

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

**MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF
PETITION FOR REHEARING *EN BANC***

MICHAEL B. KIMBERLY
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, DC 20001
Telephone: (202) 756-8000
mkimberly@mwe.com
shogarth@mwe.com

ANTHONY F. SHELLEY
Miller & Chevalier Chartered
900 16th Street, NW
Black Lives Matter Plaza
Washington, D.C. 20006
Telephone: (202) 626-5800
ashelley@milchev.com

ANDREW C. LIAZOS
McDermott Will & Emery LLP
200 Clarendon Street
Boston, MA 02116-5021
Telephone: (617) 535 4038
aliazos@mwe.com

GWENDOLYN C. PAYTON
Kilpatrick Townsend & Stockton
LLP
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
Telephone: (206) 626-7713
gpayton@kilpatricktownsend.com

Counsel for Appellant The ERISA Industry Committee

MOTION

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1, appellant The ERISA Industry Committee respectfully requests leave to file the attached Reply in Support of Petition for Rehearing *En Banc*.

1. On April 30, 2021, appellant petitioned for rehearing *en banc*, asserting that the panel's application of *Golden Gate Restaurant Association v. San Francisco*, 546 F.3d 639 (9th Cir. 2008), conflicts with authoritative decisions of the First and Fourth Circuits and various decisions of the Supreme Court. The petition is supported by three *amicus* briefs signed by fourteen national trade associations.

2. On May 25, 2021, the Court ordered appellee City of Seattle to file a response to the petition. Seattle in turn sought, and the Court granted, an extension of time to file the response, to and including July 15, 2021.

3. On July 15, 2021, Seattle filed a timely opposition to the petition for rehearing. The opposition includes various mischaracterizations, including of the First Circuit and Fourth Circuit cases that conflict with *Golden Gate* and of appellant's position concerning the importance of the case.

4. Appellant accordingly seeks leave to file a reply of under 2,000 words. Under the Federal Rules, a party seeking relief typically has an opportunity to reply to any opposition to the relief being sought. *See, e.g.*, Fed. R. App. P. 28(c) (permitting reply brief). While the Federal Rules of Appellate Procedure and the Ninth Circuit Rules do not expressly permit or prohibit a reply to responses to a petition for

rehearing, this Court routinely grants leave for a party to do so, including in numerous recent cases. *See, e.g., Bernstein v. Virgin America, Inc.*, No. 19-15382, --- F.4th ---- (9th Cir. 2021) (Court granted leave to file reply in support of rehearing petition on June 21, 2021); *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067 (9th Cir. 2020) (Court granted leave to file reply in support of rehearing petition on Oct. 7, 2021); *United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020) (Court granted leave to file reply in support of rehearing petition on Oct. 5, 2020); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc) (Court granted leave to file reply in support of rehearing petition on Nov. 1, 2018).

5. Pursuant to Ninth Circuit Rule 27-1(2) and Circuit Advisory Committee Note 27-1(5), the undersigned counsel for appellant contacted counsel for appellee concerning this motion. Counsel for appellee stated that appellee opposes the relief requested.

WHEREFORE, the Court should grant leave to file a reply to appellee's opposition to the petition for rehearing *en banc*. The proposed reply is attached.

July 22, 2021

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley

Miller & Chevalier Chartered

900 16th Street, NW

Black Lives Matter Plaza

Washington, D.C. 20006

Telephone: (202) 626-5800

E-mail: ashelley@milchev.com