Case No. 20-35472

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
Case No. 2:18-cv-01188-TSZ
Honorable Thomas S. Zilly

BRIEF OF AMICI CURIAE LAW PROFESSORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

Amici curiae are law professors and legal scholars who write and teach in the area of employee pension and welfare benefit plans. We have studied and taught about the sole issue on this appeal: whether ERISA's preemption clause prevents the City of Seattle from adopting an ordinance that would help some of its neediest employed citizens access the health care system by imposing a new wage requirement on their employers. *Amici'*s interest in the case reflects three concerns: (1) that ERISA preemption is properly cabined within the goals Congress sought to achieve in delimiting state law application to employee plans; (2) that ERISA preemption is not interpreted to preempt state and local laws whose purpose is the improvement of health so long as such laws do not seek to "enter a fundamental area of ERISA regulation," *Gobeille v. Liberty Mutual Ins. Co.*, – U.S. –, 136 S. Ct. 936 (2016); and (3) to preserve clarity and stability in ERISA preemption jurisdiction, which is threatened by the attempt to reverse the district court's correct holding that ERISA does not preempt the Seattle ordinance.

Amici American Benefits Council, HRPA, and Business Group on Health suggest that the position in their brief arguing for preemption of the Seattle

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[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure § 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and no one other than *amici,* and their counsel, contributed money intended to fund preparing or submitting this brief.

ordinance somehow protects the interests of the tens of millions of employees and their families who participate in plans sponsored by their members, presumably because plan sponsors pass on at least some of the cost reduction that results from plans being subject to the single regulatory regime, ERISA, rather than a multiplicity of state regimes.

In any event, the Appellant's *amici*'s assertion that the employees are an ultimate beneficiary of preemption is just that, an assertion, one suggested without proof. What is true, however, is that fewer than half of Americans receive health benefits from ERISA plans,[2] and that in a number of states more than 10 percent of citizens have no health insurance coverage.[3] As important, some participants in health plans do not receive adequate levels of health care benefits.

The workers benefited by the Seattle ordinance are among these uncovered and undercovered workers. The *amici* filing this brief urge the Court to consider that the City has a legitimate interest in improving the access of these workers to health care and that ERISA preemption was designed only to preempt laws that

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[2] *See How Many Americans Get Health Insurance from their Employer?,* available at https://www.ehealthinsurance.com/resources/small-business/how-many-americans-get-health-insurance-from-their-employer (accessed on November 1, 2020, at 6:53 p.m.).

[3] *See* Kaiser Family Foundation, *Health Insurance Coverage of the Total Population,* available at https://www.kff.org/statedata/ (accessed on November 1, 2020, at 6:54 p.m.).

relate to the administration and other fundamental aspects of ERISA regulation of employee plans.

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Amici hope that their experience and expertise will assist the Court in its consideration of the important questions this case presents.

SUMMARY OF ARGUMENT

Concerned about the limited access that low-income hotel workers had to medical care, the Seattle City Council enacted an ordinance that required most Seattle hotels to provide a wage supplement for their low-wage employees who work at least 80 hours per month. The employer is permitted to pay the supplement to the employee in cash and if so, the payment is simply compensatory income to the employee. But the ordinance also allows the employer to satisfy this additional wage payment by remitting the payment (in whole or in part) to a third-party insurance company or a health savings account, or through providing coverage through a self-funded employer health care plan. An employer who chooses one of these alternatives would be contributing on the employee's behalf to an ERISA plan.[5]

Appellant (and its *amici)* argue that ERISA preempts this ordinance for three reasons:

First, because in its view all three alternatives under the ordinance, including the direct cash payment to the employee, create or utilize an

[5] Whether contributions to a health savings account constitute an ERISA plan would depend on particular facts. *See* note 7, *infra*.

ERISA plan;

Second, because the ordinance has an implicit reference to an ERISA plan; and

Third, because the ordinance has an impermissible connection to an ERISA plan.

As Appellee's brief forcefully demonstrates, these arguments are foreclosed by this Circuit's opinion in *Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), *cert. denied*, 561 U.S. 1024 (2010), which held that ERISA did not preempt a functionally identical statute, and by the Supreme Court's earlier foundational decisions in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645 (1995); *Massachusetts v. Morash*, 490 U.S. 107 (1989); and *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997). And contrary to Appellant's argument, neither these cases nor the principles they enunciate have been overruled, directly or implicitly.

Appellant's third argument – that the ordinance is "connected" to an ERISA plan because it may have some effect on the employer's decision to adopt an ERISA plan – is simply wrong. An employer's decision to adopt or not adopt a plan is a settlor decision and is therefore outside the regulatory concerns of ERISA.

See, e.g., Hughes Aircraft v. Jacobson, 525 U.S. 435 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). ERISA does not preempt a state law merely because the law helps shape the workplace environment in which the employer makes settlor decisions. Indeed, virtually all state and local laws imposing or relieving costs on an employer have an indirect impact on the employer's settlor decision to establish, terminate or amend an ERISA plan.

It should also be pointed out that the ordinance provides for severability of its provisions. Thus, if those portions of the ordinance that permit an employer to use an employer plan to satisfy the ordinance's requirement were preempted by ERISA, those provisions would be severed but the remaining ordinance would be valid as a law setting a wage requirement, an area that is not preempted by federal regulation. The ordinance would lose the flexibility it extends to employers, to the advantage of no one.

Finally, Appellant argues that the district court erred by acknowledging that there is a presumption that ERISA does not preempt a state law exercising traditional state police powers, such as the Seattle ordinance. But Appellant's pronouncement of the presumption's death is, as Mark Twain once said about his own rumored demise, greatly exaggerated and, in any event, the presumption is not needed to uphold the Seattle ordinance. Furthermore, we note that the presumption

is consistent with ERISA's language and Congress's preemption goal, which was to prohibit states from imposing multiple state regulatory regimes on employee benefit plans but not from adopting laws promoting the health and welfare of their citizens, an area that has long been a core concern of state and local government. The Seattle ordinance does the latter but not the former.

ARGUMENT

I. This Circuit's Decision in *Golden Gate Restaurant Association v. San Francisco* Is Controlling Precedent.

In 2008, this Circuit considered whether ERISA preempted a San Francisco ordinance that required certain employers to make contributions for their employees to a city-established health care plan unless the employer either made contributions to a third-party health care payor or a health savings account, or provided employees with health care benefits through a self-funded arrangement. The San Francisco statute required that the employer maintain records to assess the employer's payment obligations and to allow for the statute's enforcement.

The Golden Gate Restaurant Association brought a civil action seeking a permanent injunction against implementation of the ordinance, contending that ERISA preempted its application. The district court ruled in favor of the plaintiff, but the Ninth Circuit reversed. The Ninth Circuit held that when a law is functional in the absence of an ERISA plan, it is not preempted even though the employer

may choose to satisfy its commitments under the law with an ERISA plan or without an ERISA plan. *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 659 (9th Cir. 2008), *cert. denied*, 561 U.S. 1024 (2010). There is no functional difference in this regard between the San Francisco ordinance and the Seattle ordinance. In the case of each ordinance, an employer can fully satisfy its obligations without the use of an ERISA plan. The decision, which has its foundation in a seminal 1995 Supreme Court preemption case that remains the most complete analysis of the meaning and scope of ERISA's preemption clause, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645 (1995), is binding on panels of this Circuit.

II. The Payment of Money to an Employee Under the Ordinance Does Not Create an ERISA Plan.

Appellant argues that all three of the compliance options under the ordinance involve ERISA plans, including the option of paying cash to the employee. In Appellant's view, the ordinance itself either establishes a plan or requires the employer to establish a plan. The district court, however, correctly held that when an employer pays periodically a sum of money to an employee under a local law requiring such, and particularly if the money is paid from general assets of the employer, the employer is making a payment of wages and this obligation does not create an ERISA plan. But according to Appellant, the district court should have

defined the term "plan" in accordance with its dictionary definition (more specifically, in accordance with a supposed 1974 dictionary understanding) and under such definition, the employer's legal obligation to pay wages under local law constitutes a "plan." This position is little more than sophistry.

ERISA, which prescribes what a plan is and what a plan must do, certainly did not contemplate that an obligation to pay wages from general assets somehow creates an ERISA plan. Under ERISA, as Congress enacted it in 1974, a plan is a juridical entity that can sue and be sued, 29 U.S.C. § 1132(d), must be established and maintained in accordance with a written instrument, 29 U.S.C. § 1102(a), must provide for one or more named fiduciaries who jointly or severally have authority to control and manage its operation and administration, *id.*, must have a procedure for its amendment, 29 U.S.C. § 1102(b)(3), must have a funding policy, 29 U.S.C. § 1102(b)(1), and must establish an internal claims procedure, 29 U.S.C. 1133. These requirements have no relevance or applicability to an employer's obligation under state or local law to make payments to employees from its general assets. In addition, the reason Congress enacted ERISA in 1974 was to ensure that plans were prudently managed in accordance with fiduciary principles and sound funding practices so that they would meet their benefit commitments to employees. *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("ERISA was passed by

Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits.") These concerns are simply irrelevant to a local law requiring that an employer make regular monthly payments out of general assets to certain current employees. Characterizing such an obligation as an ERISA "plan" is an exercise of fitting a large round peg into a small square hole. *See, e.g., Dillingham*, 519 U.S. at 334 (a program that pays apprentices out of an employer's general assets is not an ERISA plan).

Similarly, the ordinance's routine and relatively modest administrative requirements are imposed on the employers subject to the ordinance and not on a plan born out of some immaculate statutory conception. This is all to say that an employer can comply with the ordinance's requirements without creating or utilizing an ERISA plan.

III. The Ordinance Does Not "Relate" to an ERISA Plan.

Section 514 of ERISA, 29 U.S.C. § 1144(a), provides that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan." After two decades of difficult experience trying to give sense and clarity to this "relate to" language, which the Second Circuit Court of Appeals called a "veritable Sargasso Sea of

obfuscation," *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993), *rev'd sub nom. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Supreme Court acknowledged that the language "relate to" is indeterminate and if pushed to the extreme end of its indeterminacy, would preempt all state and local laws because "as many a curbside philosopher has observed, everything is related to everything else." *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring). *See Travelers*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes, pre-emption would never run its course.").

Before Travelers, in *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85 (1983), the Supreme Court indicated that a state law related to an employee plan if it referenced an ERISA plan or was "connected to" such a plan.[6] In *Travelers,* the Court put meaningful and sensible limits on ERISA's preemptive reach by providing a conceptual framework for deciding when a state law has an impermissible "connection" to an ERISA plan. The latter inquiry begins with a "starting presumption that Congress does not intend to supplant state law,"

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[6] We agree with the City of Seattle that an ordinance's mere mention of an ERISA plan does not result in its preemption. "Instead, a reviewing court must 'ask whether the (1) law acts immediately and exclusively upon ERISA plans' or (2) 'the existence of ERISA plans is essential to the law's operation.'" Response Brief of Defendant-Appellee, at 43-47.

especially with respect to laws within "the historic police powers of the States." *Travelers*, 514 U.S. at 654-55. Beyond that, ERISA preemption fundamentally depends on whether the state law conflicts with ERISA's preemptive purpose, which is "to eliminate the threat of conflicting and inconsistent State and local regulation" of ERISA plans. *Id.* at 657 (internal quotation marks and alteration mark omitted). Here, where the statute requires the employer, and not an ERISA plan, to make a cash payment out of its general assets to employees who work 80 hours per month, there is no regulatory regime to which any ERISA plan is subject, even though the employer can choose, if it wishes, to satisfy all or part of its obligation through the use of an ERISA plan, either by adopting such a plan or by amending an existing plan.

Adoption or amendment decisions, however, are considered settlor functions and are not subject to ERISA regulation. *See, e.g., Hughes Aircraft v. Jacobson*, 525 U.S. 435 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). ERISA regulation is focused on ensuring that when an employer decides to adopt an ERISA plan, the plan is administered and managed so that employees can rely on the promised benefits. A decision by a hotel employer to meet its obligation under the ordinance from general assets or through an employee plan set up for that purpose, is a settlor decision, which is to say a decision to which ERISA regulation

is indifferent.

Appellant, though, argues that ERISA preemption should apply to the Seattle ordinance because the ordinance's requirements might influence the employer's decision on whether to satisfy its obligations by adopting a plan, by amending an existing plan, or by other means. But this Circuit, as well as the Supreme Court, have held that a state law that "alters the incentives, but does not dictate the choices," open to an employer does not result in ERISA preemption. *Dillingham*, 519 U.S. at 334; *see also Golden Gate*, 546 F.3d at 655-56.

Indeed, Appellant appears to be endorsing a position in which a local law avoids preemption only if it confines the employer to a one-choice regulatory straitjacket – providing that the sole manner in which the employer can satisfy its obligations is making cash payments from its general assets. It would make little sense – from either the perspective of the City or the employer – to preempt an ordinance because it gives the employer choices on how to comply, one choice involving an ERISA plan and the other choices not involving an ERISA plan.[7]

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[7] The Seattle ordinance also permits the employer to satisfy its obligation by contributing to a health savings account for the employee. The Department of Labor has ruled that a contribution to a health savings account does not necessarily create an employer plan if the employee can transfer the contribution to a health savings plan selected by the employee. *See* Field Assistance Bulletin 2006-2, available at https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2006-02.pdf (accessed on November 1, 2020, at 7:02 p.m.).

Here we also note that each provision of the Seattle ordinance is separate and severable. *See* Seattle Municipal Code § 1428.250. Thus, if the provisions of the ordinance that allow the employer to satisfy its obligations through the use of an ERISA plan would result in ERISA preemption, those provisions should be severed from the ordinance and the ordinance would then require that the employer make periodic cash payments to employees who work on average 80 hours per month. Such a statute would neither reference nor have a connection to an ERISA plan. But it would deprive employers of the considerable flexibility the Seattle ordinance currently accords them in discharging their obligation under it.

IV. The Presumption of ERISA Non-Preemption of State Law Protects the Seattle Ordinance.

In *Travelers,* the Supreme Court clarified that ERISA preemption was respectful of state and local laws and accorded them a presumption of non-preemption, at least when a law was an expression of traditional state police powers, such as laws to address the health needs of its citizens.

> [W]e have never assumed lightly that Congress derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Travelers, 514 U.S. at 655 (citations omitted).

In a subsequent ERISA preemption case, the Court noted that Congress did not intend a presumption against preemption to "validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose" of ERISA. *Gobeille v. Liberty Mutual Ins. Co.*, – U.S. –, 136 S. Ct. 936, 946 (2016). But this observation is non-controversial and announced no new principle; no one ever suggested that the presumption was conclusive and could validate laws that enter a "fundamental area of ERISA regulation." We have earlier shown that the Seattle ordinance did not enter such a fundamental area. At most, the ordinance modified the legal and economic context in which an employer, acting as an unregulated settlor, decides whether to adopt an ERISA plan.

Appellant further claims that the Supreme Court has for all intents and purposes reversed its position on an ERISA presumption against preemption in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016), a case not involving ERISA preemption. Apparently, Appellant has arrived at this position by reading considerable emphasis into a (1) "*see also*" citation to *Gobeille*, which (2) appears at the end of a sentence, that (3) Appellant quotes only in part, (4) in an opinion dealing with the preemption provision of a different statute (the Bankruptcy Code), and (5) that, if quoted completely, only says that the

Court will determine the scope of a federal statute's preemption clause by looking at the language of the clause of that statute. This Circuit, in light of the precedent of *Travelers*, which finds a presumption against ERISA preemption, and in light of its own precedent in *Golden Gate*, should decline Appellant's invitation to reverse precedent based on its self-interested reading of judicial tea leaves, especially when the tea leaves consist of a "see also" citation to a sentence, half of which is omitted from Appellant's brief.

In addition, the Supreme Court decided *Travelers* a quarter century ago. If Congress were alarmed by the Court noting a presumption against preemption for laws within a state's traditional police power or outside ERISA's core regulatory concerns, it has had more than ample opportunity to amend the statute. That it has not done so can be understood as Congressional recognition of the important role states have traditionally played as the laboratories of our democracy, especially in issues of political, social and economic significance such as health care. *See* Michael Serota & Michelle Singer, *Maintaining Healthy Laboratories of Experimentation: Federalism, Health Care Reform, and ERISA*, 99 Calif. L. Rev. 557 (2011). In a time in our country's history where ensuring access to health care is a priority of both local and national government, this Court should affirm its decision in *Golden Gate* and cabin ERISA's preemptive reach to its appropriate

goals of protecting employee benefit expectations and not discouraging employers from adopting plans.

And finally, for whatever the general value of the discussion of whether a presumption against preemption exists in ERISA, the presumption is not needed to affirm the district court's ruling. The Seattle ordinance at issue in this case, for the reasons already noted in this brief and Appellee's brief, simply does not relate to an ERISA plan and certainly does not touch a "fundamental area of ERISA regulation." Moreover, even if the ordinance did so, it would only result in the severing of the offending clauses that allow an employer to choose to use an ERISA plan to meet its obligations under the ordinance and would leave the remainder of the ordinance intact. Ironically, that would be a loss to many of the Appellant's members.

CONCLUSION

For the reasons discussed above, the district court's decision should be affirmed.

Respectfully submitted,

Dated: November 4, 2020

s/ Teresa S. Renaker

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UNITED STATES COURT OF APPEALS
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