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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

REPLY BRIEF

We demonstrated in the petition for rehearing that *Golden Gate Restaurant Association v. San Francisco*, 546 F.3d 639 (9th Cir. 2008), conflicts with authoritative decisions of the First and Fourth Circuits. Those circuits have held that even when "a non-ERISA option [is] available for compliance with" a local employee-benefit mandate, "the availability of such an option does not save" the mandate from preemption because it "still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals." *Merit Constr. Alliance v. City of Quincy*, 759 F.3d 122, 131 (1st Cir. 2014); *accord Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 196-97 (4th Cir. 2007). This Court, in *Golden Gate*, held the precise opposite.

We showed also that, by destroying the uniformity promised by ERISA's preemption clause, *Golden Gate* implicates a matter of tremendous practical importance. The Court need look no further for evidence on that point than the three *amicus* briefs, filed by fourteen of the Nation's largest and best respected trade associations, urging the Court to revisit *Golden Gate*'s errant holding.

Finally, we demonstrated that *Golden Gate* is badly out of step with the Supreme Court's ERISA preemption precedents and should be overruled. That much is confirmed by the opinion of the eight judges who dissented from *en banc* rehearing in *Golden Gate*.

Against this background, Seattle's opposition to the petition for rehearing is unconvincing. For starters, it devotes the bulk of its presentation to the merits. *See* Opp. 2-10. For our part, we are confident that *Golden Gate* was wrongly decided. But the point for present purposes is that the merits are for the Court to decide *after* it grants *en banc* review, with the benefit of full re-briefing and re-argument. And *en banc* review is warranted because nothing else in Seattle's response is persuasive.

A. The Court Should Grant *En Banc* Review to Resolve a Broadly-Recognized 2-1 Circuit Split

The petition for rehearing explained (at 10-12) that *Golden Gate* is irreconcilable with *Fielder* and *Merit Construction*.

Seattle says (Opp. 9-11) that *Fielder* does not conflict with *Golden Gate* because *Fielder* involved a statute under which the non-ERISA option was really no option at all. Because "the only rational choice employers" had under the law was to restructure their benefit plans to comply, Seattle says, the law was preempted by ERISA. Opp. 9 (quoting *Fielder*, 475 F.3d at 193).

But as we observed in the petition (at 10), *Fielder* had two alternative holdings. In its second holding, it reasoned that, even assuming a rational employer might select the non-ERISA method for complying with the law, it still would be preempted because it would put employers to an impermissible choice. Both holdings are binding on courts within the Fourth Circuit. *See*

United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'") (quoting *Union Pac. R. Co. v. Mason City & Ft. D.R. Co.*, 199 U.S. 160, 166 (1905)). We made this point about *Fielder*'s second holding in the petition—as did the academic sources we cited—but Seattle talks past us.

As for *Merit Construction*, according to Seattle (Opp. 11), the First Circuit itself distinguished *Golden Gate* on the ground that this Court did not "lay down a blanket rule that whenever compliance can come through a non-ERISA option, ERISA preemption is unavailable." *Merit Construction*, 759 F.3d at 130. But Seattle itself took the opposite view in its merits brief before the panel, characterizing *Golden Gate* as laying down exactly such a blanket rule. *See* Red Br. 14-15 (describing the "central holding of *Golden Gate*," that a local benefit mandate is not preempted by ERISA if an employer can comply "even in the absence of a single ERISA plan"). And there can be no doubt after this case that *Golden Gate* is in fact being applied by the district courts and panels of this Court in a blanket manner.

The bottom line is this: if Seattle's ordinance had been adopted by Baltimore or Richmond, or Boston or Providence, it would have been struck down as preempted by ERISA. It survived appellant's preemption challenge

only because Seattle is located in the Ninth Circuit. That kind of stark variability in the application of such an important federal law as ERISA is intolerable. The Court should convene *en banc* to resolve the split and restore national uniformity on this issue.

B. A Grant of *En Banc* Review Also Would Permit the Court to Clarify the Law On the Presumption Against Preemption

We showed in the petition (at 17-18) that *Golden Gate* conflicts further with a recent decision of the Fifth Circuit, on the question whether the presumption against preemption applies in ERISA cases. We explained that *Golden Gate* led off its preemption analysis by reciting the presumption, which in turn influenced the remainder of its reasoning. *See* 546 F.3d at 647-52.[1] The Fifth Circuit, in *Dialysis Newco v. Community Health Systems Group Health Plan*, 938 F.3d 246 (5th Cir. 2019), by contrast, held that the presumption no longer applies in ERISA preemption cases.

Seattle effectively concedes (Opp. 16) the conflict with the Fifth Circuit's presumption-against-preemption holding, dubiously calling it "dicta." It is nothing of the sort. The Fifth Circuit spent many paragraphs on the issue and deemed the non-existence of a presumption against preemption as the first and

[1] Although the panel in this case issued a short memorandum disposition, it also spent considerable time reaffirming the view that, "[c]ontrary to ERIC's argument, 'state and local laws enjoy a presumption against [ERISA] preemption when they clearly operate in a field that has been traditionally occupied by the state.'" Slip op. 2 (quoting *Golden Gate*, 546 F.3d at 647).

key basis for rejecting extension of an earlier ERISA precedent that had rested on the presumption. *See* 938 F.3d at 257-59. Plainly enough, the Fifth Circuit has "walked back from" the "presumption against preemption" in ERISA cases. *Id*. at 259. Under *Golden Gate*, the opposite is true in this circuit.

Seattle devotes nearly one fifth of its opposition (at 13-16) to a defense of the presumption against preemption on its merits, insisting (at 15) among other things that "*Gobeille* did not reject the presumption against preemption." But, again, the question whether Seattle or the Fifth Circuit has the better of that argument is an issue for the Court to decide *after* the parties have had an opportunity to fully air this important question in re-briefing and re-argument.

C. The Question Whether Ordinances Like Seattle's Are Preempted By ERISA Has Substantial and Growing Importance

As we explained in the petition (at 12-14), *Golden Gate* invites municipalities to adopt a patchwork of local benefit mandates and, if allowed to stand, will lead to precisely the disuniformity that Congress intended ERISA's preemption clause to prevent.

Seattle proclaims (Opp. 13) that the "parade of horribles" originally predicted after *Golden Gate* was decided a dozen years ago "did not come to pass and there is no reason to believe that the continued validity of [*Golden Gate*] will cause it to do so." But in taking this position, Seattle simply ignores what we said in the petition. In fact, we acknowledged (at 3) that, although the

same argument was made in *Golden Gate*, "municipalities' efforts to promulgate [benefit-mandate] ordinances were initially stalled after *Golden Gate* by the Affordable Care Act's enactment." Indeed, it was on this basis that the Solicitor General successfully urged the Supreme Court to deny certiorari at that time. *See Br. for U.S. as Amicus Curiae*, No. 08-1515, 2010 WL 2173776, at *15 (May 26, 2010) (explaining that the "preemption issue" presented in *Golden Gate* "does not warrant [Supreme Court] review at this time" in light of the ACA's intervening enactment and the fact that "[t]he full contours and effects of many aspects of the new federal framework . . . remain to be fleshed out").

But the ACA's dust has now settled, and it is no longer slowing the adoption of ordinances like Seattle's. The Court need not take our word for it; a host of municipalities filed an *amicus* brief before the three-judge panel promising to bring this result about as soon as practicable. Seattle brushes that promise aside (Opp. 13) as "purely speculative." But its own *amici* obviously disagree. And it hardly makes sense to put off reconsideration of *Golden Gate* to see if they will make good on their promise; ERISA preemption is supposed to prevent a crazy-quilt of regulation *before* it takes hold.

The opposition also asserts (at 12) that ordinances like Seattle's do not invite a patchwork because they "provide employers with meaningful alternatives to altering or adopting ERISA plans." But that misses the point:

Under *Golden Gate*, employers must keep on top of an enormous catalogue of intricate and endlessly variable local rules for what they must do to avoid having to alter their benefit plans—here, paying a cash benefit in addition to or in lieu of a healthcare benefit. *Cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 149 (2001) (a central goal of ERISA preemption is to save "ERISA administrators [from having] to master the relevant laws of 50 States"). And that is to say nothing of the fact that—contrary to the panel's holding—Seattle's ordinance *does* require the creation of an ERISA-covered benefit plan regardless of what option an employer selects. Either way, it portends precisely the kind of wild disuniformity of regulation that ERISA is meant to foreclose.

D. Seattle's Merits Arguments Are Unpersuasive and Are No Basis for Denying Rehearing

With little persuasive to say in response to the circuit split or importance of the question presented here, Seattle devotes most of its brief to the merits, which we do not dwell on here. We note only that the grounds that the city offers for distinguishing *Egelhoff* and *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), are red herrings.

Concerning *Egelehoff*, Seattle observes (Opp. 7) that, to exercise the opt-out path, plan administrators had to take the technical step of amending their plan documents to indicate expressly that they would not follow the state law at issue there governing distribution of benefits. But ERISA preemption does not

turn on such jots and tittles. The statute at issue in *Egelhoff* was preempted because it "dictate[d] the choices facing ERISA plans with respect to matters of plan administration" by forcing them to choose either to alter their substantive benefits or otherwise to take certain affirmative steps to avoid having to do so. 532 U.S. at 150. Seattle's ordinance does precisely the same thing. It makes no difference that the opt-out path here requires employers to administer a cash benefit rather than amending their ERISA-covered healthcare benefit documents.

Seattle splits hairs even more finely in its response to *Greater Washington*. An employer's obligation to pay its employees a cash benefit under Seattle's ordinance depends on how generous the employer's ERISA-covered healthcare benefit is—the more generous the healthcare benefit, the smaller the cash payment has to be, and vice-à-versa. And as Seattle itself admits, that is precisely what *Greater Washington* forbids—the establishment of an obligation "'measured by reference to' the levels of benefits the employer provided under its ERISA plan." Opp. 7-8 (quoting *Greater Washington*, 506 U.S. at 130). Seattle says (Opp. 8) that its ordinance merely "enumerate[s] how much employers must pay." But it also admits that the ordinance permits an employer "to count its ERISA plan contributions towards the statutorily prescribed contribution amount." *Id*. (emphasis omitted). The difference between that and the scheme rejected in *Greater Washington* is not apparent.

In light of these conflicts, if the Court is going to continue to hew to *Golden Gate*, it should at least be the Full Court that says so.

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

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

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

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

Counsel for Appellant The ERISA Industry Committee

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 40-1, the undersigned counsel for appellant certifies that this petition:

(i) complies with the type-volume limitation of Rule 35(b)(2)(A) because it contains 1,999 words, including footnotes and excluding the parts of the petition exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

July 22, 2021 /s/ *Anthony F. Shelley*

CERTIFICATE OF SERVICE

I hereby certify that that on July 22, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

July 22, 2021 /s/ *Anthony F. Shelley*