No. 20-35472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ERISA INDUSTRY COMMITTEE,

Plaintiff-Appellant,

v.

CITY OF SEATTLE,

Defendant-Appellee

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE BUSINESS ROUNDTABLE, AND CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae the Chamber of Commerce of the United States of America (the "Chamber"), the Business Roundtable (the "Roundtable"), and California Chamber of Commerce ("CalChamber") are all not-for-profit organizations. Each certifies that it has no parent corporation and that no publicly-held corporation owns ten percent or more of its stock.

Dated: May 10, 2021

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are associations whose members sponsor health and retirement benefits for millions of American workers.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Roundtable is an association of chief executive officers of leading U.S. companies with over sixteen million employees and $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel contributed money that was intended for preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(b) and Circuit Rule 29-3, counsel for the parties have consented to the filing of this brief.

California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

Amici frequently participate in cases that bear on the sustainability of the health and retirement benefit plans that private employers provide for millions of Americans and their families. This is such a case.

Congress recognized, in enacting ERISA, that a homogenous and predictable regulatory system would be necessary to encourage employers to establish and maintain robust benefit plans. Through ERISA's preemption provision, "Congress sought to ensure that plans and plan sponsors would be subject to a uniform body of benefits law, thereby minimizing 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." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 480 (2020) (cleaned up). If a law requires an employer "to structure benefit plans in particular ways" or if its effects are to "force an ERISA plan to adopt a certain scheme of coverage," it is preempted. *Id.*

The panel decision, and the circuit precedent it extends, adopt a different

rule. Right now, in this circuit but nowhere else, states and localities may adopt laws that mandate the substantive benefits that an employer must provide to employees in a local jurisdiction. The practical effect of the circuit's tolerance for this patchwork of local ordinances is to directly regulate and substantially burden ERISA plans—and that practical effect means that this Court's rule is irreconcilable, as a legal matter, with ERISA's preemption provision. The opinion in *Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), was wrong when it was decided, and circuit law has now veered only further off course. The *en banc* Court should use this opportunity to realign its caselaw with ERISA's text, purpose, and jurisprudence.

ARGUMENT

Nearly half of all Americans—158,000,000 people—receive health care through an employer,[2] and nearly half of all private-sector workers participate in an employer-sponsored retirement plan.[3] Employers contribute trillions of dollars to ERISA-governed benefit plans every year.[4] Their ability to do so under a uniform

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[2] Kaiser Family Foundation, *Health Insurance Coverage of the Total Population* (2019), https://www.kff.org/other/state-indicator/total-population/.
[3] Bureau of Labor Statistics, *Employment Benefits in the United States* (Mar. 2020), at 9, https://www.bls.gov/news.release/pdf/ebs2.pdf.
[4] Benefits contributions constitute 29.7% of the total compensation paid by private employers in the United States. Bureau of Labor Statistics, *Employer Costs for Employee Compensation* (Dec. 2020), at 4, https://www.bls.gov/news.release/pdf/ecec.pdf. U.S. private employers pay $8.3

system of laws "minimizes the administrative and financial burdens" of plan administration, *Gobeille v. Liberty Mutual Insurance Company*, 577 U.S. 312, 321 (2016) (cleaned up), freeing up resources for the actual payment of benefits.

Ordinances like Seattle Municipal Code Chapter 14.28 seek to channel those resources to particular localities. But a system of local patronage comes at a cost: it diverts benefits away from workers in other communities, and reduces the benefits available for all workers by requiring an apparatus to administer the provision of workplace benefits under a patchwork of complex and potentially inconsistent local laws. Congress anticipated exactly this problem, and solved it with an express preemption provision that ensures employers do not need "to master the relevant laws of 50 states"—much less thousands of municipalities—in providing employees with health care and retirement benefits of their own design. *Id.* at 321. Using a preemptive federal law, Congress "intended to ensure that employee benefit plan regulation would be exclusively a federal concern." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (cleaned up).

A local law mandating the payment and administration of particular benefits should be an easy case for ERISA preemption. Only this circuit's anomalous rule

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trillion in wages and salary disbursements annually. Federal Reserve Bank of St. Louis, *Compensation of Employees* (Mar. 2021), Federal Reserve Economic Data, https://fred.stlouisfed.org/graph/?g=DCNH.

holds otherwise. Other courts of appeals evaluating similar laws have found them preempted under black-letter ERISA preemption principles. *See Merit Const. Alliance v. Quincy*, 759 F.3d 122, 130–31 (1st Cir. 2014); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 190 (4th Cir. 2007). And the Supreme Court's decisions over the past decade have only reinforced that those decisions are right—and that *Golden Gate* is wrong. *See Gobeille*, 577 U.S. at 326–27 (the "central design of ERISA" is "to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States even when those laws, to a large extent, impose parallel requirements"); *see also Rutledge*, 141 S. Ct. at 480 (reiterating that ERISA preempts "laws that require providers to structure benefit plans in particular ways, such as by requiring payment of specific benefits, or by binding plan administrators to specific rules for determining beneficiary status," as well as laws whose "acute, albeit indirect, economic effects . . . force an ERISA plan to adopt a certain scheme of substantive coverage" (quotation and citations omitted)). The full Court can correct that error now, by granting rehearing *en banc*. It should do so.

I. *Golden Gate* conflicts with established ERISA preemption principles

ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has construed this provision to preempt any state law that either

(1) has a "reference to" ERISA plans, by acting "immediately and exclusively upon" them or where "the existence of ERISA plans are essential to the law's operation"; or (2) has an "impermissible connection with" ERISA plans, meaning that the state law "governs . . . a central matter of plan administration or interferes with nationally uniform plan administration." *Gobeille*, 577 U.S. at 320 (cleaned up). A municipal ordinance requiring the payment of specified benefits either through a company's ERISA plan or in cash implicates both of these prohibitions, and *Golden Gate*'s contrary holding is incorrect.

As a starting matter, the panel decision in *Golden Gate* builds on a premise now known to be flawed. The Court considered itself bound to apply a "presumption against preemption," 546 F.3d at 647, but intervening Supreme Court precedent has clarified that no such presumption can "validate a state law that enters a fundamental area of ERISA regulation." *Gobeille*, 577 U.S. at 326; *see also Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) ("[B]ecause the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption." (quotation omitted)); *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258–59 (5th Cir. 2019) (holding that *Franklin* and *Gobeille* together make clear that ERISA's express preemption provision forecloses a presumption against preemption in the ERISA context). The Court should therefore decide whether an ordinance like Chapter

14.28 can survive scrutiny without a thumb on the scale against preemption.

Clearly it cannot, under law that is settled elsewhere and in the Supreme Court. First, Chapter 14.28 makes "reference to" ERISA plans because it requires employers either to modify existing ERISA plans to ensure compliance with the ordinance or to create a new ERISA plan. A covered employer must comply with Chapter 14.28 in one of three ways: it must either (1) pay the requisite amounts of money for each employee (and their qualifying partners and dependents) to a third party, such as an insurance carrier, a trust, or a tax-favored employee account, *id.* § 14.28.060.B.2; (2) ensure that the existing benefits programs offered by the employer make sufficient "[a]verage per-capita monthly expenditures for healthcare services," *id.* § 14.28.060.B.3; or (3) pay additional compensation directly to a qualifying employee, *id.* § 14.28.060.B.1. The first two of these three compliance options undisputedly make "reference to" ERISA plans. Chapter 14.28 is thus preempted if the third—mandating particular benefit payments to employees—also offends ERISA's preemption requirements.

As the First and Fourth Circuits have recognized, it does: "A grant of a benefit that occurs periodically and requires the employer to maintain some ongoing administrative support generally constitutes a 'plan.'" *Fielder*, 475 F.3d at 190 (citations omitted); *see Merit Const. Alliance*, 759 F.3d at 129 (explaining that an Ordinance that "mandates an employee benefit structure and specifies how

that structure must be administered . . . is simply too intrusive to withstand ERISA preemption"). A benefits regime constitutes a "plan" for purposes of ERISA if it necessitates a detailed administrative structure and requires discretionary application of rules. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 12 (1987) ("Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.").

Indeed, this Court itself just reiterated these core principles, in reviewing California's "CalSavers" scheme. *Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program*, __ F.3d __ , 2021 WL 1805758 (9th Cir. May 6, 2021) ("*HJTA*"). CalSavers requires certain employers that do not offer their own tax-qualified retirement benefit plans to remit employee payroll deductions to a state-managed retirement system. The Court held that CalSavers is not preempted by ERISA because, among other things, it is established and maintained by the State alone, and it does not apply to employers with their own ERISA plans. *Id.* at *9–11. But the Court stressed that ERISA *would* preempt a local measure mandating that "private employers provide certain [employee] benefits to their employees." *Id.* at *10. That is exactly what Chapter 14.28 does, and what *Golden Gate* erroneously permits, even when an employer already sponsors an ERISA-governed healthcare plan for its employees.

The *HJTA* decision notes, citing *Golden Gate*, that "non-discretionary

administrative obligations under a government-mandated benefit program" do not, "without more," violate ERISA. *Id.* at *9. But of course the laws at issue in *Golden Gate* itself and the panel decision here *do* require more, by requiring employers to alter their own benefit plans, or fund new ones. As *HJTA* itself recognizes, once a law requires the employer to *fund* a benefit plan, the conflict with ERISA's preemptive scope becomes inescapable. Such laws do not "merely increase costs or alter incentives for ERISA plans": in contravention of the Supreme Court's ERISA preemption pronouncements, they require employers to provide a "particular benefit" to each "particular beneficiary" in a "particular way." *Rutledge*, 141 S. Ct. at 480; *see also Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1505 (9th Cir. 1993) (finding that a state statute requiring employers to defray costs of certain medical exams for pilots constituted an ERISA plan because eligibility for benefits was employee-specific and required the creation of an administrative scheme); *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992) (finding that a one-time severance payment nonetheless constituted a "plan" because eligibility turned on employee-specific facts that required the adoption of an administrative structure). *HJTA* only highlights the discord between *Golden Gate* and black-letter ERISA preemption principles, reinforcing that immediate *en banc* review is necessary.

ERISA does not, in any case, tolerate the particular administrative burdens

that accompany compliance with localized benefit regimes like Chapter 14.28. An employer cannot comply with Chapter 14.28 without creating a tailored administrative system to analyze the payments due to each and every beneficiary of the law *relative to the benefits the employer already provides*. Here, again, *HJTA* is instructive: the fact that CalSavers does not apply to employers with existing ERISA plans was critical to the Court's holding that the program "does not regulate ERISA plans or the benefits provided under them." 2021 WL 1805758, at *11. The Court distinguished laws that have an effect on existing ERISA plans, and expressly reserved the question whether CalSavers would be preempted if it extended to employers that already sponsored their own plans. *Id.* at *11–13 & n.5. But *Golden Gate* gives such laws the green light: Chapter 14.28 and ordinances like it apply to employers with ERISA plans, and require them to test the sufficiency of those plans against the idiosyncratic mandates of the particular locality. That is the hallmark of a statute that has an impermissible "connection with" ERISA plans.

Practicable reporting, disclosure, and recordkeeping requirements are "central to . . . the uniform system of plan administration contemplated by ERISA." *Gobeille*, 577 U.S. at 323. ERISA's preemption provision thus forbids municipalities to graft "[d]iffering, or even parallel" requirements onto ERISA's comprehensive regime, even when their putative purpose is to complement ERISA,

or when they have "different objectives." *Id.* at 323–25. Whether conflicting or complementary, local mandates that require employers to "accommodate multiple governmental agencies" oblige employers to absorb compliance costs that Congress has prohibited. *Id.* at 324. With just one locality, the conflict with a uniform regulatory regime is obvious. Multiplied across thousands of local ordinances prescribing individualized health care and retirement benefits, the conflict is intractable.

ERISA is uniquely concerned with the administrative burdens posed by this intergovernmental accommodation, which is why state laws can be preempted even when they specifically allow an employer to opt out of the specific change in law the state statute effects. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001). As other courts of appeals have recognized in analyzing ERISA's preemption of local laws like Chapter 14.28, the availability of a "non-ERISA option . . . for compliance" with such a law does not save it, because "its mandate still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals." *Merit Const. Alliance*, 759 F.3d at 131; *accord Fielder*, 475 F.3d at 193 ("Even if a state law provides a route by which ERISA plans can avoid the state law's requirements," "taking that route might still be too disruptive of uniform plan administration to avoid preemption." (citing *Egelhoff*, 532 U.S. at 151)). Schemes like Chapter 14.28 still require employers to "keep an eye on

conflicting state and local [laws]" and to either adjust their own benefit offerings or incorporate new ones. *Fielder*, 475 F.3d at 197. In this way, the relative magnitude of any particular ordinance's practical impact is beside the point—the very *existence* of a patchwork of local regulation interrelating with existing benefit plans offends ERISA's goal of "nationally uniform plan administration." *Egelhoff*, 532 U.S. at 148.

Golden Gate never squared with these principles, and its extension to ordinances requiring the direct payment of benefits takes the law in this circuit even further off track. Multistate employers now must grapple not only with the proliferation of localized benefits regulation within the Ninth Circuit, but also with a disuniform body of circuit precedent governing their provision of employee benefits. *Compare, e.g.*, *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F. Supp. 2d 83, 95 (S.D.N.Y. 2009) (following the Fourth Circuit's analysis in *Fielder*), *with Cal. Hotels & Lodging Ass'n v. City of Oakland*, 393 F. Supp. 3d 817, 829–31 (N.D. Cal. 2019) (following *Golden Gate*). The *en banc* Court should use this opportunity to bring Ninth Circuit law back in line with the Supreme Court's intervening decisions in *Gobeille* and *Rutledge*, and with the Fourth and First Circuits' correct recognition in *Fielder* and *Merit Construction Alliance* that municipal employee benefits laws are fundamentally incompatible with a singular federal system of employee benefit regulation. *Fielder*, 475 F.3d at 187; *Merit*

Const. Alliance, 759 F.3d at 130.

II. The splintered regulatory structure endorsed by *Golden Gate* has undermined the provision of employee benefits within the Ninth Circuit

A decade ago, the United States urged the Supreme Court not to review *Golden Gate* on the theory that the Affordable Care Act would quell the proliferation of local health care benefits laws. That prediction has proved wrong. Municipalities within the Ninth Circuit continue to experiment with ways to channel benefit resources to their own residents. An employer in just the Bay Area, with all of its employees concentrated within a fifteen-mile radius, has to contend with no fewer than seven separate ordinances defining minimum amounts of employer health expenditures. *See* Berkeley, Cal., Municipal Code Ch. 13.27; Oakland, Cal., Municipal Code Ch. 2.28 (applying city-wide); *id.* Ch. 5.93 (imposing additional benefits requirements on Oakland hotel operators); San Francisco, Cal., Admin. Code § 14 (applying city-wide); *id.* § 12Q (imposing additional benefits requirements for airport workers); Marin County, Cal., Admin. & Pers. Code § 2.50.050; San Leandro, Cal. Municipal Code § 1-6-625. Each of these overlapping ordinances, unsurprisingly, has different and conflicting requirements. *Compare, e.g.*, Oakland, Cal. Municipal Code Ch. 2.28.030(C) (requiring health care benefit expenditures of at least $1.25 per hour), *with* Berkeley, Cal., Municipal Code Ch. 13.27.050(A), (D) (providing for annual adjustments to medical benefit reimbursement rate), *and* City of San Francisco

Office of Labor Standards Enforcement, *Health Care Security Ordinance* (Updated May 4, 2021), https://sfgov.org/olse//health-care-security-ordinance-hcso (listing mandatory health expenditure rates for 2021 from $2.12 to $3.18 per hour).

Municipal ordinances that veer into health plan administration create multiple barriers to an employer's nationally uniform benefits plan. At the outset, an employer must adopt the ordinance's system for testing the sufficiency of its current offerings and determine whether the ordinance will require modifications to the existing ERISA plan. This initial review often turns on detailed eligibility criteria; for an ordinance like Chapter 14.28, employers must conduct a detailed employee-by-employee analysis of particularities like whether the employee has access to "high-quality and adequate" health care through other means, whether the employee has turned down previous coverage offers from the employer, and whether those previous coverage offers would have provided "adequate" coverage based on a variable formula in the ordinance. Employers then have to either modify existing ERISA plans or create new plans in order to accommodate the municipal requirements. The employer must tailor the additional payment amounts due to each employee based on that employee's particular characteristics. And the employer must keep detailed records at each step in the process. In Seattle, employers must track every health-related expenditure made for each employee for the past three years, among other requirements. These record-keeping obligations

may require employers to track different metrics from the information they already collect, or calculate existing metrics in new ways. And in addition to record-keeping requirements, municipalities also impose reporting burdens in order to supervise compliance. Local regulations thus impose costs on employers even when existing plans would already comply, because employers must undertake an analysis of each municipality's separate requirements in order to determine compliance, and collect and report records to prove it.

Any such ordinance is problematic in and of itself. Multiplied across thousands of municipalities, these idiosyncratic compliance regimes exact costs and administrative tolls that reduce the resources available for the actual provision of benefits to workers in *every* community. *See, e.g.*, *Fort Halifax*, 482 US at 11; Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers: 1999–2003*, at iii (1998) (showing that each one percent increase in . . . plans' costs [causes] a potential loss of insurance coverage for about 315,000 individuals"); *see also* Michael Chernow *et al.*, *Increasing Health Insurance Costs and the Decline in Insurance Coverage*, Health Servs. Research (Aug. 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361195/ (calculating that a one percent increase in premiums will cause a net increase in the uninsured population of 164,000 people). Those adverse effects will be most pronounced among the

large, cross-jurisdictional employers that form the backbone of the country's employer-sponsored healthcare system.[5]

Rather than "inducing employers to offer benefits by assuring a predictable set of liabilities," the imposition of local regulations requires employers to reallocate resources away from the provision of benefits, and toward "administrative costs or litigation expenses [that] unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (cleaned up). The additional costs created by these ordinances are deadweight losses to American workers. And the administrative burden they impose reconfirms that they are preempted. Congress was well aware of the practical threat that balkanized benefits regulation would pose to the extension of employer-sponsored benefits to workers across the country, and enacted ERISA § 514 to avoid precisely this outcome. *Egelhoff*, 532 U.S. at 149. There is no place for local employee benefit mandates in ERISA's comprehensive, uniform, and national benefits apparatus.

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[5] Firms with 200 or more employees provide health insurance to 70% of the workers who receive employer-sponsored health insurance. Kaiser Family Foundation, *A Comparison of the Availability and Cost of Coverage for Workers in Small Firms and Large Firms: Update from the 2015 Employer Health Benefits Survey* (Feb. 5, 2016), https://www.kff.org/private-insurance/issue-brief/a-comparison-of-the-availability-and-cost-of-coverage-for-workers-in-small-firms-and-large-firms-update-from-the-2015-employer-health-benefits-survey/.

CONCLUSION

Amici curiae respectfully urge this Court to grant ERIC's Petition for Rehearing *En Banc*.

Dated: May 10, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FRAP 29(b)(4) and Ninth Circuit Local Rule 29-2(c)(2) because the brief contains 3,697 words, excluding the items listed in Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font (14-point for footnotes).

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, the foregoing document

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