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, AMERICAN HOTEL & LODGING ASSOCIATION, NATIONAL RETAIL FEDERATION, AND INTERNATIONAL FRANCHISE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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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 OF INTEREST[1]

Whether municipalities can impose new, burdensome, city-specific obligations on select businesses—in contravention of the national uniformity that Congress sought to achieve in the Employee Retirement Income Security Act of 1974 ("ERISA"), and in violation of ERISA's express preemption provision—is critically important to a broad and diverse array of businesses across the economy. Many businesses of all stripes and types have already been harmed by this Court's decision in *Golden Gate Restaurant Ass'n v. City & Cnty. of San Francisco*, 546 F.3d 639 (9th Cir. 2008). If this Court permits Seattle to follow *Golden Gate*'s roadmap around ERISA, that harm may spread. Indeed, other major municipalities have already signaled their intent to follow in Seattle's wake and enact their own policies to accomplish what ERISA prohibits.

It is critical that this Court recognize the potentially far reaching consequences of this case. As businesses continue to address the unprecedented economic and operational challenges of a pandemic, the mandates at issue could impact not only large national chains but also local independent operators and small, family-run companies that operate a range of businesses adjacent to large hotels. The coalition

[1] Pursuant to Circuit Rule 29-2(a), *amici* state that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29, no party's counsel authored this brief in whole or in part, and no money intended to fund preparing or submitting this brief was contributed by a party or party's counsel or anyone other than *amici*, its members, or its counsel.

of *amici* listed below—representing the restaurant and hospitality industries as well as independent, retail, and franchise businesses—therefore submit this brief to encourage the Court to grant the petition for rehearing by the ERISA Industry Committee ("ERIC"), to overturn this Court's incorrect and harmful decision in *Golden Gate*, and to hold that Seattle Municipal Code 14.28 is preempted.

The Restaurant 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 Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Restaurant 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 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 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 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. Nearly 60 percent of hotels are considered a small business in the lodging sector.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 52 million employees and contributes $3.9 trillion annually to GDP. As the industry umbrella group, the NRF regularly submits amicus curiae briefs in cases raising significant legal issues that are important to the retail industry.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA works to protect, enhance and promote franchising. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development. IFA frequently files amicus briefs in cases raising critical legal matters of importance to franchising.

SUMMARY OF ARGUMENT

ERIC ably explains in its brief why this Court should grant the petition for rehearing *en banc*, discard its outlier decision *Golden Gate*, and find that SMC 14.28

is preempted by ERISA. *Amici* write separately to emphasize the "exceptional importance" and practical impact of this issue. Fed. R. App. P. 35(a)(2). The Ninth Circuit's narrow interpretation of ERISA preemption creates continuing uncertainty that has and will have very real economic consequences for businesses throughout the economy. The effect will be particularly pronounced for struggling restaurants, hotels, and small businesses as they try to recover from the COVID-19 pandemic.

I. *Golden Gate* 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. But *Golden Gate* has created precisely what ERISA was meant to eliminate. Both small and large businesses may now feel pressure to comply with two very different benefit regimes—one sanctioned by ERISA, the other operating in its shadow wherever a municipality feels so emboldened. To avoid higher costs for employers—and to discourage other cities from attempting to engraft their own preferences onto a national regulatory regime—this Court should accept 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.

II. A patchwork system of competing regulations would be impermissible under any circumstance. But SMC 14.28 and the movement it advances 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 independent, retail, and franchise businesses. At a time when every level of government should be working to help businesses stay and keep their workers employed, Seattle and others seek to impose an added burden that many businesses simply will be unable to bear.

ARGUMENT

I. *Golden Gate* Sows Uncertainty By Allowing Localities To Flout ERISA By Imposing New Rules On Benefit Plan Administration.

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 panel 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.

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, pushing for what has been described as "the most expansive preemption provision in any federal statute." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 947 (2016) (Thomas, J., concurring). In "terse but comprehensive" terms, the provision states 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 recognized Congress's interest in preserving a uniform, national system for regulating employee benefits, routinely relying 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 New York Human Rights Law that required employers to provide specific healthcare benefits); *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (invalidating Penn. statute that prohibited healthcare "plans from . . . requiring reimbursement in the event of recovery from a third party").

Consistent with the 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 of 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.").

Golden Gate undermines this predictability while conflicting with the Supreme Court's current teaching and decisions from other circuits. The panel opinion here 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. Applying the Supreme Court's guidance and following its sister circuits, this Court should reject any presumption against preemption here and provide businesses with the predictability Congress intended in enacting ERISA's broad preemption provision.

II. Employers Need ERISA's National Uniformity Now More Than Ever.

Providing clarity and predictability is particularly important to protect the millions of restaurant, hospitality, retail, independent, and franchise businesses from unnecessary and burdensome attempts by localities to deviate from a uniform

national regime like ERISA. This unpredictability comes during a particularly challenging time for businesses as they try to recover from the COVID-19 pandemic.

The restaurant and hospitality industries have been hit especially hard. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[2] In April 2020, for example, over eight million restaurant employees—nearly two thirds of the restaurant workforce—had been laid off or furloughed due to the pandemic.[3] By the end of the year, restaurant sales were down $240 billion from expected levels and 110,000 restaurants temporarily or permanently closed.[4] These closures can devastate neighborhoods as the impact reverberates, harming other local businesses and industries. They can also harm local culture and stability: restaurants help foster unique neighborhood identities, drive commercial revitalization, and anchor those focused on seeing their neighborhoods grow and thrive.

Washington State was ground zero for the pandemic in the United States, and its restaurant industry has yet to recover. Though the industry is beginning to add

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[2] National Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

[3] 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.

[4] National Restaurant Ass'n, *National Statistics* (last visited May 3, 2021), https://www.restaurant.org/research/restaurant-statistics/restaurant-industry-facts-at-a-glance.

jobs again, Washington's restaurant industry lost nearly 50,000 jobs, representing approximately 20% of its work force, since February of 2020.[5] Seattle has been particularly hard hit. By the end of July 2020, almost 70 downtown businesses had been closed.[6] Between March and September 2020, more than 600 restaurants and bars in Seattle closed, as did hundreds of establishments elsewhere across Washington.[7]

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.* §§

[5] National Restaurant Ass'n & Bureau of Labor Stat., *State Eating and Drinking Place Employment Trends* (2021), https://restaurant.org/downloads/pdfs/research/state-employment-trends-march-2021.pdf.

[6] Natalie Swaby, *'Downtown Core is Devastated': Seattle Restaurants and Shops Fight to Survive Pandemic*, King5 (July 19, 2020).

[7] Tan Vinh, *624 Seattle restaurants and bars have closed during the COVID-19 pandemic, survey finds*, The Seattle Times (Dec. 8, 2020), https://www.seattletimes.com/life/food-drink/624-seattle-restaurants-and-bars-have-closed-during-the-covid-19-pandemic-survey-finds/.

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. For example, the application of Seattle's Ordinance may vary based on whether a business "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." *Id.* § 14.28.020. What constitutes "routine," how to discern a hotel's "purpose," and who a business is serving may be subject to different reasonable interpretations.

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 wielding a private right of action, *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); *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 even the hardest working members of the business community. Though there has been some improvement in recent months, these gains remain precarious and unevenly distributed, with 22% of small businesses' sales remaining at less than half of what they were at this time in 2020 and 13% reporting that they will have to close their doors if current economic conditions do not improve over the next six months.[8] Employment levels in the restaurant industry remain below their pre-pandemic

[8] National Federation of Independent Business, *NFIB COVID-19 Survey: Small Business Recovery Remains Fragile* (Mar. 25, 2021), https://www.nfib.com/content/press-release/coronavirus/nfib-covid-19-survey-small-business-recovery-remains-fragile/.

levels in all 50 states and the District of Columbia.[9] Sales levels for over one-third of small businesses are still down considerably as compared to before the COVID-19 pandemic.[10] And business owners remain uncertain about whether it is a good time to expand their business and make capital expenditures.[11]

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.

CONCLUSION

The petition for rehearing *en banc* should be granted, *Golden Gate* should be overruled, and the District Court's decision dismissing the action should be reversed.

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[9] National Restaurant Ass'n, *49 States and DC Added Jobs in March* (Apr. 16, 2021), https://restaurant.org/articles/news/49-states-and-dc-added-restaurant-jobs-in-march.

[10] NFIB Covid-19 Small Business Survey (April 2021), available at https://assets.nfib.com/nfibcom/Covid-19-17-Questionnaire.pdf.

[11] NFIB Small Business Economic Trends (March 2021), available at https://assets.nfib.com/nfibcom/SBET-Mar-2021-Final.pdf.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief contains 3,285 words.

/s/ Gabriel K. Gillett

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2021, 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