No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

GOLDEN GATE RESTAURANT ASSOCIATION, *Applicant*,

v.

CITY AND COUNTY OF SAN FRANCISCO, *Respondent;*

SAN FRANCISCO CENTRAL LABOR COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021; SEIU UNITED HEALTHCARE WORKERS-WEST; and UNITE HERE! LOCAL 2; *Intervenors/Respondents*.

On Application to the Honorable Anthony M. Kennedy,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit, for Order Vacating Stay
of District Court Judgment Entered by Motions Panel of the Court
of Appeals for the Ninth Circuit

APPLICATION FOR ORDER VACATING STAY OF DISTRICT COURT JUDGMENT

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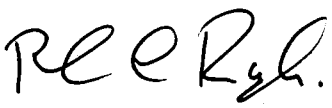
RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Golden Gate Restaurant Association is a private non-profit corporation. It has no parent company and there is no publicly owned company that owns any of its stock.

Respectfully Submitted,



Dated: February 7, 2008

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APPLICATION FOR ORDER VACATING STAY OF DISTRICT COURT JUDGMENT

To the Honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit:

Applicant Golden Gate Restaurant Association respectfully applies for an order vacating the stay of judgment ordered by the United States Court of Appeals for the Ninth Circuit. The application is made pursuant to Rules of the Supreme Court of the United States, Rule 22.

The district court found that the employer minimum healthcare expenditure requirement of San Francisco's Health Care Security Ordinance is preempted by the Employee Retirement

Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and its express preemption provision, 29 U.S.C. § 1144. *See Appendix of Materials Supporting Golden Gate Restaurant Association's Application for Order Vacating Stay of District Court Judgment* ("App."), Exhibit ("Exh.") A. Respondents City and County of San Francisco and Respondent-Intervenors San Francisco Central Labor Council, Service Employees International Union, Local 1021, SEIU United Healthcare Workers-West; and UNITE HERE! Local 2 have sought review of the judgment and filed concurrent emergency motions for stay of the judgment with both the district court and the Ninth Circuit's December 2007 substantive motions panel ("Motions Panel"). The district court denied Respondents' motion but the Motions Panel granted a stay via published order. App. Exh. B. The Motions Panel ordered a somewhat expedited briefing schedule for the parties' merits appeal, but no oral argument date was set.

Golden Gate Restaurant Association ("GGRA") now applies to vacate the stay entered by the Motions Panel. The stay has the effect of implementing the San Francisco Health Care Security Ordinance's employer mandate pending appeal. This implementation immediately disrupted the status quo and eliminated the national uniformity Congress intended to preserve when enacting ERISA.

INTRODUCTION

This matter lies at the center of a national debate over universal healthcare: may various local governments require employers to pay different minimum amounts toward employee health benefits, or is that authority reserved to the federal government? More than half the States have considered this type of legislation in the past three years, setting up an inevitable collision with more than three decades of uniform benefit regulation under ERISA.

San Francisco's Health Care Security Ordinance is one of these recent laws. In addition to setting minimum healthcare spending requirements, it imposes comprehensive recordkeeping, reporting and enforcement requirements based solely on employment within a single city.

Though declared invalid on December 26, 2007, the ordinance took effect when the Ninth Circuit Court of Appeals stayed the district court judgment, concluding (in a published order) that it likely will not hold the local spending mandate to be preempted. This conclusion was based on an interpretation of ERISA preemption at odds with both Supreme Court precedent and recent cases invalidating similar local mandates.

As a result of the stay, San Francisco's purely local mandate has been implemented and more than three decades of uniform federal benefit plan regulation has ended. Employee benefit plans and plan sponsors must now face, and immediately conform their conduct to, inconsistent local requirements. Moreover, because the order was published, its language will cause confusion far beyond San Francisco, requiring employers throughout the nation to closely monitor and plan for dozens of similar state and local proposals. Only by vacating the stay can the Court restore uniformity, avoid immediate disruption of the national interests Congress intended to protect, and preserve ERISA's structure and balance pending appeal.

STATEMENT OF THE CASE

A. The San Francisco Health Care Security Ordinance.

The San Francisco Health Care Security Ordinance ("Ordinance") was passed on July 25, 2006. *See* S.F., Cal., Admin. Code Chap. 14, §§ 14.1 – 14.8 (2007) (as amended April 2, 2007) ("Ord.") (App. Exh. C). It imposes "health care expenditure" requirements and other mandates on "covered employers" with as few as one "covered employee" working in San Francisco. Ord. §§ 14.1(b)(3), 14.1(b)(11-12). All employees are counted toward coverage whether employed in San Francisco or elsewhere. Ord. §§ 14.1(b)(2), 14.1(b)(11-12). Covered employees include,

with some exceptions, those working in the City for a covered employer for an average of at least ten hours per week for 2008 and eight hours per week after January 1, 2009. Ord. §§ 14.1(b)(2)(b)-(f).

Covered employers must make minimum health care expenditures for every hour worked by covered employees. Ord. § 14.3(a). "Health care expenditures" include "any amount paid by a covered employer to its covered employees or to a third party [including the City] on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services." Ord. § 14.1(b)(7). The initial expenditure rate for businesses with at least 100 employees is $1.73 per hour or approximately $300 per month for full-time employees; the initial rate for businesses with 20 to 99 employees is set at $1.17 per hour or approximately $203 per month for full-time employees. Ord. § 14.1(b)(8)(b). These rates will initially increase five percent each year. Ord. § 14.1(b)(8)(b). Non-compliance with the Ordinance's expenditure requirements results in penalties of up to $1000 per week per employee. Ord. § 14.4(e)(1).

In addition to mandating that covered employers make minimum health care expenditures, the Ordinance requires that:

- Covered employers maintain "accurate records of health care expenditures" and "proof of such expenditures," allow "reasonable access" by City officials to such records, and annually report "such other information" that the City requires. Ord. § 14.3(b);
- All employers avoid reducing their workforce below any of the Ordinance thresholds or prove that the reduction was not done to avoid the threshholds. Ord. § 14.4(c); and

- All employers not retaliate, intimidate, threaten, coerce, command, or influence any person who "participated in an action to enforce, inquire about, or inform others" about Ordinance requirements. Ord. § 14.4(d).

Violation of any of these requirements can result in significant penalties and presumptions against employers. *See, e.g.,* Ord. § 14.3(b) (presumption that expenditures were not made "absent clear and convincing evidence otherwise"); Ord. § 14.4(d) ("rebuttable presumption" that adverse action based on protected activity). The City's Office of Labor Standards Enforcement ("OLSE") also issued regulations creating additional recordkeeping and reporting obligations, permitting employee complaints for alleged failure to fund health care benefits at required levels, providing authority to order reimbursement of medical expenses incurred during times an employer did not make required expenditures, and prohibiting adverse action "based on whether [an individual] possesses health insurance" – including insurance that is part of an ERISA plan. *S.F., Cal., Regulations Implementing the Employer Spending Requirement of the S.F. Health Care Security Ordinance* (2007) ("Final Reg.") (App. Exh. D); *see, e.g.,* Final Reg. §§ 8.2(A)(1), 9.2(A), 7.7.

B. Proceedings Below.

1. The District Court Proceedings And Decision Finding Preemption.

GGRA filed this lawsuit on November 8, 2006, contending that portions of the Ordinance relating to the employer funding mechanism and employer administrative obligations, Sections 14.3 and 14.4, are preempted by ERISA. The district court granted summary judgment for GGRA on December 26, 2007, finding that:

- The Ordinance has a prohibited connection with ERISA plans because its local mandated expenditure requirement interferes with nationally uniform plan administration;

- By mandating minimum health care expenditure levels, the Ordinance regulates the types of benefits provided by ERISA plans;
- The Ordinance imposes recordkeeping, inspection and other administrative burdens related to the administration of ERISA plans; and
- The Ordinance makes unlawful reference to existing ERISA plans by requiring employers either to modify the administration of such plans or to structure additional payments by express reference to amounts paid under existing plans.

Order re Cross-Motions for Summary Judgment, U.S.D.C. (N.D. Cal.) Case No. 06-6997 JSW (December 26, 2007), 2007 WL 4570521 (N.D. Cal. 2007) (App. Exh. A), 9:1 – 11:6.

2. Ninth Circuit Proceedings And The Order Of Stay Pending Appeal.

Respondents filed emergency motions for stay pending appeal with both the district court and the Ninth Circuit Court of Appeals. The district court denied Respondents' motion on December 28. The Ninth Circuit Motions Panel granted an emergency stay, however, on the basis that Respondents had established a "strong likelihood" of success on appeal. *See* January 9, 2008 *Order [for Publication]*, U.S.C.A. (9th Cir.) Case Nos. 07-17370, 07-17372, ___ F. 3d __ (9th Cir. 2008) ("Order"), App. Exh. B, p. 15. Its Order indicated that the panel was likely to conclude that the Ordinance is not preempted because, by compelling minimum *payments* rather than specific *benefits*, the ordinance has no improper effect on ERISA plans. Order at 15-28. The Motions Panel set a slightly expedited briefing schedule, allowing it to retain the matter on the merits, but set no date for oral argument.

The City immediately implemented a full-scale rollout of the employer mandate coupled with comprehensive communication, education and enforcement activities. These activities

accelerated over the past week, during which the OLSE forwarded notice to all businesses registered in San Francisco requiring covered employers to report last year's health care expenditures, including insured and self-funded ERISA plan expenditures, for all four quarters of 2007. App. Exh. E. This has been accompanied by a growing number of additional forms and notices published by the OLSE. The City's implementation activities, as well as documentation and forms required by the Ordinance, can be viewed at the OLSE website: http://www.sfgov.org/site/olse_index.asp?id=45168. As a result of the stay and San Francisco's aggressive enforcement, covered employers with any San Francisco employees must immediately begin extensive compliance and reporting activities irrespective of whether the district court's preemption decision is upheld on appeal.

REASONS AND AUTHORITY FOR VACATING STAY

It is "well settled" that a Circuit Justice has the power to dissolve a stay issued by a lower federal court. *New York Natural Resources Defense Council v. Kleppe*, 429 U.S. 1307 (1976) (MARSHALL, J., in chambers). "The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay." *Certain Named and Unnamed Non-citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (POWELL, J., in chambers). Those principles, adapted for context, have been described as follows:

> [T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility ["that a majority of the Court eventually will agree with the district court's decision"]; and there must be a likelihood that irreparable harm [if the stay is not vacated].

Id., quoting Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers).

Although it has been recognized that interim determinations of the Court of Appeals should not be disturbed "except upon the weightiest considerations," such action is appropriate in the "exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction." *Certain Named and Unnamed Non-citizen Children and their Parents v. Texas*, *supra*, 448 U.S. at 1327, 1330-1331 (vacating stay of district court ruling by circuit court). Immediate disruption of uniform national benefit regulation caused by the stay, and the apparent split between circuits on an issue of pressing national importance caused by the published Order, make this matter such an exceptional case.

A. There Is A Reasonable Probability The Court Will Grant Certiorari To Determine Whether The Local Ordinance Is Preempted By ERISA.

Interim relief from an individual Circuit Justice is appropriate where the Justice concludes there is a reasonable probability that four members of the Court would vote to grant certiorari to resolve the issues raised in the case. *See California v. American Stores Co.* ("*American Stores*"), 492 U.S. 1301, 1305 (1989) (O'CONNOR, J., in chambers). In the context of an application to vacate a circuit court's stay of a district court order, this analysis focuses on whether the underlying issue (i.e., the correctness of the district court's ruling) satisfies criteria for exercise of the Court's discretionary jurisdiction, including the considerations designated in Supreme Court Rule 10. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (REHNQUIST, C.J., in chambers). The issues raised in this matter strongly suggest that four Justices would elect to exercise jurisdiction if the Ninth Circuit reversed the judgment of the district court.[1]

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[1] The Court may also – in light of the Order's national significance, immediate impact and apparent inter-circuit conflict – consider treating this application as a petition for certiorari to review the employer mandate immediately. *See, e.g., Purcell v. Gonzales*, 127 S. Ct. 5 (2006).

1. The Federal Questions In This Matter Have Nationwide Significance.

The central issue in this case, whether local government may require employers to spend different amounts in different jurisdictions on employee health care, presents important questions regarding the scope of ERISA preemption. During the past two years, "pay or play" statutes similar to the Ordinance were enacted by the State of Maryland and Suffolk County, New York, and different courts determined each preempted by ERISA. *See Retail Industry Leaders Assn. v. Fielder* ("*Fielder*"), 475 F. 3d 180 (4th Cir. 2007); *see also Retail Industry Leaders Assn. v. Suffolk County* ("*Suffolk County*"), 497 F. Supp. 2d 403 (E.D.N.Y. 2007). These pay or play statutes, sometimes named "Fair Share" laws, require employers either to pay a minimum amount toward health benefits for employees working in a particular jurisdiction or to pay a similar amount directly to state or local government. Similar statutes have been proposed or are under consideration by state and local jurisdictions across the country, including almost thirty states. *See* Julia Contreras & Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 St. Thomas L. Rev. 105, 136 (2006) (list of recent pay-or-play legislation); *see also* National Conference of State Legislatures, *2006-2007 Fair Share Health Care Fund or "Pay or Play" Bills* (same) (App. Exh. F). Given the pressing national debate over improving health care access, and recent nationwide efforts to impose local pay-or-play requirements, exercise of the Court's jurisdiction is appropriate to resolve unanswered questions regarding ERISA's effect in this area. *See Certain Named and Unnamed Non-citizen Children and their Parents v. Texas*, *supra*, 448 U.S. at 1331.

2. The Ninth Circuit's Published Order Indicates A Likelihood Of Conflicting Decisions Between Circuit Courts.

The likelihood of conflicting circuit decisions also suggests that four members of the Court would vote to exercise jurisdiction on a petition for writ of certiorari. *See* Sup. Ct. R.

10(a). When granting the stay, the Motions Panel expressed its opinion that there was a "strong likelihood" it would find that the Ordinance's employer mandate was not preempted by ERISA. Order at 15. This published language already creates an apparent inter-circuit conflict. If the panel reaches the same conclusion on the merits, its decision will place the Ninth Circuit in even further conflict with the Fourth Circuit and lead to greater confusion resolvable only by this Court. *Fielder, supra*, 475 F. 3d 180. The predictable impact of such confusion on nationwide plan administration suggests that at least four Justices would vote to grant certiorari to resolve conflict regarding the scope of ERISA preemption. *See American Stores*, 492 U.S. at 1305.

3. Certiorari Would Be Appropriate To Correct The Ninth Circuit's Erroneous Presumption That The Employer Benefit Mandate Was Not Preempted.

The Motions Panel predicated its conclusion that the City was likely to prevail on the merits on a newly expanded concept of what constitutes a traditional area of state regulation. The panel began its preemption analysis by discussing local action in areas historically regulated by the States, noting that "[t]he Supreme Court has instructed that there is a presumption against holding that ERISA preempts" such statutes. Order at 15-16, *citing Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* ("*Dillingham*"), 519 U.S. 316, 325 (1997), *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund* ("*De Buono*"), 520 U.S. 806, 813 & n.10 (1997). It suggested that the Ordinance operates in such an area and that, in light of these precedents, a presumption against preemption would apply.

Application of a "presumption against preemption" to the Ordinance's employer mandate conflicts with settled Supreme Court authority. In each of the cases cited by the Motions Panel, the state law at issue was "remote from the areas with which ERISA is expressly concerned" and operated in "areas where ERISA has nothing to say." *See, e.g., Dillingham*, 519 U.S. at 330; *Egelhoff v. Egelhoff* ("*Egelhoff*"), 532 U.S. 141, 147-148 (2001) (quoting *Dillingham*). San

Francisco's mandate, in contrast, aims directly at employer payment of employee health care expenses – the very relationship ERISA was meant to govern. When reviewing local attempts at governing employers' provision of health benefits, this Court and the circuits have uniformly held such laws preempted by ERISA. *See, e.g., Shaw v. Delta Air Lines* ("*Shaw*"), 463 U.S. 85 (1983); *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F. 2d 323 (2d Cir. 1983), *summarily aff'd* 463 U.S. 1220 (1983); *Standard Oil Co. of Calif. v. Agsalud*, 633 F. 2d 760, 764 (9th Cir.1980), *summarily aff'd* 454 U.S. 801 (1981). Because the Order adopts a presumption against preemption far broader than that recognized by the Court, and suggests it will permit local regulation in a recognized area of core ERISA concern, it appears likely that at least four Justices would vote to grant certiorari to correct significant misapplication of the Court's relevant precedents. *See* Sup. Ct. R. 10(c).

B. There Is A Significant Probability That The District Court's Ruling Will Be Affirmed.

1. ERISA Preempts State And Local Laws Bearing A Connection With Or Reference To Employee Welfare Benefit Plans.

ERISA preemption was designed to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila* ("*Davila*"), 542 U.S. 200, 208 (2004); *Shaw,* 463 U.S. at 98-100 (reviewing legislative history). The "basic thrust" of ERISA preemption, as explained by its legislative history, is to "avoid a multiplicity of regulation in order to permit the nationally uniform administration" of employee benefits. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* ("*Travelers*"), 514 U.S. 645, 657 (1995); *accord Egelhoff*, 532 U.S. at 148. As explained by one ERISA sponsor, Senator Jacob Javits:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong. Rec. 29197 (1974), quoted at *Shaw,* 463 U.S. at 99. In light of this breadth, the Supreme Court has long held that local laws cannot act as an obstacle to the achieving the full purposes and objectives of Congress or "to change ERISA's structure and balance." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997). Though the Supreme Court has cautioned against "an 'uncritical literalism' that would make pre-emption turn on 'infinite connections,'" its current jurisprudence recognizes that ERISA preemption is "clearly expansive" and that state law is preempted "if it has a *connection with* or *reference to*" ERISA plans. *Egelhoff*, 532 U.S. at 146-47 (2001) (emphasis added) (quoting *Travelers,* 514 U.S. at 655); *Shaw,* 463 U.S. at 97.

2. The Ordinance's Health Care Expenditure Requirement Bears An Impermissible *Connection With* Employee Benefit Plans.

To guide its analysis under *Shaw*, the Court looks to "the objectives of the ERISA statute" and the "nature of the effect of state law upon those objectives." *Egelhoff*, 532 U.S. at 147. Local laws may not conflict with "an area of core ERISA concern" or interfere with ERISA's "principal goals." *Egelhoff*, 532 U.S. at 146, 147. The City's mandate does both. It intrudes directly into areas of core ERISA concern, including employers' freedom to choose whether and how to fund employee health benefits, and interferes with ERISA's principal goal of ensuring a uniform national regulatory environment.

a. The Health Care Expenditure Requirement Interferes With An Area Of Core ERISA Concern By Mandating Employee Benefit Levels.

The minimum expenditure requirement is – as a practical matter – a benefit mandate. It requires employers to fund employee health care, and only employee health care, at set minimum levels. This intrudes on a core area of ERISA concern: employers' autonomy over whether and on what terms to provide employer-funded health benefits.

Though setting "various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility," ERISA "does not mandate that employers provide any particular benefits." *Shaw*, 463 U.S. at 91. This freedom to choose whether and how to provide health coverage permits employers "for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("under ERISA private parties, not the Government, control the level of benefits"). Employers' flexibility "is not an accident;" it was intended to encourage employers to set higher benefit levels by streamlining administration and decreasing employee benefit plan costs. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.* ("*Inter-Modal*"), 520 U.S. 510, 515 (1997). This autonomy, designed to encourage employers to voluntarily "offer more generous benefits" overall, was carefully balanced with employee-protection provisions that (1) expressly prohibit interference with existing benefits, and (2) require employers to follow published procedures prior to amending plan terms. *Id.* at 515-16; *see also* 29 U.S.C. § 1140; 29 U.S.C. § 1102(b)(3). These statutory protections counterbalance employer flexibility "by ensuring that employers do not 'circumvent the provision of promised benefits.'" *Inter-Modal*, 520 U.S. at 515 (quoting *Ingersoll-Rand Co. v. McClendon* ("*Ingersoll-Rand*"), 498 U.S. 133, 143 (1990)).

Allowing local governments to mandate minimum health care payment levels would, as a practical matter, destroy the autonomy left to employers by Congress. It would be fiction to assume that a payment mandate would not have the same effect on employer conduct as mandated benefit levels – and employer conduct is what Congress meant to affect. *Inter-Modal,* 520 U.S. at 515-16. The Fourth Circuit recognized this in *Fielder* when looking to "the effect of a state law on the ability of ERISA plans to be administered uniformly nationwide" and whether

any purportedly non-ERISA compliance alternatives "might still be too disruptive of uniform plan administration to avoid preemption." *Id.* at 193 (citing *Egelhoff*, 532 U.S. at 151). Holding that "the overwhelming effect of the Act is to mandate spending increases," and that such increases would certainly implicate plan administration, the court concluded that a Maryland "Fair Share" law effectively regulated employer-provided health benefits and was therefore preempted by ERISA. *Fielder*, 475 F. 3d at 197. Its opinion adopted the position of the United States Department of Labor, which had argued that:

> Accepting Maryland's argument would permit an end-run around the principle that the states may not mandate ERISA-covered benefits. If Maryland's argument were correct, states could impose all kinds of mandates on plans and plan sponsors with penalties for non-compliance and argue that the mandates were not preempted because the plan or plan sponsor could always choose to pay the penalty.

Brief of the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellee and Requesting Affirmance, Retail Indus. Leaders Ass'n v. Fielder, Nos. 06-1840, 06-1901 (4th Cir. Nov. 6, 2006), available at http://www.dol.gov/sol/media/briefs/RILA(A)-11-07-2006.htm ("DOL Amicus Brief"), App. Exh. G, p. 15; see also E. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*, 28 Cardozo L. Rev. 847, 866 (2006) (Maryland law "unacceptably coerces the covered employer as to the substance of [its] welfare plans' coverage" because it "mandates the level of [an employer's] medical outlays and impairs national uniformity in the administration of [its] medical plans.").

The Ordinance's health care expenditure requirement effectively mandates covered employers' choice whether and how to implement health care coverage for their employees. It ensures that covered employers have no reasonable alternative but to comply each quarter – precisely the dynamic recognized in *Fielder* as having an "overwhelming effect" of mandating health-care spending. *Fielder*, 475 F. 3d at 197. The Ordinance destroys the autonomy that was

an essential part of the balance struck by Congress, conflicting with clear congressional intent and an area of core ERISA concern, and is thus preempted. *Egelhoff*, 532 U.S. at 147.

b. The Health Care Expenditure Requirement Interferes With Uniform Plan Design And Administration.

The Ordinance also bears an impermissible connection with employee benefit plans due to its effect on the uniform administration of employer-provided health benefits. If valid, the Ordinance would require employers who provide or wish to provide health benefits to account for San Francisco's specific expenditure requirements in addition to any coverage they provide for employees in other cities, counties or states. This problem was identified by the Court in *Fort Halifax Packing Co., Inc. v. Coyne* ("*Fort Halifax*"), 482 U.S. 1, 12 (1987), noting that "[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all."

San Francisco's mandate creates precisely the same problem. A covered employer wishing to offer benefits to its employees both in and outside of San Francisco would face either (1) different overall health-care expenditure levels for employees covered by the same plan, or (2) the need to carve out and provide separate coverage for San Francisco-based employees. Covered employers thus could not count on "structuring administrative practices according to a set of uniform guidelines." *Fort Halifax* at 12. Worse, differences between locations would conflict with Congress' desire to encourage employers to set higher benefit levels by decreasing costs; because the Ordinance sets flat hourly minimums, employers would lose incentive to negotiate lower health costs and potentially augment health or other benefits with all or part of the savings. This loss is heightened for employers with employees both in and outside of San Francisco, who would have a strong incentive to lower overall plan benefits to offset their

increased costs for San Francisco-based employees. *See Egelhoff*, 532 U.S. at 149-50 (lack of uniformity would "undermine the congressional goal of minimizing the administrative and financial burdens . . . ultimately borne by the beneficiaries") (citing *Ingersoll-Rand*, 498 U.S. at 142) (internal quotations omitted). While covered employers could not reduce benefits or simply not pay them at all for *San Francisco* employees, they certainly could do so for other employees not covered by the Ordinance. This result conflicts with Congress' desire "to promote the interests of employees and their beneficiaries in employee benefit plans" and to facilitate uniform nationwide plan administration. *Shaw*, 463 U.S. at 90.

c. The Health Care Expenditure Requirement Bears An Impermissible Connection With Employee Benefit Plans By Imposing Local Recordkeeping, Inspection And Other Administrative Burdens (And Penalties).

The Ordinance places specific recordkeeping requirements on employers including (1) maintaining accurate records of all health care expenditures, all required health care expenditures, and proof of quarterly health-care expenditures; (2) allowing City agency access to all such records; and (3) providing information regarding health-care expenditures to the City, on an annual basis, including "such other information" as the City may require. Ord. § 14.3(b). It dictates creation of additional procedures "for covered employers to maintain accurate records" and to "provide a report to the City." Ord. § 14.4(a). Failure to comply with these and other requirements subjects an employer to substantial daily penalties and a punitive presumption that, "absent clear and convincing evidence," required expenditures were not made. Ord. §§ 14.3(b), 14.4(e)(2).

These requirements create the type of inconsistent state and local regulation Congress intended to prevent. Employers and plan administrators must now monitor state and local reporting requirements and penalties, contrary to the Court's observation in *Egelhoff* that

"'tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction' is exactly the burden ERISA seeks to eliminate." *Egelhoff*, 532 U.S. at 151 (quoting *Ingersoll-Rand*, 498 U.S. at 142). In short, the uniform administrative environment envisioned by ERISA's framers no longer exists so long as the Ordinance is in effect.

3. The Ordinance's Health Care Expenditure Requirements Make Unlawful *Reference To* Employee Benefit Plans.

State and local laws make "reference to" employee benefit plans when they act immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation. *Dillingham*, 519 U.S. at 325. Because liability under the Ordinance is determined exclusively by reference to employer-provided health benefits, and because employer-sponsored plans are essential to its operation, the Ordinance's health care expenditure requirements are preempted by ERISA.

The plain language of the Ordinance shows that it refers directly to ERISA-governed benefits. It calculates an employer's liability by looking at amounts "paid by a covered employer to its covered employees or to a third party . . . for the purpose of providing health care services for covered employees." Ord. § 14.1(b)(7). This necessarily examines whether employers provide benefits through ERISA-governed plans, which include "any plan, fund or program" maintained to provide "through the purchase of insurance or otherwise" any "medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1).

Moreover, the fact that an employer may make payments directly to the City does not create an alternative "means other than establishing ERISA plans" allowing the Ordinance to operate, at least in some cases, without express reference to ERISA-regulated benefits. Order at 14. The Court has long held that government-mandated payments of a type generally regulated by ERISA – such as medical and severance benefits – escape preemption only if the requirement

does not create a continuing need to calculate and process the payments on an ongoing basis. This was made clear in *Fort Halifax*, where the Court held that a severance mandate applicable only to plant closures was not preempted by ERISA. The Court noted that the payment, a "one-time, lump-sum payment triggered by a single event," required "no administrative scheme whatsoever" and was "predicated on the occurrence of a single contingency that may never materialize." *Fort Halifax*, 482 U.S. at 12. Because it imposed no further obligations, the Court concluded that the statute "differs radically in impact from a requirement that an employer pay ongoing benefits on a continuous basis" and thus "creates no impediment to an employer's adoption of a uniform benefit administration scheme." *Id.* at 14. The Court contrasted this with "benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation," recognizing that local statutes imposing ongoing administrative obligations would "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Id.* at 11.

Unlike the severance payments in *Fort Halifax*, San Francisco's mandate imposes regularly recurring obligations, requiring employers to make minimum health care expenditures, report time worked and expenditure amounts, participate in audits and enforcement actions, and undertake a variety of other ongoing obligations. It requires extensive recordkeeping and unique administration, such as:

- Differentiating hours worked by employees inside and outside the City, as opposed to total hours worked each week, including duties such as "pick ups or deliveries" and occasional "travel within the geographic boundaries of the City and County of San Francisco." Ord. § 14.3(b); Final Reg. §§ 3.1(C)(1)(a); 6.1(C)(1)(c). Failure to differentiate and track such time by

"clear and convincing evidence" results in a presumption that all hours worked were in San Francisco. Final Reg. § 6.1(C)(1)(a).

- Calculating the percentage of paid time off (such as sick leave and vacation) attributable to time worked inside and outside of San Francisco. Final Reg. § 6.1(C)(1)(b).
- Determining the time and location that telecommuters employed at locations outside San Francisco spend working from their own homes within San Francisco. Final Reg. §§ 3.1(C)(3); 6.1(C)(1)(d).
- Differentiating hours paid to "managerial," "supervisory" or "confidential" employees as those terms are defined by the Ordinance, not state or federal law. Ord. § 14.1(b)(2)(d).
- Tracking and reporting employment data not only for the employer but also for any other company, however unrelated, falling within the same "controlled group" of companies. Ord. § 14.1(b)(4) (citing 26 U.S.C. § 1563 (2000)). (A San Francisco business with five employees, for example, would be required to include and report employment statistics for an otherwise completely unrelated business in Chicago if the two happened to be partly owned by the same person or entity. *See, e.g.,* 26 U.S.C. § 1563(a)(1)-(3) (defining "controlled group")).
- Monitoring coverage and waiver status, including voluntary waiver forms, of employees receiving coverage from another employer. Ord. § 14.1(b)(2)(h); Final Reg. § 3.2(A)(5).

- Differentiating and reporting health care expenditure amounts, including reports to individual employees for whom expenditures were made each quarter. Final Reg. § 7.1.
- Preparing documentation sufficient to prove that any reduction in force was not done to avoid coverage by or obligations under the Ordinance. Ord. § 14.4(c); Final Reg. § 7.5.

The Ordinance requires far more than a "contingent" or "one-time" benefit payment of the type permitted by *Fort Halifax*. It requires "an ongoing administrative program" as well as "ongoing benefits on a continuing basis" – precisely the type of local obligations the Court has recognized would require "a separate plan to process and pay benefits under the plan required by [local government]." *Fort Halifax*, 482 U.S. at 13. Moreover, even if an employer chose to make payments directly to the City, those payments would still be made "for the purpose of providing health care services for covered employees or reimbursing the cost of such services." (Ord. § 14.1(7)). Providing such payments falls squarely within ERISA's definition of "welfare benefit plan" whether provided "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). Accordingly, payments directly to the City *do not* create a "means other than establishing ERISA plans" or avoid reference to such plans under *Fort Halifax*.

4. The Mandate Does Not Escape Preemption Merely Because It Does Not Expressly Require Employers To Create Or Modify ERISA Plans.

The Motions Panel noted its initial impression that the Ordinance would not ultimately be found preempted because it "does not require any employer to adopt an ERISA plan or other health plan" or impose any "particular choice of rules on plans." Order at 19, 21. It based this analysis on a distinction between employee benefit "plans" and "employers," suggesting it would

conclude on the merits that where "the only influence is on the employer" there can be no preemption. Order at 21. Under this approach, the mandate would not be preempted because employers can make payments to the City in addition to or instead of benefits offered under ERISA-governed plans. Order at 19-20.

Adopting a semantic distinction between "employer" and "plan" – or "expenditures" and "benefits" – would make ERISA's express preemption language less forceful than the implied preemption generally applicable to other federal laws. Under the Supremacy Clause, state and local laws are preempted whenever "compliance with federal and state regulations is a physical impossibility ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992); *c.f. Boggs v. Boggs, supra*, 520 U.S. at 841. The Motions Panel's approach would allow local government to sidestep the "purposes and objectives of Congress" by artfully phrasing expenditure requirements. So long as employers could pay fees rather than provide the indirectly mandated benefit directly, the law would not be preempted because "employers may fully satisfy the [mandate] by means other than establishing or changing ERISA plans, including by making payments to [local government]." Order at 14. This would apply regardless of the impact a local mandate had on employer conduct or Congressional objectives, making ERISA less preemptive than other federal statutes generally – a result already rejected by the Court. *Boggs v. Boggs*, *supra*, 520 U.S. at 841 ("We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects"); *see also Alessi*, 451 U.S. at 525 ("ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision."); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 397 (2002) (THOMAS, J., dissent)

("formalist tricks cannot be sufficient to bypass" ERISA preemption) (citing *Fort Halifax* at 16-17); DOL *Amicus* Brief, *supra*, App. Exh. G, p. 16-17 (criticizing reliance on "two tier" prevailing wage laws).

The fact that the Ordinance does not purport to require employers to adopt or modify ERISA-governed plans does not eliminate the impact its benefit mandate will have on employers, employer conduct and, ultimately, employer-sponsored plans. For this reason, as discussed above, the Ordinance is preempted and the district court's judgment is likely to be affirmed.

C. The Balance Of Equities And Existence Of Irreparable Harm Favors Vacating The Stay.

The balance of the equities, and the relative hardships that may be suffered by the parties if the stay remains in place, also suggest that the stay should be vacated. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) ("In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public.") *citing Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers); *Times-Picayune Publishing Corp. v. Schulingkamp*, *supra*, 419 U.S. at 1304. In *Rostker*, Justice Brennan explained that the purpose of this analysis is "to explore the relative harms to applicant and respondent, as well as the interests of the public at large." 448 U.S. at 1308. Equity may also favor preserving the status quo pending resolution of an appeal. *See San Diegans for Mt. Soledad Nat. War Memorial v. Paulson*, 126 S. Ct. 2856 (2006) (KENNEDY, J., in chambers). In this action, dissolving the stay serves public interests much broader than the Applicant's alone; indeed, given the national significance of the legal questions raised by the Ordinance, dissolving the stay would serve the nationwide interests identified by Congress when it crafted ERISA.

1. The Public Interest In This Case Extends Far Beyond San Francisco.

By enacting ERISA, Congress sought expressly to protect the interest of the public at large. *See* 29 U.S.C. § 1001(a) ("The Congress finds. . .. that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest"). And, as discussed above, ensuring national uniformity via preemption was an essential part of this statutory scheme. The immediate effect of the stay is to eliminate national uniformity and, in doing so, create the very risk of inconsistent state and local treatment that motivated Congress. For example, workers in other jurisdictions without minimum spending requirements risk losing benefits so that companies with scarce resources can divert them to fulfill the mandates imposed by San Francisco. *Egelhoff*, 532 U.S. at 149-50 (lack of uniformity would "undermine the congressional goal of minimizing the administrative and financial burdens . . . ultimately borne by the beneficiaries"); *Fort Halifax,* 482 U.S. at 12.

While the Motions Panel considered the effect a stay might have on some residents of the City and County of San Francisco, it neither mentioned nor analyzed the effect its order would have elsewhere. The panel explicitly deferred to local government despite acknowledging its obligation to apply federal public policy in the area of employee benefits, holding that "our consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest." Order at 32, 33. It did not mention or consider the national public policy declared by Congress when enacting ERISA. Yet the stay immediately affects those outside of San Francisco by creating differential requirements in different jurisdictions. This effect will be especially acute for employers sponsoring self-insured plans, to whom a semantic distinction between "expenditures" and "benefits" makes no practical sense, and who rely on "experience and actuarial services to determine sound benefit levels." R.

Goetz, *The Case Against State Regulation of Uninsured Employee Welfare Plans*, 35 J. of Risk and Insurance 311, 315 (1968). It also encourages the developing patchwork of local regulation and emboldens other jurisdictions to implement their own health benefit requirements. *See, e.g.*, Press Release, California Assembly Speaker Fabian Nuñez, *Statement on Ninth Circuit Court's ERISA Decision on San Francisco's Citywide Health Care Plan* (January 9, 2008), published at http://democrats.assembly.ca.gov/members/a46/press/20080109AD46PR01.htm, (comments by author of California A.B.X.1 1 (2007), a universal coverage proposal including employer participation mandates, that Order will help move such proposals forward). This trend presents a far broader threat to established public policy, with implications that extend well beyond San Francisco's own geographic boundaries. In this case, preserving the prior status quo while the lawfulness of the Ordinance is tested will protect ERISA's goal of maintaining national uniformity as the matter moves through merits appeal.

2. Likelihood Of Harm/Sufficiency Of Remedy: Applicant's Harm Is Immediate And Incapable Of Repair.

Vacating the stay will serve the dual purpose of preserving the status quo pending appeal and putting an end to Applicant members' harm. When the Motions Panel issued its Order, the harm to Applicant's members was immediate and substantial. They, as well as all other covered businesses wherever located, were immediately forced to comply with a host of inconsistent recordkeeping and administrative requirements including complex time and geographic tracking; leave and benefit differentiation; categorization of employees by unique and unprecedented definitions; calculating and reporting employment data not only for an employer but also for any other company falling within the same "controlled group;" monitoring coverage and waiver status, including voluntary waiver forms, of employees receiving health benefits from other employers; differentiating and reporting payments for employee health care benefits, including

reports to individual employees to whom benefits were provided each quarter; and preparing documentation sufficient to prove that any reduction in force was not done to avoid coverage. *See* Section B(4), *supra.* This impact is not speculative; the stay immediately implemented the Ordinance. *See* Order at 29. These burdens exist in addition to the now "balkanized" regulatory environment recognized and avoided by the Fourth Circuit. *Fielder*, 475 F. 3d at 194.

The harm does not end with new administrative burdens. By April 30, the Ordinance's first payment deadline, employers will be forced to begin payment to San Francisco if they have not already made sufficient payments to existing health plans. Ord. § 6.2 ("The required health care expenditure must be made regularly, and no later than 30 days after the end of the preceding quarter."). There may be no effective remedy for this injury, as much of the money may be paid directly to employers' own employee benefit plans or deposited into accounts created by the City but belonging to employees. If the stay is vacated, the status quo will be reinstated and future harm can be prevented pending determination of the lawfulness of the Ordinance.

3. Respondent's Injury Is Speculative, And It Is Unclear That The Stay Will Actually Remedy Any Claimed Harm.

In granting the stay, the Motions Panel did not conclude that people would be denied health services if implementation of the employer mandate were delayed. Rather, it concluded that some in need of medical services would look to other existing healthcare resources but opined that others without formal "health coverage" would be less likely to do so. Order at 29. Like all counties in California, San Francisco already has an obligation to provide health services to residents. *See* Cal. Welf. & Inst. § 17000 (West 2008). In fact, the Motions Panel expressly acknowledged the continued availability of existing health care options, noting that "[t]he City will incur some otherwise avoidable financial costs if a stay is denied, for some individuals who would otherwise be covered under the Ordinance will seek emergency treatment from San

Francisco General Hospital or City health clinics." Order at 29. Because uninsured residents have access to existing health service options, any injury is speculative.

4. The City's Alleged Harm Is Self Imposed.

The City anticipated arguments that ERISA preempts the Ordinance, recognizing this concern well before it became law. *See, e.g.,* App. Exh. H, 9:2-23. Then, after Applicant's suit was filed, the Ordinance was amended to delay implementation of its employer mandate portions by six months. Ord. § 14.8 (added by Ord. 72-07, File No. 070354, 4/2/2007). Thus, the amended ordinance took effect well after the underlying lawsuit was filed, after the parties' stipulated briefing schedules confirmed that summary judgment motions would be filed, and after similar laws were stricken by both the Fourth Circuit and the Eastern District of New York. *Fielder, supra*; *Suffolk County, supra.* The City nonetheless pressed forward with implementation, fully aware that serious questions existed regarding the validity of the Ordinance's employer spending mandate.

This chronological background is analogous to that in *Lucas v. Townsend, supra*, 486 U.S. at 1304, where the applicants sought to enjoin an election which for which local government had not obtained proper "preclearance" under the federal Voting Rights Act. After a three-judge panel declined to stay the election, the Circuit Justice issued an injunction on the basis that permitting "the election to go forward would place the burdens of inertia and litigation delay on those whom [the Voting Rights Act] was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election." *Id.* at 1305. The Circuit Justice also noted that "although an injunction would doubtless place certain burdens on respondents, such burdens can be fairly ascribed to the respondent's own failure to seek preclearance sufficiently in advance of the date chosen for the election." *Id.*.

Here, damage similar to that enjoined in *Lucas* will occur if the Ordinance remains in effect. As discussed above, Congress enacted ERISA to protect plans, employers and beneficiaries throughout the nation from the costs and harms resulting from a patchwork of local regulation. By effectively implementing the Ordinance, the stay thwarts this statutory protection, immediately causing the national disuniformity Congress sought to prevent. While the City will not receive Ordinance revenues if the stay is vacated, the basic health care obligation it faces is exactly the same as before the Ordinance. Any additional potential harm – such as funding needs created by hiring staff and implementing a comprehensive public program during this legal challenge – is the result of decisions made unilaterally by the City. As in *Lucas*, the City pushed forward with an arbitrary implementation date despite serious and substantial questions involving the lawfulness of its action. Its deliberate tactics to accelerate implementation should not trump the policies and nationwide interests Congress intended ERISA to protect.

CONCLUSION

Staying the district court's judgment ended more than three decades of national uniformity under ERISA and exposed employers and plans to the possibility – and in San Francisco, the reality – of inconsistent local and state regulation. For this reason, as argued

above, Golden Gate Restaurant Association respectfully requests that the Circuit Justice vacate that stay and restore the status quo pending merits consideration of this appeal.

Respectfully Submitted,

Dated: February 7, 2008

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

GOLDEN GATE RESTAURANT ASSOCIATION, *Applicant*,

v.

CITY AND COUNTY OF SAN FRANCISCO, *Respondent;*

SAN FRANCISCO CENTRAL LABOR COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021; SEIU UNITED HEALTHCARE WORKERS-WEST; and UNITE HERE! LOCAL 2;
Intervenors/Respondents.

On Application to the Honorable Anthony M. Kennedy,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit, for Order Vacating Stay
of District Court Judgment Entered by Motions Panel of the Court
of Appeals for the Ninth Circuit

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ACKNOWLEDGMENT OF SERVICE

I, Richard C. Rybicki, am an attorney at law admitted to practice before the Supreme Court of the United States and Counsel of Record for Applicant in this matter. I acknowledge that all parties required to be served with the accompanying *Application for Order Vacating Stay of District Court Judgment* and *Appendix of Materials Supporting Golden Gate Restaurant Association's Application for Order Vacating Stay of District Court Judgment* have been served. The following parties were served by FedEx overnight service for delivery on February 8, 2008:

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