphasize what the Supreme Court has made clear: that the presumption against preemption has no force or effect when Congress has enacted an express preemption provision.

ARGUMENT

I. The District Court's Decision Ignores ERISA's Call for Uniform Regulation at a Time When It Is Most Needed.

Congress enacted ERISA with the express purpose of creating a uniform regulatory scheme for employee benefits nationwide. Its intent—as made clear by the express preemption provision it enacted, and as recognized for decades by the judiciary—was to ease the administrative burden on employers and their employees caused by a balkanized employee benefit system. *See Dishman v. Unum Life Ins. Co. of Am.*, 269 F.3d 974, 981 (9th Cir. 2001). The District Court's decision openly flouts that intent by preserving a local ordinance that achieves precisely what ERISA was meant to preempt: the creation of burdensome local rules governing the administration of employee benefit plans. Especially at a time when hospitality businesses are facing unprecedented challenges and working hard just to keep their doors open—in addition to attempting to adapt to an uncertain future—the additional costs, burdens, and other obligations created by Seattle's ordinance come at exactly the wrong time.

A. ERISA Created a Nationally Uniform System Governing the Administration of Employee Benefit 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). These privately negotiated benefit plans rarely lived up to their promise. *Id.* 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 emergent 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—once resistant to 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 & n.5 (1983) (quoting 29 U.S.C. § 1002(1)). 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. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 651 (1995).

In passing ERISA, Congress aimed to replace the inconsistent state benefit plan laws with a single, uniform, national scheme. New York Senator Jacob Javits, ERISA's primary sponsor, recognized that "the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private

employee benefit programs." *Shaw*, 463 U.S. at 99 n.20 (quoting 120 Cong. Rec. 29942). During Committee debate on the bill, Javits's former aide, Frank Cummings, further warned that "if the States are to legislate in this field, . . . only chaos can result." Wooten, *supra* at 34 (quoting Senate Committee on Finance, *Private Pension Plan Reform: Hearings before the Committee on Finance*, 93d Cong., 1st sess., 1973).

Other House and Senate members echoed these sentiments, *see Shaw*, 463 U.S. at 99, and pushed for what has been described as "the most expansive preemption provision in any federal statute." *Gobeille*, 136 S. Ct at 947 (Thomas, J., concurring). That provision states, in "terse but comprehensive" terms, 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); *Gobeille*, 136 S. Ct. at 943. 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 M. Fox & Daniel C. Schaffer, *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)).

The Supreme Court has consistently honored the text of ERISA's express preemption provision and recognized Congress's interest in preserving a uniform,

national system for regulating employee benefits. "[Congress's] goal," according to the Court, "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). It achieved that end through what the Court has described as "an explicit congressional statement about the pre-emptive effect of its action" that departed from Congress's past practice of allowing states to construct employee benefit laws for themselves. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-23 (1981). The Supreme Court has routinely relied on this "explicit congressional statement" to invalidate state laws that regulate employer sponsored healthcare benefits, as SMC 14.28 does. *See, e.g.*, *Shaw*, 463 U.S. at 97 (invalidating a provision of the New York Human Rights Law that required employers to provide specific healthcare benefits); *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (invalidating a Pennsylvania statute that prohibited healthcare "plans from . . . requiring reimbursement in the event of recovery from a third party").

B. SMC 14.28 Runs Afoul of ERISA's National Scheme at a Time When Employers Need Uniformity More Than Ever.

Consistent with the plain 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 benefits plans. 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—including family-owned businesses with relatively limited resources—that even in good times may be somewhat constrained in attempting to tailor benefit and compliance programs to the proclivities or particular jurisdictions. *See, e.g.*, *Gobeille*, 136 S. Ct. at 945 ("Differing, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability.").

But these are challenging times for the restaurant and hospitality industries, and other small businesses, to say the least. For instance, as of April, over eight million restaurant employees—nearly two thirds of the restaurant workforce—had been laid off or furloughed due to the pandemic. National Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), https://www.restaurant.org/downloads/pdfs/business/covid19-infographic-impact-survey.pdf. By the end of April, almost 40% of all restaurants were shuttered and the restaurant and foodservice industry lost over $80 billion in sales. *Id.* Economists predict that those numbers will only continue to rise, and that by 2020's end the industry will have sustained almost $250 billion in lost revenues. *Id.*

Washington State was ground zero for the pandemic in the United States, and its restaurant industry has yet to recover. Between February and July of this year,

Washington's restaurant industry lost nearly 50,000 jobs, representing approximately 20% of its work force. National Restaurant Ass'n & Bureau of Labor Stat., *State Eating and Drinking Place Employment Trends*, https://restaurant.org/downloads/pdfs/research/state-employment-trends-july-2020.pdf. Seattle has been particularly hard hit. By the end of July, almost 70 downtown businesses had been closed, many—if not most—were restaurants and bars. Natalie Swaby, *'Downtown Core is Devastated': Seattle Restaurants and Shops Fight to Survive Pandemic*, King5 (July 19, 2020).

It is against this backdrop that Seattle passed SMC 14.28, purporting to reach an "ancillary hotel business" with 50 or more employees worldwide. *See* SMC §§ 14.28.040, 14.28.020. The law adds hundreds of dollars of additional expense for each qualified employee, 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. *Id.* § 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.

What is more, SMC 14.28 requires small and large businesses alike to navigate a complex labyrinth of conflicting employee benefit rules—with all the

attendant inefficiency—without even making clear what businesses it supposedly covers or specifying those businesses that lie outside its ambit. *See, e.g.*, *id.* § 14.28.020 (including a business that "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."). 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 and 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 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, *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), *superseded by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *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 a national pandemic, the financial and other burdens created by Seattle's experiment may be simply too much to bear for the even the hardest working members of the restaurant and hospitality industries and the broader small business community. As of July 30th, more than half of the open hotel rooms were empty countrywide, and thousands more have already been closed. American Hotel & Lodging Association, *Covid-19's Impact on the Hotel Industry*, https://www.ahla.com/covid-19s-impact-hotel-industry. Additionally, more than 20% of small business owners report they will have to close their doors if current economic conditions do not improve over the next six months. NFIB Research Center, *COVID-19 Small Business Survey (11)*, (Aug. 17-18, 2020), https://assets.nfib.com/nfibcom/Covid-19-11-Questionnaire-and-Write-up-FINAL.pdf. Governments should be redoubling efforts to protect these important pillars of our economy. Seattle has instead pushed ahead with an ordinance that aims to encumber business owners and operators with the prospect of expensive new benefit requirements, steep administrative costs, and—critically—a departure from the predictability and uniformity that ERISA provides.

II. The District Court Wrongly Applies the Presumption Against Preemption and Relied On *Golden Gate.*

The District Court's opinion disregards clear Supreme Court teaching—and builds on this Court's flawed decision in *Golden Gate*—to rescue Seattle's scheme based on a presumption against ERISA preemption where no such presumption should exist. The point is not academic; this Court should emphasize that any presumption against preemption has no application in the face of the express statutory preemption provision in ERISA. Such emphasis is particularly important to protect restaurant and hospitality businesses, as well as small businesses in other sectors, from unnecessary and burdensome attempts by localities to deviate from a uniform national regime like ERISA.

A. The "Presumption Against Preemption" Does Not Overcome ERISA's Express Preemption Clause.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). Although the courts should "[presume] that the historic police powers of the States [are] not to be superseded by . . . Federal Act," that presumption yields where it "[is] the clear and manifest purpose of Congress" to preempt state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Consequently, "any presumption against pre-emption, whatever its force in other instances, cannot

validate a state law that enters a fundamental area of ERISA regulation." *Gobeille*, 136 S. Ct. at 946.

Historically, courts have applied the presumption against preemption not as a mandate against interference in state legislation,[2] but as an interpretive canon for exploring whether an ambiguous statement from Congress intended to displace local law. Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption against Preemption*, 89 Temp. L. Rev. 95, 108-10 (2016). Consequently, most of the original cases applying the presumption occurred in the *implied preemption* context—*i.e.* when federal legislation lacked a clearly articulated preemption clause. *See id.* at 103 (defining implied preemption).

For instance, the Supreme Court first recognized the presumption against preemption in *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218 (1947). There, an Illinois grain dealer requested that the State's Commerce Commission prohibit grain warehousers (who were also competing dealers) from charging discriminatory warehousing rates to their competition. *Rice*, 331 U.S. at 221-22. In response, the

[2] As multiple scholars have recognized, the presumption against preemption does not emanate from the Constitution and therefore no constitutional entitlement to the presumption exists. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2092 (2000) ("[A]s a matter of constitutional structure, there should be no general systematic presumption against or in favor of preemption."); *see also* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 294 (2000) (explaining that the Constitution's Supremacy Clause "suggests that courts should not automatically seek narrowing constructions of express preemption clauses").

defendants countered that any activity by the Commerce Commission was preempted by the United States Warehouse Act, which regulated, among other things, the pricing and safety of grain warehouses. *Id.* at 224-29.

On appeal, the Supreme Court acknowledged that when Congress legislates in a field traditionally occupied by the states, there is an "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230. However, the Court quickly determined that, with regard to rate setting, discriminatory pricing, and warehouse safety, that "assumption" provided the plaintiffs no shelter. *Id.* at 234-36. Because the Warehouse Act included an express preemption clause addressing those precise aspects of the warehouse business, the Court held that the Act had plainly "terminat[ed] the dual system of regulation" with respect to these issues. *Id.* at 234. By contrast, in the few areas of state activity that *did not* fall under the Act's express preemption clause, the Court "refused to hold that state regulation was superseded by . . . federal law." *Id.* at 237. Despite lingering uncertainty as to whether Congress had intended to displace state activity in those areas as well, the Court placed its thumb on the scale in favor of the State and held that the Commission's activity could continue unabated in those limited contexts. *Id.*

The Court's longstanding reliance on the presumption in cases where Congress has failed to expressly displace state regulation is well documented. *See*

Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 Ariz. L. Rev. 1379, 1384 (1998) (explaining that the presumption has its roots in the Court's 1912 implied preemption case, *Savage v. Jones*, 225 U.S. 501 (1912)). That documentation extends to health-related cases, as the Court has explained the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause," but instead guides the Court's preemption analysis absent a "clear and manifest" statement from Congress to the contrary. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (declining to invalidate local health-related ordinances when federal legislation did not expressly preempt the local laws).

The Court's reliance on the presumption as an interpretive canon in implied preemption cases may make sense, as in those cases Congress has not made a clear statement that it intended to foreclose state activity. *See* McCuskey, *supra* at 108-09. The same logic does not hold in express preemption cases, when Congress has stated in clear terms that it intends to displace state law—as it did with ERISA. In those cases, the legislative text should mark the beginning and end of a court's inquiry, as Congress's clear statement on preemption provides all the evidence a court needs to divine its intent.

The Supreme Court's historic approach to ERISA preemption illustrates this principle clearly. For much of its history, the Court had no use for the presumption

against preemption in ERISA cases because Congress's intent was plain. When a state law "relate[d] to any employee benefit plan," 29 U.S.C. § 1144(a), ERISA preempted the state activity without any need for the Court to invoke the presumption. *See, e.g.*, *Alessi*, 451 U.S. at 522-24 (acknowledging the presumption, but declining to apply it where there existed "an explicit congressional statement about [ERISA's] pre-emptive effect"); *Shaw*, 463 U.S. at 97-109 (striking down state employee benefit legislation without invoking the presumption); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 132-33 (1992) (same).

The Court's decision in *Travelers* is not inconsistent with this longstanding pattern. Although the Supreme Court for the first time invoked the presumption against preemption to uphold state legislation that referenced employee health plans, the Court did not hold that the presumption applied to state laws that regulated employer sponsored healthcare plans. Instead, the Court concluded that because the New York surcharge in *Travelers* applied to the insurance payer—not the employer—it did not "relate to" any ERISA plan, and was therefore not expressly covered by ERISA's preemption clause. 514 U.S. at 658-61. Thus, the Court relied on the presumption *after* concluding that ERISA's preemption provision did not expressly cover New York's surcharge. The *Travelers* Court thus found itself conducting a traditional implied preemption analysis to determine if ERISA

nevertheless displaced the State's law—precisely what the presumption against preemption has been used for since *Rice*.

More importantly, since *Travelers*, the Supreme Court has emphatically reversed course on whether the presumption against preemption plays *any* role in express preemption cases, let alone in the ERISA context. In *Gobeille*, the Court expressed serious doubts that the presumption, "whatever its force in other instances," could "validate a state law that enters a fundamental area of ERISA regulation." 136 S. Ct. at 946. The Court then underscored that point in *Franklin*, where it reaffirmed that, when a "statute 'contains an express pre-emption clause,'" the presumption does not apply. 136 S. Ct. at 1946.

Franklin and *Gobeille* thus represent a return to form for the Court's approach to the presumption against preemption. Since its inception, the presumption has yielded to express statements from Congress evincing an intent to preempt. The District Court should have similarly yielded here, and found that the presumption against preemption (if it remains viable at all) cannot overcome an express statement from Congress to the contrary. By correcting that error here, this Court will provide companies across the economy with the certainty and uniformity that Congress sought to advance when it chose to override the patchwork of laws and regulations that existed before ERISA. In addition, reversal will have collateral benefits. It will discourage other courts from similarly disregarding express preemption provisions

in other contexts—thereby allowing employers to avoid the higher costs and greater burdens that Congress sought to alleviate. And it will deter aggressive municipalities from attempting to circumvent the will of Congress by imposing new obligations that go beyond federal mandates.

B. This Court's Decision in *Golden Gate* Is of No Consequence Here.

Golden Gate does not provide any support for the conclusion that the District Court reaches here. As ERIC explained, the San Francisco ordinance at issue there is distinguishable on a number of grounds, and thus the decision has no application here.

More broadly, *Golden Gate*'s reliance on the presumption against preemption is good reason for this Court to find *Golden Gate* is no longer in force. Importantly, *Golden Gate* was decided in 2008 and relied on the Supreme Court's suggestion in *Travelers* that the presumption against preemption could apply in ERISA preemption cases. *See* 514 U.S. at 654-55. As explained above, however, that was based on a misunderstanding of *Travelers*, and the Supreme Court has since made clear in both *Gobeille* and *Franklin* that under today's controlling Supreme Court precedent the presumption plays no role in express preemption or ERISA preemption cases. *See Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 259 (5th Cir. 2019) ("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.").

Under these circumstances, *Golden Gate* can no longer be squared with the Supreme Court's current teaching. As a result, *Golden Gate* is of no consequence whether it applies or not. A panel is not bound by circuit precedent where "intervening Supreme Court authority is clearly irreconcilable" with that precedent because the Supreme Court's decision "undercut[s] the theory or reasoning underlying the prior circuit precedent," even if the issues are not "identical" and the cases address "different federal statutes." *See United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1112-13 (9th Cir. 2012) (internal quotation marks omitted); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 975-79 (9th Cir. 2012). As this Court has done repeatedly, it should deem its prior decisions abrogated and should instead apply the Supreme Court's current teaching.[3]

CONCLUSION

The District Court's decision dismissing the action should be reversed.

[3] *See, e.g., United States ex rel. Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1176-78 (9th Cir. 2013); *Leeson*, 671 F.3d at 978-79; *Irigoyen-Briones v. Holder*, 644 F.3d 943, 947 (9th Cir. 2011).

September 3, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 5,003 words.

/s/ Gabriel K. Gillett

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2020, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Gabriel K. Gillett