**No. 20-35472**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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THE ERISA INDUSTRY COMMITTEE,

*Plaintiff-Appellant,*

v.

CITY OF SEATTLE,

*Defendant-Appellee*.

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

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

### I. THE SUPREME COURT'S RECENT *RUTLEDGE* DECISION CONFIRMS THAT ERISA PREEMPTS SMC 14.28

On December 10, 2020, the Supreme Court issued a new decision addressing ERISA preemption, *Rutledge v. PCMA*, No. 18-540, 2020 U.S. LEXIS 5988 (U.S. Dec. 10, 2020). The decision held that ERISA did not preempt a state law in a setting different than the current dispute; nonetheless, the Supreme Court's description of the overall framework and standards for ERISA preemption reinforces that ERISA preempts SMC 14.28. ERIC begins by addressing *Rutledge*'s application in light of the arguments presented in this appeal and, in subsequent sections, more specifically replies to the City's and its *amici*'s presentations.

*First*, the Court in *Rutledge* emphasized what typically falls within the scope of ERISA preemption and what does not. *Rutledge* involved Arkansas's regulation of certain "intermediaries" – known as pharmacy benefit managers or "PBMs" – that help administer "prescription-drug plans" sponsored by governments, insurance companies, and ERISA-governed private employers. *Id.* at *5; *see also id.* at *13 n.1. More particularly, the Arkansas statute controlled the reimbursement rates and procedures that PBMs – not ERISA plans directly – paid to pharmacies for certain drugs. *See id.* at *6 (noting that "a PBM's reimbursement from a plan often differs and exceeds a PBM's reimbursement to a pharmacy"). In

that context, the Supreme Court highlighted that ERISA does not preempt a state law "amount[ing] to nothing more than cost regulation." *Id.* at *13. So long as a state regulation is directed to the intermediaries, there generally will be no preemption "even if plans decide to limit benefits or charge plan members higher rates as a result." *Id.* at *16. In other words, state laws that "affect a plan's shopping decisions" survive. *Id.* at *10 (internal quotation marks and citation omitted).

At the same time, the Supreme Court in *Rutledge* underscored – as it had in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312, 320-21 (2016) – that ERISA, under the "connection with" prong of the analysis associated with 29 U.S.C. § 1144(a), *does* preempt state laws requiring ERISA plans "to tailor substantive benefits to the particularities of multiple jurisdictions." *Rutledge*, 2020 U.S. LEXIS 5988, at *9. Thus, ERISA "preempt[s] laws that require providers to structure benefit plans in particular ways, such as requiring payment of specific benefits or by binding plan administrators to specific rules for determining beneficiary status." *Id.* (internal quotation marks and citations omitted); *see id.* at *14 (finding no preemption because Arkansas's PBM statute "does not require plans to provide any particular benefit to any particular beneficiary in any particular way").

Given the way the Court detailed the preemption standards in *Rutledge*, SMC 14.28 now even more plainly has a "connection with" ERISA plans. The City's Ordinance is nothing like rate regulation of an ERISA plan's service-provider and, therefore, not within the area safe from preemption under *Rutledge*. Rather, under any of the options that SMC 14.28 offers an employer for compliance (*i.e.*, establishing a program of direct payments to covered employees for them to obtain health insurance, adding the employees to the employer's insured health plan, or adding the employees to the employer's self-funded health plan), the Ordinance mandates the amount of benefits to provide (*i.e.*, a specific dollar amount depending on marital or partner status and family size) and whom the beneficiaries shall be (*i.e.*, employees working 80 or more hours per month and their spouses, partners, and family members).

*Second*, also with regard to the "connection with" prong of the preemption analysis, *Rutledge* restates and applies the standard that, even for regulations not aimed precisely at ERISA plans (such as measures focused on intermediaries), there is preemption if "the effect of [the state law] [is] so acute that it will effectively dictate plan choices." *Id.* at *11; *accord id.* at *9 ("A state law may also be subject to pre-emption if 'acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of coverage.'") (quoting *Gobeille*, 577 U.S. at 320). The Court then applied this test, but ultimately found that the

Arkansas PBM statute did not fail under it. *See id.* at *11-*12. The Court's embrace, and application, of this aspect of the "connection with" standard nullifies the City's assertion that the "acute" effects test is just "*dicta*" and unnecessary "to the holding in *Travelers*, *Gobeille*, or any other case." Appellee's Br. 48, 49 (citing *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) ("*Travelers*")). And as ERIC showed in its opening brief (*see* Appellant's Br. 51-55) and amplifies later, application of the "acute" effects test to SMC 14.78 results in preemption. *See infra* pp. 22-24.

*Third*, *Rutledge*'s application of the "reference to" prong of ERISA preemption solidifies the case for preemption of SMC 14.28. In ruling that "ERISA plans are . . . not essential to [the Arkansas law's] operation," with essentiality being a key test under the "reference to" prong, the Court highlighted that the Arkansas measure "regulates PBMs *whether or not* the plans they service fall within ERISA's coverage." *Rutledge*, 2020 U.S. LEXIS 5988, at *12-*13 (emphasis added). The Court noted that the state law affected PBM contracts "with a variety of healthcare plans and programs that are not covered by ERISA, including Medicaid, Medicare, military, and market place plans." *Id.* at *13 n.1. Unlike the Arkansas statute, SMC 14.28 applies solely to employee-based programs established or maintained by *private* employers, not to any government or other entities, which means the City's Ordinance operates exclusively in

situations fitting ERISA's definition of a welfare plan. *See* Appellant's Br. 28-33; *see also infra* pp. 21-22 (noting other ways in which SMC 14.28 "refers to" ERISA plans consistent with *Rutledge*).

*Fourth*, the *Rutledge* decision further verifies the death of a presumption against preemption when courts are applying ERISA's express preemption provision, 29 U.S.C. § 1144(a). If it were not enough that – citing *Gobeille* – the Supreme Court in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016) ("*Franklin*"), expressly rejected a presumption against preemption whenever an express preemption provision is at issue, the Court in *Rutledge* made no mention of such a presumption. Conspicuously, it made no mention of a presumption when describing the overarching standards associated with ERISA preemption, and even when applying *Travelers*, the ERISA decision that had made the presumption a centerpiece in the ERISA express-preemption analysis in the first place. *See Rutledge*, 2020 U.S. LEXIS 5988, at *8-*12. Nor did Justice Thomas, in his concurrence in *Rutledge*, reference any presumption against preemption in his description of the Court's current "ERISA pre-emption jurisprudence." *Rutledge*, 2020 U.S. LEXIS 5988, at *17 (Thomas, J., concurring). As *Rutledge* accentuates (and ERIC addresses further next), the presumption against ERISA express preemption is no more.

## II. THERE IS NO PRESUMPTION AGAINST PREEMPTION IN THIS CASE

### A. *Franklin*'s Rejection of a Presumption Against Preemption Controls Here

In its brief, the City spends much time trying to show that there remains a presumption against preemption, presumably because the chief precedent on which the City relies – *Golden Gate* – so heavily rests on such a presumption and rightly may be limited to its facts without a presumption. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 647, 654 (9th Cir. 2008) (invoking presumption against preemption); *see also Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 259 (5th Cir. 2019) (because an earlier ERISA precedent "was built upon a presumption against preemption that the Supreme Court appears to have walked back from, we decline to extend [the precedent's] reasoning to the facts of this case"). But in defending the presumption, the City, anachronistically, relies on Supreme Court and Ninth Circuit decisions that pre-date *Franklin*, the Supreme Court precedent issued in 2016 that clinched the presumption's demise. *See* Appellee's Br. 20, 22, 28 (citing *Cippollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996); *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996)).

Insofar as the City does cite post-2016 Ninth Circuit cases for the proposition that a presumption against preemption still exists, it misleadingly suggests that these cases involved *express* preemption, when they largely involved only traditional *conflict* preemption (and not even under ERISA). *See id.* at 20, 28 (citing *Cal. Ins. Guarantee Ass'n v. Azar*, 940 F.3d 1061, 1068 (9th Cir. 2019), and *Lazar v. Kroncke*, 862 F.3d 1186, 1195 (9th Cir. 2017)); *Cal. Ins. Guarantee Ass'n*, 940 F.3d at 1068 n.6 ("the Medicare Act's secondary payer provisions do not contain a preemption clause"); *Lazar*, 862 F.3d at 1195 ("None of these statutes or regulations contains an express preemption clause"). No one disputes that a presumption against preemption still applies in an ordinary conflict-preemption inquiry; it is when "the statute 'contains an express pre-emption clause[]' [that] we do not invoke any presumption against pre-emption." *Franklin*, 136 S. Ct. at 1946 (citing *Gobeille*, and quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)).

The one instance post-*Franklin* that the City cites (and its *amici* further emphasize) where the Ninth Circuit did mention a presumption against preemption in the context of ERISA's express preemption provision is *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019). Even there, the Ninth Circuit did not adopt a full-fledged presumption against preemption, but cabined it to situations not involving a state's "'direct regulation of a fundamental ERISA

function.'" *Id.* (quoting *Gobeille*, 136 S. Ct. at 946). In any event, before the Ninth Circuit issued its decision in *Depot*, no party there pressed for (or argued against) a presumption against preemption as part of its presentation[1]; instead, the Ninth Circuit included the statement in its opinion *sua sponte*, and it mentioned the presumption only once, ultimately did not rest on the presumption in rejecting preemption for some of the claims at issue (while finding preemption for others), and certainly nowhere reached the issue of *Franklin*'s effect on the vitality of a presumption. "'[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 597 (2020) (Gorsuch, J., concurring) (quoting *Webster v. Fall*, 266 U. S. 507, 511 (1925)). Hence, even considering *Depot*, the question of whether *Franklin* mandates rejection of a presumption against preemption in an ERISA express-preemption case remains an open matter in this Court.[2]

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[1] *See Depot, Inc. v. Caring for Montanans*, No. 17-35597 (9th Cir.), Appellants' Opening Br. 42-49 (Mar. 1, 2018) (D.E. 17); *id.*, Br. of Appellee Caring for Montanans, Inc. 51-59 (June 1, 2018) (D.E. 32); *id.*, Appellants' Reply Br. 27-30 (Aug. 7, 2018) (D.E. 44).

[2] The *Depot* Appellee did file a rehearing petition challenging for the first time the existence of a presumption against preemption, and *amici* Cities and Counties note the filing of a petition for certiorari to the Supreme Court on the same issue. *See* Br. of *Amici Curiae* City & County of San Francisco, *et al.* 9 (D.E. 28). Both rehearing and certiorari were summarily denied. Of course, a denial of rehearing

(footnote continued on next page)

Moreover, were the Court to accept the City's invitation to find that a presumption against ERISA express preemption operates in the face of *Franklin*, it will set up a Circuit split with the Fifth Circuit's decision in *Dialysis Newco*, which found the presumption no longer exists (and, to do so, even relied on this Court's decision in *Atay*). *See* Appellant's Br. 23. This Court eschews creating Circuit splits, unless unmistakably necessary, which is not the case here. *See United States v. Alexander*, 287 F.3d 811, 820 (9th Cir. 2002). Though the City attempts to derogate *Dialysis Newco*'s holding as *dicta*, it was not, with the Fifth Circuit spending numerous paragraphs on the issue and deeming the non-existence of a presumption against preemption as the first and key basis for rejecting extension of an earlier ERISA precedent that had rested on the presumption. *See* 938 F.3d at 257-59. And insofar as the City asserts that other Circuits have stated a presumption against ERISA express preemption post-*Franklin*, none did so against an assertion that *Franklin* requires otherwise; indeed, the other Circuits might not

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or a petition for certiorari is not precedent on any issue raised. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). Accordingly, it remains that the Ninth Circuit's *Depot* decision is "silent on the argument now before us," namely, whether to upend the presumption against preemption in the ERISA express-preemption context due to *Franklin*. *Ret. Plans Comm. of IBM*, 140 S. Ct. at 597 (Gorsuch, J., concurring). If anything, where *Franklin* has been raised and considered, this Court has held that *Franklin* prohibits a presumption against preemption in express-preemption situations. *E.g.*, *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016); *see also* Appellant's Br. 23. Rather than being bound by anything said in *Depot* on the presumption, the binding precedent is *Atay*.

even have been aware of *Franklin*. *See* Appellee's Br. 27 (citing *Laborers' Pension Fund v. Miscevic*, 880 F.3d 927, 933-34 (7th Cir. 2018); *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 555 (6th Cir. 2016)). Consequently, *Dialysis Newco* is the only out-of-Circuit precedent directly on point, and adoption of a presumption against preemption here would conflict with it.

Finally, the City argues that *Franklin*'s reach should not extend to ERISA's preemption provision because the "relate to" language in § 1144(a) is not "plain" enough to construe without a presumption against preemption. Appellee's Br. 28. While "relate to" may be broad, it is not un-plain in the sense of being subject to numerous different definitions. *See FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (describing text of ERISA's preemption provision as "plain"). With respect to other statutes likewise containing a preemption provision with "relate to" language, the Supreme Court – consistent with *Franklin* – recently has relied solely on the "text, context, and purpose," rejecting a party's "urg[ing] . . . to apply a presumption against preemption." *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1198 (2017) (involving preemption provision in Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8902(m)(1)); *see generally Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 393 (9th Cir. 2002) (noting that FEHBA's preemption provision "closely resembles ERISA's

express preemption provision" and that precedents under each are "interchangeabl[e]").

### B. SMC 14.28 Is Not an Exercise of the City's Traditional Police Powers

Even assuming the presumption against preemption remains extant in the ERISA express-preemption setting, the City recognizes it must still show that SMC 14.28 is "at the heart of the City's police powers" in order to trigger the presumption. Appellee's Br. 21. As ERIC showed in its opening brief (*see* Appellant's Br. 25), the Ordinance is aimed at employee "health *coverage*," rather than being a minimum-wage law or regulation of the provision of healthcare, and therefore does not qualify as a traditional police-power regulation. SMC 14.28.025 (emphasis added). Health benefits coverage provided by private employers is a "fundamental ERISA function," not a traditional state-law matter, so that it falls outside the protection of any presumption against preemption. *Depot*, 915 F.3d at 666; *accord Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1505 (9th Cir. 1993) (holding that Hawaii law requiring direct reimbursement by employers of costs of medical exams "does not represent a regulation of traditional state authority" and is preempted by ERISA) (emphasis removed).

In response, the City doubles-down that SMC 14.28 is simply "[a] command to compensate employees" and that "local authority regulating employment relationships has been recognized for over 80 years." Appellee's Br. 21. However,

the Ordinance is not a wage law, just as its text explains. *See* SMC 14.28.060.E ("[t]he required healthcare expenditure[s] . . . will not be considered wages for purposes of determining compliance with hourly wage and hourly compensation laws and regulations"). Furthermore, the City never even responds (because it cannot) to the point that, if it were a wage law, SMC 14.28 would be illegal under Washington State law, since amounts owed under the Ordinance decrease if the employee is single rather than married and Washington law prohibits employment discrimination based on marital status. *See* Appellant's Br. 32 (citing Wash. Rev. Code Ann. § 49.60.180(3)).[3]

The City likewise reiterates that the Ordinance is a traditional regulation of "health and safety." Appellee's Br. 25 (internal quotation marks and citation omitted). That argument might have some persuasiveness if, like in *Golden Gate*, the City had established a law actually *to provide* healthcare to certain workers; but

[3] ERISA benefits that vary based on marriage or family status survive, because they are governed exclusively by federal law (preempting Washington's anti-discrimination law); federal law has no similar rule against discrimination based on such statuses. *See generally Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88-89 (1983). At the same time, treating amounts paid under SMC 14.28 as the ERISA benefits that they are necessarily invalidates them since *the City* cannot order their provision, again because of ERISA preemption. In light of ERISA preemption, only the federal government, or the employer voluntarily, can create a regime whereby a private employer must maintain a program for the purpose of providing insurance coverage in the event of sickness. *See* 29 U.S.C. § 1002(1) (definition of an ERISA-covered "welfare plan").

SMC 14.28 has nothing to do the provision of governmental healthcare services, focusing, again, instead on ensuring "access . . . to . . . affordable health *coverage*" for the employees' benefit. SMC 14.28 (second introductory "Whereas" clause) (emphasis added); *cf. Golden Gate*, 546 F.3d at 642, 645 (applying presumption because San Francisco law created "a City-administered health care program" that "provides enrollees with medical services") (internal quotation marks and citation omitted).

## III. THERE IS PREEMPTION BECAUSE, UNDER ANY OF SMC 14.28'S DISCRETIONARY OPTIONS FOR COMPLIANCE, A COVERED EMPLOYER MUST ESTABLISH OR MAINTAIN AN ERISA PLAN

As in the District Court, the City does not contest that the establishment or maintenance of ERISA plans is necessary for compliance with SMC 14.28's second and third options, disputing only whether the first option mandates the creation of ERISA plans. The City sets forth a potpourri of arguments to defend the direct payments under the first option as "merely" a typical wage scheme about which ERISA should have no concern, but none is persuasive. Appellee's Br. 39 n.14.; *see id.* at 30-42.

First of all, the City chastises ERIC for "spill[ing] considerable ink" on ERISA's definitional section, rather than turning immediately to prior case law to determine whether compliance with the first option results in the creation of an ERISA "welfare plan." *Id.* at 31. But it is the Supreme Court that this past year,

both in and outside of the ERISA context, instructed assessment of, and adherence to, the dictionary definitions of a statute's relevant terms to determine the statute's scope and meaning, notwithstanding that "judges" had "add[ed] to, remodel[ed], update[d], or detract[ed] from [the] old statutory terms" in the meantime. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (Title VII case); *accord Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777, 776 (2020) (ERISA case).

Turning to the case law, the City focuses initially on the old chestnuts *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Massachusetts v. Morash*, 490 U.S. 107 (1989). Yet, the City ignores the way this Court has already distinguished those Supreme Court decisions when holding that direct-payment programs to employees *are* ERISA plans. *See* Appellant's Br. 41 (discussing how *Aloha Airlines* distinguished *Morash* and *Fort Halifax*). In brief, *Morash* and *Fort Halifax* involved simple, fixed, sometimes one-time disbursements to employees, not the plan-inducing employer administrative apparatus accompanying direct disbursements to employees based on complex statutory criteria (as with SMC 14.28).

Then, as expected, the City insists that the direct-payment option is not an ERISA plan under *Golden Gate*'s reasoning. To the contrary, as ERIC has already explained, the San Francisco law at issue in *Golden Gate* did not involve direct payments to employees at all, but tax-like payments *to the government* that, by

definition, could not have warranted the administrative scheme to pay the *employee* benefits on which ERISA's definition of "welfare plan" hinges. *See* Appellant's Br. 42-46. To be sure, the City – disagreeing with ERIC – says it was not *dictum* when *Golden Gate* in passing stated that an alternative program of company payments directly to employees also might not be an ERISA plan. Yet, in making that point, all that the City does is explain that the Ninth Circuit, as a precursor to finding the tax-like payments not to compel an ERISA plan, summarized *Morash* and *Fort Halifax*. *See* Appellee's Br. 34-35. The presence of *Morash* and *Fort Halifax* in the opinion, however, does not transform *Golden Gate*'s extra musing about a different situation into more than *dictum*. *See Bliss v. CoreCivic, Inc.*, 978 F.3d 1144, 1149 n.2 (9th Cir. 2020) ("we are not bound by a prior panel's comments . . . done as a prelude to another legal issue that commands the panel's full attention") (internal quotation marks and citation omitted).

Next, the City embarks on trying to show that SMC 14.28's first option requires only "minimal" effort so as not to warrant the administrative scheme that triggers ERISA-plan status. Appellee's Br. 36. What is striking about this section of the City's brief is that the City addresses none of the more intricate parts of SMC 14.28 that apply to the first option (and, actually, to all options), seemingly hoping that these intricacies will not be noticed. Most notably, the City glosses over the three most onerous parts of the direct-payment option: (1) calculation of

payment amounts based on the employer's investigation of the employee's marital, partner, and family status (irrespective of hours worked); (2) the complex waiver process that authorizes non-payment if the employer (after giving full, City-prescribed notice to the employee) offers insured or self-funded ERISA-plan coverage to the employee's entire household (with as much as 20% employee cost-sharing) and the employee declines; and (3) the creation and keeping of affidavits to memorialize the waiver process. *See* Appellant's Br. 5-11, 36-38, 55-56.

Refusing to grapple with any of these features, the City pretends that the employer's undertaking is "identical to the activities employers engage in when paying wages." Appellee's Br. 36. What employer must investigate and substantiate whether an employee is married, has a partner, or has children in order to pay wages, and then pays wages *based on family size*? What employer must establish a program for paying wages that includes avoidance of paying the wages where the employee declines an alternate option (with an employee cost-sharing component) that the employee finds too expensive to choose? What employer must document through affidavits its moves in navigating the wage-payment and waiver process, with potentially a different, unique affidavit needed for each affected employee? The answer is "none," because wage-payment systems do not require this sort of detail and administrative machinery for compliance.

Comparison with the tasks under the San Francisco law at issue in *Golden Gate* only further illustrates that SMC 14.28 requires an administrative scheme (and thus the creation of an ERISA plan) far beyond what San Francisco's law necessitated. The San Francisco measure fixed the employer's payments to the government on the number of employees and hours worked, a rote calculation parallel to wage computation; the San Francisco law had *employer* waivers for amounts the employer otherwise paid in the aggregate in health benefits, not an individualized waiver process that required interaction between the employer and employee and a unique result potentially for each *employee*; and the record-keeping requirements under the San Francisco law did not mandate *affidavits* singular to each affected employee, but just the usual accounting records an employer keeps of debits made. *See* Appellee's Br. 37-38 (noting details of San Francisco law as documented by *Golden Gate* Court). Completing all of the tasks and steps associated with properly paying, or legally being exonerated from paying, amounts under SMC 14.28's first option for each affected employee results, of necessity, in the establishment and maintenance of a "program" and "plan" under ERISA's "welfare plan" definition, even if navigating the requirements of San Francisco's law did not. 29 U.S.C. § 1002(1).[4]

[4] Trying to erase the burden associated with SMC 14.28's requirement of investigating and then paying benefits based on the employee's marital, partner,

(footnote continued on next page)

Last, the City beseeches the Court to disregard *Aloha Airlines* and *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992), two decisions involving employer programs that this Court held constituted ERISA plans. *See* Appellee's Br. 38-42. ERIC has already shown (*see* Appellant's Br. 33-39) why SMC 14.28's first option necessitates at least as much "'ongoing, particularized, administrative, discretionary analysis'" by the employer as with the programs in those cases, so as to warrant a similar finding of ERISA-plan status. *Golden Gate*, 546 F.3d at 651 (quoting *Bogue*, 976 F.2d at 1323). Apparently recognizing that application of the reasoning of those decisions would lead to a preemption result here, the City dismisses them wholesale either as now bad law or as limited to narrow categories.

As to the City's argument that the decisions are now bad law, the City thinks *Travelers* constituted such a sea change that everything favorable to preemption before *Travelers* currently should be treated as "outdated." Appellee's Br. 38. The assertion is nonsense. Post-*Travelers*, *Aloha Airlines* has regularly been followed by this and other Courts. *E.g.*, *BankAmerica Pension Plan v. McMath*, 206 F.3d

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and family status, the City says – without citation – that "employers routinely record employee marital status, dependent status and the like for tax reporting purposes related to employment." Appellee's Br. 37. The City's statement is plain wrong. ERIC is unaware of any federal or state tax requirement that requires the *employer* to keep track of employee personal statuses, whereas the *employee* might (or might not) want, for instance, to count dependents when he or she completes his or her W-4 form (depending on how much withholding is sought).

821, 830 (9th Cir. 2000); *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998); *Tamrazian v. Unum Life Ins. Co.*, No. 2:19-cv-05583, 2019 U.S. Dist. LEXIS 232558, at *6 (C.D. Cal. Sept. 23, 2019). Indeed, in one instance where this Court applied *Aloha Airlines*, but arguably read it narrowly to find no preemption in the circumstances, the Supreme Court later overruled this Court. *See Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 960 (9th Cir. 1998), *overruled in part by Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001). Likewise, *Golden Gate* itself recognized that *Bogue* remains good precedent. *See* 546 F.3d at 650-51. More generally, ERIC cites *Aloha Airlines* and *Bogue* for their rulings on what constitutes an ERISA plan, not on any niceties regarding the "reference to" or "connection with" standards that *Travelers* explored. Consequently, it is hard to see how *Travelers* could have done violence to these decisions as relevant here.

With regard to the City's contention that *Aloha Airlines* and *Bogue* apply to limited categories of situations, it maintains that the decisions justify preemption only of state laws that apply directly to ERISA "*administrators*," as opposed to "apply[ing] to *covered employers*." Appellee's Br. 40. Nonsense again. *Aloha Airlines* unquestionably concerned a state law that "require[d] *an employer* to pay or provide for the cost of medical examinations." 12 F.3d at 1501 (emphasis added); *accord Bogue*, 976 F.2d at 1323-24 (emphasizing that program at issue was

"'established or maintained by an employer' and is accordingly controlled by ERISA") (quoting 29 U.S.C. § 1002(1)). Additionally, from its early cases, the Supreme Court has found state mandates on employers subject to ERISA preemption. *E.g.*, *Shaw*, 463 U.S. at 97 ("the [New York] Disability Benefits Law, which requires *employers to pay employees* specific benefits, clearly 'relate[s] to' benefit plans") (emphasis added). Even in this month's *Rutledge* decision, the Supreme Court described ERISA as "preempting laws that require providers to structure benefit plans in particular ways," with "providers" meaning employer sponsors. 2020 U.S. LEXIS 5988, at *9.[5]

## IV. SMC 14.28 REFERENCES ERISA PLANS THROUGHOUT ITS PROVISIONS

As ERIC showed in its opening brief, SMC 14.28 makes impermissible references to ERISA plans throughout its provisions, even assuming the first option

[5] When the City does attempt some limited, granular factual distinguishing of *Aloha Airlines* and *Bogues* from the current dispute, it again ignores the specific features of the direct-payment option under SMC 14.28. Considering the necessity, under the first option, for investigation and analysis of each employee's marital, partner, and family status, for determination of whether the particular employee declined properly noticed and proffered insured or self-funded ERISA coverage, and for memorializing events in appropriate cases through affidavits, *Aloha Airlines*' and *Bogue*'s findings of ERISA-plan status fit the first option like a glove: "There was no way to carry out th[e] [employer's] obligation[s] with the unthinking, one-time, nondiscretionary application of the plan administrators in *Fort Halifax*. . . . [T]he program's administration required a case-by-case, discretionary application of its terms." *Bogue*, 976 F.2d at 1323; *accord Aloha Airlines*, 12 F.3d at 1503, 1505.

does not require the creation of ERISA plans. That is, even if the first option entails a non-ERISA program, it cannot operate without interacting with ERISA plans, because several matters associated with even the first option turn on ERISA-plan provisions, including: (1) the starting point for making direct payments for new employees is measured by the waiting period in the employer's ERISA plan; (2) waiver of direct payments depends on whether the employee has declined employer coverage under an ERISA insured or self-funded plan; (3) eligibility for direct payments is contingent on the employee not receiving ERISA-plan coverage from another employer; and (4) the effective date of the Ordinance depends on the employer's open enrollment period under its ERISA plans. *See* Appellant's Br. 47-48.

Most important, the fundamental structure of the Ordinance makes ERISA plans, under *Rutledge*'s reaffirmation of the "reference to" test, "essential to [the Ordinance's] operation." 2020 U.S. LEXIS 5988, at *12. The core element of SMC 14.28 is its conferral to employers of "*discretion* as to the form of the monthly required healthcare expenditures they choose to make for their covered employees," with the three options from which to choose being direct payments, insured ERISA-plan coverage, and self-funded ERISA-plan coverage. SMC 14.28.060.B (emphasis added). Therefore, by its terms, the Ordinance is facially designed to give the employer a discretionary choice, which cannot occur unless

the possibility of ERISA-plan coverage (even if just to reject the choice) is part of the calculus. Put differently, the law on its face is not configured as a rigid mandate for direct payments, but as a measure that purports to leave it to the employer to choose the manner least objectionable to it to provide covered employees with health coverage. The City removes that "essential" discretionary component, re-writing the Ordinance as a one-option scheme that, for its operation, makes no reference to ERISA plans. *Rutledge*, 2020 U.S. 5988, at *12.[6]

## V. SMC 14.28 HAS A CONNECTION WITH ERISA PLANS

There are three ways in which SMC 14.28 has disqualifying "connection with" ERISA plans: (1) the Ordinance, in practical effect, forces covered employers to comply by altering their ERISA plans; (2) the Ordinance impermissibly adds to ERISA's disclosure and record-keeping requirements; and (3) SMC 14.28 impermissibly structures employers' choices regarding their existing plans and otherwise burdens ERISA-plan administrators. *See* Appellant's Br. 51-59. On the first point, the City responds that "acute" economic and other

[6] The City does not contest that every employer covered by the Ordinance (and certainly ERIC's covered members) already has an ERISA health plan of some sort. Indeed, SMC 14.28's overt reference to coverage through insured and self-funded ERISA plans as two of the options for compliance readily shows that the City understands covered employers to have ERISA plans. Against this backdrop, there is no circumstance under which the Ordinance can operate without the employer balancing the pluses and minuses of complying through the direct-payment option or the ERISA-insured-plan and ERISA-self-funded-plan options.

effects from a state law so as inevitably to steer an employer to alter its ERISA plans is not a recognized basis for preemption (*see* Appellee's Br. 48); but ERIC has already shown that *Rutledge* sinks that argument, if the City's contention had, to start with, any merit. *See supra* pp. 3-4.

Also on the first point, the City defends the District Court having required ERIC, at the pleadings stage, to "show" that the Ordinance effectively compels employers to choose the second or third options. Appellee's Br. 52. Here, the City (as did the District Court) holds ERIC to an incorrect pleadings standard, refusing to accept as true the facts already alleged in the First Amended Complaint – *i.e.*, that employers inexorably will and already have chosen the second and third options, as a result of substantially preferable tax consequences and other critical advantages. *See* Appellant's Br. 53-54. Under Rule 12(b)(6), "[a] claim has facial plausibility when the plaintiff pleads content that allows the court to draw the reasonable inference that the defendant is liable"; the test "is not akin to a probability standard." *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017) (internal quotation marks and citation omitted). The City has not demonstrated it to be somehow outlandish to think that the first option is so financially onerous and otherwise problematic as to steer employers automatically to the second and third options, especially when it is a known fact that employers

altered their ERISA plans under SMC 14.28's predecessor rather than made direct payments. *See* Appellant's Br. 55.[7]

On the second "connection with" point (namely, that the Ordinance impermissibly adds to ERISA's disclosure and record-keeping requirements), the City says little more than that the disclosure and record-keeping requirements are the same as under the San Francisco law that the Court upheld in *Golden Gate*. *See* Appellee's Br. 48. ERIC has already shown that SMC 14.28's disclosure and record-keeping requirements have no parallel in San Francisco's law, with SMC 14.28's obligations regarding waivers and the associated affidavit requirement especially being absent in San Francisco's statute. *See supra* p. 17; *see also* Appellant's Br. 56.

As to the third "connection with" point (*i.e.*, that the Ordinance burdens plan administrators), the City ignores ERIC's key argument: SMC 14.28 frames choices that include ERISA plans as an alternative, and, even where the supposed non-ERISA alternative is chosen, plan administrators have to keep track of it as a

[7] The City seems to think that "acute" economic and other effects limiting an employer's actual choices requires effects of gargantuan proportions. That is not the definition of "acute." The word does not mean devastating; rather, it encompasses something "felt, perceived, or experienced *intensely*." "Acute," *Merriam-Webster's Collegiate Dictionary* (11th ed. 2008) (emphasis added). Accordingly, real and measurable negative effects that are strong enough to induce a particular course of action should be all that is required "effectively [to] dictate plan choices." *Rutledge*, 2020U.S. LEXIS 5988, at *11.

necessary adjunct of their ERISA-plan administration. *See* Appellant's Br. 56-60; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48, 150 (2001); *Merit Constr. All. v. City of Quincy*, 759 F.3d 122, 130 (1st Cir. 2014). The brief of *amici* Cities and Counties only highlights the burdens facing employers and plan administrators, as it shows that innumerable cities and counties stand ready to enact similar laws if the Court upholds SMC 14.28. In that event, employers and plan administrators who seek to maintain a single, national health plan can do so only by monitoring and, on the side, complying with differing, non-ERISA options in innumerable jurisdictions insofar as the national plan is insufficient to meet the full requirements of each jurisdiction's law. *See Rutledge*, 2020 U.S. LEXIS 5988, at *9 ("Congress sought 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law,' thereby 'minimiz[ing] the administrative and financial burden of complying with conflicting directives' and ensuring that plans do not have to tailor substantive benefits to the particularities of multiple jurisdictions.") (quoting *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 142 (1990)).

## VI. THE COURT SHOULD NOT CONSIDER *AMICI*'S NEWLY RAISED ARGUMENTS

The *amici* supporting the City raise several arguments nowhere raised by the City in the District Court or in the City's brief here. Under its established practice, the Court should decline to reach any of these arguments. *See Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue

raised only by an amicus. . . . The Swans did not adopt amicus' argument by reference in their brief and . . . [t]he issue has been waived.").

Out of an abundance of caution, ERIC does address briefly one matter raised solely by the *Amici* Law Professors: severability. *See* Br. of *Amici Curiae* Law Professors 6, 14 (D.E. 27) [hereinafter "*Amici* Professors' Br."]. The Professors note that SMC 14.28 contains a severability clause (*see* SMC 14.28.250) and suggest that the Court should sever the parts of the Ordinance that reference or have connection with ERISA plans, so that "the [O]rdinance would then require that the employer make periodic cash payments to employees who work on average 80 hours per month." *Amici* Professors' Br. 14.

However, in order to remove all of the provisions making reference to ERISA plans (let alone those having connection with ERISA plans), the Court would have to strike the Ordinance's second and third options, the starting-date provision for making direct payments for new hires under the first option, the first option's waiver provision allowing employer's to satisfy their obligation under the first option when they offer ERISA-plan coverage that the employee declines, and the effective date provision of the statute. *See* Appellant's Br. 46-48 (listing the various provisions of the Ordinance that make reference to ERISA plans). The Ordinance would become non-operational; just as important, severing would transform the Ordinance from one in which the City's Council purported to give

the employer flexibility and *discretion* as to how to comply into a single-option mandate never adopted by the Council.

Even where a statutory severability clause exists, the Court has refused "to examine and rewrite" a statute "in a vacuum as to how the various provisions were intended to intersect and in a way that would be at odds with the purpose of the statute." *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008); *see also Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) ("Federal courts should avoid 'judicial legislation' – that is, amending, rather than construing, statutory text – out of respect for the separation-of-powers principle that only legislatures ought to make positive law."); *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001), *aff'd sub nom*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) ("A statute's unconstitutional provisions are not severable if the entire statute is designed to strike a balance between competing interests."). Furthermore, "[t]he need for deference and restraint in severing a state or local enactment is all the more acute because of our respect for federalism and local control." *Vivid Entm't*, 774 F.3d at 574.

Seemingly because the City would not want to invite a statute that the legislature did not enact or intend, and because the public interest is not served where a federal court refashions a local statute in a manner at odds with the legislative scheme and purpose, the City never raised severability. The Court

should heed the City's choice, with the resulting remedy being the invalidation of SMC 14.28 in its entirety as preempted. The City's Council thereafter can reexamine the best alternative, legal course of action, if any.

## CONCLUSION

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

Respectfully submitted,

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# CERTIFICATE OF COMPLIANCE

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

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