No. 08-1515

IN THE

Supreme Court of the United States

GOLDEN GATE RESTAURANT ASSOCIATION,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

SAN FRANCISCO CENTRAL LABOR COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION ("SEIU"), LOCAL 1021; SEIU UNITED HEALTHCARE WORKERS-WEST; AND UNITE HERE! LOCAL 2,
Intervenor/Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NIBBI BROS. ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE* [1]

Amicus Curiae Nibbi Bros. Associates, Inc. ("Nibbi Brothers") is a privately-owned general contractor that has been in operation in the greater San Francisco Bay Area since 1950. From a small shop in the South of Market district of San Francisco, Nibbi Brothers has grown to be the 13th largest contractor in the Bay Area. Nibbi Brothers is a dedicated team of construction professionals who genuinely care for the communities in which they live and work. Nibbi Brothers employs carpenters and laborers on a job-by-job basis, resulting in a highly transitory and seasonal workforce. The company's projects have ranged over seven counties, and it is required to comply with numerous city and county ordinances in these diverse jurisdictions. As such, the company has great familiarity with the procedures required to monitor and comply with the employment laws of multiple jurisdictions.

Nibbi Brothers fully supports the goals of the San Francisco Health Care Security Ordinance ("HCSO") and the benefits it has already accorded to individual employees and the community in general. Nibbi Brothers presents this brief to counter the hyperbolic presentation of the Petitioner and its *amici* who

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[1] Nibbi Brothers has obtained the written consent of all the parties to file this brief with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Pursuant to Supreme Court Rule 37.6, the Amicus notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

insist, with no record evidence whatsoever, that complying with laws like the HCSO is somehow a Herculean task. With modern computer systems, standard business and accounting practices, and a little rational planning, adjusting to the varying rules in different jurisdictions takes only a nominal effort. Indeed, it is no more difficult to comply with the HCSO than it is to comply with diverse prevailing wage laws that have been consistently found not preempted by ERISA, or with negotiated contracts that require different wage terms in different areas.

In addition, as a responsible employer that provides health care for its workers, Nibbi Brothers has an interest in not being at a competitive disadvantage when dealing with employers who choose not to bear any of that societal cost. One of the purposes of the HCSO is to "prevent[] a 'race to the bottom' in which employers stop paying for employee health care to remain competitive . . . ." Resp. App. 64-65 (SF Admin. Code Ch. 14 §1); *see also WSB Electric, Inc. v. Curry*, 88 F.3d 788, 794 (9th Cir. 1996) (noting concern that contractors who provide fringe benefits may not be able to effectively compete against contractors who provide only cash wages). Nibbi Brothers has a competitive interest in avoiding a "race to the bottom," and San Francisco's HCSO is a rational means of promoting that legitimate governmental purpose.

SUMMARY OF ARGUMENT

The petition for *certiorari* should be denied for three reasons:

First, the Ninth Circuit correctly held that the HCSO is not preempted by ERISA because it has, at most, an indirect and voluntary impact on ERISA

plans. In this regard, the HCSO is functionally indistinguishable from prevailing wage and living wage laws that have universally been found *not* preempted by ERISA.

Second, the circuit split Petitioner attempts to manufacture does not exist. The Fourth Circuit's decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), is wholly consistent with the Ninth Circuit's decision in *Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639 (9th. Cir. 2008) ("*GGRA II*"). Both cases recognize that state and local laws can have incidental impacts on ERISA plans without triggering ERISA preemption as long as they do not force employers to adopt or change ERISA plans.

Third, Petitioner's argument that compliance with the HCSO and hypothetical similar laws would overwhelm employers and ERISA plans simply has no factual basis. Compliance with the HCSO by employers is straightforward and requires nothing more than the sensible business steps already necessary to work across jurisdictions. Indeed, compliance with the HCSO is no more burdensome than compliance with standard terms in negotiated construction contracts or with the prevailing wage/living wage laws discussed above. While some industries may not have chosen to engage in the same payroll accounting practices, their prevalence in the construction industry and prevailing wage laws demonstrates the commercial feasibility of applying different pay standards to workers, even the same workers, across different jurisdictions. As for ERISA plans, the HCSO imposes no requirements on them whatsoever.

ARGUMENT

I. THE HCSO IS NOT PREEMPTED BY ERISA

The Ninth Circuit held that ERISA does not *preempt the health care spending requirement of the* HCSO because (1) it does not create an ERISA plan, (2) it has no prohibited "connection to" ERISA plans, and (3) it does not have a forbidden "reference to" ERISA plans. *GGRA II*, 546 F.3d at 648-59. Although Respondent's opposition fully addresses these points, Nibbi Brothers presents this additional argument because of Nibbi Brothers' interest and experience in dealing with prevailing wage and other employment laws across various jurisdictions.

As this Court is aware, numerous jurisdictions have enacted prevailing wage laws that regulate the wages paid to workers performing tasks under government contracts and/or living wage laws that apply to work performed in a given jurisdiction. Those regulations (like minimum wage laws) vary substantially from jurisdiction to jurisdiction, and it is incumbent on a business like Nibbi Brothers that performs work across jurisdictions to remain informed about changes in those laws so that it can comply with them.

Prevailing/living wage laws typically set a mandatory minimum pay structure that is higher than the local, state, or federal minimum wage. The prevailing/living wage laws also commonly allow employers to pay some of the mandatory wage in benefits rather than directly as wages. In the San Francisco Bay Area where Nibbi Brothers operates, for example, the City of Oakland requires certain employers to contribute $1.25/hour toward health benefits or pay an

additional $1.25/hour in wages above the minimum wage. Oakland, Cal., City Charter art. VII, § 728 & Mun. Code § 2.28.030 (2008). In Berkeley, which borders Oakland to the north, similar employers contribute $1.62 per hour toward health benefits or pay additional $1.62/hour in wages. Berkeley, Cal., Mun. Code §§ 13.27.030, 13.27.050 (2009). Similar laws exist throughout California,[2] and the rest of the United States.[3]

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[2] *See, e.g.*, Port Hueneme, Cal., Mun. Code § 2561.2 (2009) (living wage of $9.35/hour with health benefit plan or $11.85/hour without); Sacramento, Cal., City Code § 3.58.03 (2009) (two schedules of minimum living wage payments depending on whether at least $1.50/hour is spent on health benefits); San Buenaventura, Cal. (Ventura City), Ordinance Code § 2.525.150 (2009) (living wage of $12.50/hour without health benefits or $9.75/hour with at least $2.75/hour of medical benefits); Santa Barbara, Cal., Mun. Code §§ 9.128.010, 9.128.020 (living wage of $14/hour without specific benefits or $12/hour with); Sebastopol, Cal., Mun. Code § 2.72.060 (2009) (crediting the "actual amount" spent on any health benefits to the living wage); Sonoma, Cal., Mun. Code § 2.70.060 (2009) (crediting health benefit payments to living wage); Ventura County, Cal., Mun. Code § 4954 (2009) (mandating living wage of $8/hour with health benefits or $10/hour without).

[3] *See, e.g.*, Nev. Const. art. XV, § 16; Albuquerque, N.M., Code of Ordinances § 13-12-3 (2009); Bernalillo County, N.M., Ord. No. 2006-26 (to be codified) (2006); Santa Fe, N.M., City Code § 28-1.5(B) (2009); Miami, Fla., Charter and Code § 18-556 (2009); Bloomington, Ind., Mun. Code § 2.28.030 (2005); Lawrence, Kan., Econ. Dev. Goals, Process and Procedures §§ 1-2112, 1-2113 (2009); Detroit, Mich., Code § 18-5-83 (2008); Lansing, Mich., Codified Ordinances § 206.24 (2008); Lincoln, Neb., Mun. Code § 2.81.030 (2009); Albany, N.Y., Code § 42-161 (2008); Nassau County, N.Y., Misc. Laws, tit. 57 (2008); New York, N.Y., Admin. Code § 6-109(b) (2002); Syracuse, N.Y., Rev. Gen. Ordinances § 50-3 (2005); Dayton, Ohio, Code of Ordinances § 35.71 (2009); Lakewood, Ohio, Admin. Code § 113.02 (2008).

Petitioner argues that it is somehow improper for an employer to be required to stay informed about changes in the law in jurisdictions where it operates. Employment is a highly regulated sphere, and laws governing innumerable aspects of the employment relationship are constantly changing. Any multi-jurisdictional employer must properly stay informed about, and in compliance with, those myriad laws. The uniformity encouraged by ERISA does *not* relate to an employer's obligations per se, but to those of a *plan administrator*. Unlike employers, ERISA plan administrators need to rely on a relatively static and uniform set of rules concerning *how to administer the plan*. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11 (1987) (recognizing Congressional interest in "establish[ing] a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.") *Employers*, by contrast, must reasonably expect to shift their conduct—including their labor costs—according to changes in diverse local employment laws.

Nibbi Brothers and others who perform government contract work or other qualifying work within a living wage jurisdiction are thus required to keep track of where their employees are working, what they are being paid, and what is provided in terms of benefits in order to comply with local laws. Performance under public works contracts typically requires the contractor to certify compliance with these laws, and to provide detailed accountings on a regular basis to prove compliance. The certifications Nibbi Brothers regularly provides to show compliance with prevailing wage laws are far more frequent and detailed than those required by the HCSO (which only requires a single-page yearly report). Pet. App. 144a (OLSE Reg. No. 7.3).

Prevailing/living wage statutes are not preempted by ERISA. In *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997), this Court rejected the claim that California's apprenticeship prevailing wage law was preempted by ERISA because it "made reference to" ERISA plans. Recognizing the prevalence of prevailing wage statutes, the Court held that a statute which "alters the incentives, but does not dictate the choices, facing ERISA plans" is *not* preempted by ERISA, and that Congress had no intention of preempting traditional areas of state regulation like wage ordinances. *Id.* at 334. The Circuit Courts have also consistently upheld wage ordinances that give credit for health benefits. *Burgio and Campofelice, Inc. v. New York State Dept. of Labor*, 107 F.3d 1000, 1009 (2d Cir. 1997); *WSB Electric, Inc.*, 88 F.3d at 793-94; *Keystone Chapter, Assoc. Builders and Contractors, Inc. v. Foley*, 37 F.3d 945, 960-61 (3d Cir. 1994).

Prevailing/living wage laws do not impose any plan administration duties. Such laws do not establish what benefits must be provided, do not set any standard of care for providing or administering plans, and do not otherwise interfere in any way with the operation of benefit plans. Nor do these laws *require* any employer to offer an ERISA benefits plan. Instead, these ubiquitous laws function as either a minimum wage or a tax, while allowing employers the opportunity for a credit against that minimum wage or tax if they choose to provide employee benefits with an ERISA plan or otherwise.

San Francisco's HCSO functions in precisely this manner: as a minimum wage/tax based on hours worked within the City. Employers must pay the required amounts to the City unless they already

make sufficient payments to offset their HCSO obligation. No employer is required to have an ERISA plan, but if they choose to, then they can claim credit for its cost. Any shortfall can be paid to the City in cash or through other appropriate expenses, which need not be ERISA plan expenses. Pet. App. 135a-137a (OLSE Reg. No. 4.2).

San Francisco's ordinance would plainly not be preempted by ERISA if it required all employers to pay the required amounts to the City *without* recognizing a credit for the cost of employer-provided health benefits. Allowing (but not requiring) employers to claim a credit against their HCSO obligation does not transmogrify an otherwise unassailable ordinance into one preempted by ERISA. In this manner, the HCSO is functionally indistinguishable from the prevailing wage law approved in *WSB*:

> [A]though the law may cause employers to maintain a separate administrative scheme to keep track of prevailing wage data for public works projects, it does not require that they maintain a separate employee benefit plan. They may choose to do so if they want to ensure that they contribute no more to employee benefits than the maximum credited under the excess benefit cap. But they are not required to do so. If their benefit contributions fall below the prevailing benefit rate, then they can make up the shortfall with cash wages, which would have no effect on their ERISA plans.

WSB Electric Inc., 88 F.3d at 795.

As with prevailing/living wage laws, the HCSO "does not force employers to provide any particular employee benefits or plans, to alter their existing

plans, or to even provide ERISA plans or employee benefits at all." *Id.* at 794. An employer can fully comply with the HCSO without having any ERISA plan. The Ninth Circuit correctly found that the same analysis applied to prevailing/living wage laws applies equally to the HCSO, and thus the HCSO is not preempted by ERISA.

II. *FIELDER* IS CONSISTENT WITH *GGRA II*

Contrary to Petitioner's arguments, the Fourth Circuit's decision in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007) is entirely consistent with the above analysis. Although Petitioner and its *amici* attempt to lump these two cases together as "pay or play" decisions, the law challenged in *Fielder* was substantially different from the HCSO. *Fielder* involved a *sui generis* attempt by the State of Maryland to force Wal-Mart to provide a higher level of ERISA benefits to its employees. *Fielder*, 475 F.3d at 183. The law was *solely* directed at Wal-Mart, a fact repeatedly emphasized in the Court's opinion. *See id.* at 183, 184, 185, 194. The Maryland law required Wal-Mart to spend at least 8% of its payroll on health insurance for its employees or pay the difference to a state fund where it would offset Maryland's general Medicaid and children's health insurance budget. *Id.* at 184-85.

Fielder determined (by a 2-1 decision) that the Maryland law was intended to, and rationally could only, operate by forcing Wal-Mart to increase its ERISA spending. The Court found that no rational employer would do otherwise given the law's choices because payments to the State general fund do not benefit the employer's workers. *Id.* at 193. It also found that the Maryland legislature was aware of

this reality, and did not anticipate receiving *any* revenue from the act. The Court thus characterized any money collected by the state as a fee or penalty, not a tax. *Id.* at 189. Given these unique circumstances, the Fourth Circuit determined that the challenged law was a backdoor way of forcing Wal-Mart to increase ERISA spending, and thus preempted by ERISA. *Id.* at 195-97.

The HCSO could not be more different. It is not directed at one employer, or even only huge employers, but reaches medium and large employers across all industries in San Francisco. Pet. App. 109a, 112a (SF Admin. Code §§ 14.1(b)(3) & (12)); Pet. App. 128a-129a (OLSE Reg. No. 2.2). The City pay option is not an unrealistic or irrational penalty, and is not designed to force employers to change their ERISA benefit plans (or to create any such plan). Employers who already provide health insurance for their workers are unlikely to owe any additional money, as the average cost of health insurance is well above the City payments required by the HCSO, and thus employers with ERISA plans will, in most cases, receive a full credit for the HCSO amounts owed. Employers who do not offer health insurance are *not* required to provide it, but only to pay the City the per-hour assessment or make other non-ERISA expenditures. Pet. App. 135a-137a (OLSE Reg. No. 4.2). Unlike Maryland's law, the money is not used for a general public assistance budget; instead the payments are used to fund health care for the employees whose work led to the payments. Pet. App. 113a-115a (SF Admin. Code § 14.2).

The Ninth Circuit correctly analyzed these facts, concluding that San Francisco's law is materially different than the anti-Wal-Mart legislation at issue

in *Fielder*. As discussed above, the correct analogy is to a tax/credit or prevailing wage law which is fully consistent with *Fielder* and not preempted by ERISA. Any contrary ruling would have necessarily called into question the validity of previously upheld prevailing/living wage laws across the country, which have the same remote and indirect connection to ERISA plans as the HCSO.

III. MULTI-JURISDICTIONAL COMPLIANCE WITH LAWS LIKE THE HCSO IS NOT BURDENSOME

Finally, Petitioner and several of its *amici* make broad, unsupported parade of horribles arguments contending that the HCSO is difficult to comply with, and an unmanageable nightmare for a multi-jurisdictional employer. After inventing a hypothetical world where there is a "bewildering mismatch of employer contribution rules," Petitioner goes so far as to claim that "[c]ompliance with varying employer contribution formulas and data-compilation and administrative rules will overload the largest human resources departments and the most expensive software-systems." Pet. 38. With respect, such histrionics are empty rhetoric. Nibbi Brothers *is* a multi-jurisdictional employer with a highly variable workforce—precisely the type of employer supposedly threatened by the HCSO—yet Nibbi *does* comply with the HCSO as well as the laws of many other jurisdictions with no significant administrative effort. Compliance with this type of law is far easier than Petitioner and its allies contend.

A. Calculation of the Payments Owed is Simple

In order to comply with the HCSO, an employer needs to know (1) who its employees are, (2) when they are working in San Francisco, (3) how many hours they worked in San Francisco, and (4) what amount, if any, was paid for a health care expenditure to or for that employee. Each of these are things an employer should know in the general course of business, and which are readily tracked by any modern payroll software.

Employers with more than 20 employees obviously should know who those employees are. They are required, at least in California, and Nibbi Brothers suspects in all states, to keep records of the hours those employees work. *See* Cal. Lab. Code § 226 (2009). If employees work at fixed work sites, their employer should easily know which are working in San Francisco and which are not. Whether a restaurant, construction site, office building, etc. is within City limits is not hard to figure out. Only the tiny fraction of workers, like truck drivers, whose jobs are mobile would require any special record keeping, and they could simply record when they are within the City limits.[4]

Of course, if an employer sets up its payroll system without competent records, or with no regard to what records may be required by the jurisdictions in which it operates, then there may be start up costs associated with properly tracking the required data. The

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[4] Truck drivers are already often subject to record keeping requirements that mandate they track their location and activities on a detailed hourly basis. *See, e.g.*, 49 C.F.R. § 395.8 (2009).

purported concern here, however, is with large employers who operate across numerous jurisdictions. Such employers are highly likely to have appropriate software programs that track employee hours, pay, and benefits, or to contract with a third party payroll service, like ADP, to keep such records for them. Nibbi Brothers has such a computer system, and it takes virtually no effort at all to reprogram it to take into account various formulas required by different jurisdictions.

Once the necessary data points are collected, calculating the baseline obligation under the HCSO is simply basic algebra. For each covered employee[5] who has been employed for more than 90 days, the employer need only multiply hours worked (up to a maximum) by the applicable hourly rate (currently $1.23 or $1.85 depending on the employer's size). Pet. App. 138a-139a (OLSE Reg. No. 5.2(B). There is nothing complicated about it.

Petitioner claims that it is somehow challenging to apply different formulae in various jurisdictions.[6]

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[5] Like virtually any wage law, the HCSO exempts certain types of employees, including managerial, supervisorial, or confidential employees, from its coverage. Pet. App. 132a-135a (OLSE Reg. No. 3.2). Petitioner vaguely claims such determinations may be burdensome, but makes no attempt to explain why these determinations—which need to be made regularly to comply with minimum wage, overtime, and other types of federal and state wage and hour laws—create any new burden for employers, much less ERISA plans.

[6] Petitioner makes no showing of what formulae it is worried about, or how a slightly different mathematical formula in different jurisdictions is any harder to implement than varying minimum wages, prevailing wage laws, expense reimbursement rules, workers' compensation and unemployment insurance

That simply makes no sense. The whole point of a computerized payroll database is to allow different calculations to be run across the data. There is no reason that employers cannot code hours worked based on the location of the work, and then program their computers to apply the applicable formula to hours worked in each location. Employers too small to do so are unlikely to work across jurisdictions, but if they do they can hire a competent payroll service or otherwise structure their time keeping to reflect where work occurred.

Once the baseline expense obligation is determined, the employer applies its credits for existing expenditures to determine what additional amount, if any, is owed to the City. For employers who do *not* provide employee health benefits, this step is essentially non-existent, and they need only pay the City the required baseline amounts. Such an employer's desire not to pay the required amounts is, of course, irrelevant to ERISA preemption. The debate over whether employers should be required to pay for health care in one form or another—which in all candor appears to be the real objection Petitioner and its *amici* have to the HCSO—is a policy matter for the legislature, not a question of law for the judicial branch. It is ironic that ERISA, a statute intended to *promote* the provision of employment benefits by employers, 29 U.S.C. § 1001, is being trumpeted as creating some type of immunity from any obligation to pay for society's health care costs. ERISA is, at a minimum, agnostic about this topic; nothing in existing ERISA case law supports the notion that the government may not tax employers for the purpose of

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rates, or the myriad other payroll laws that vary across localities and contracts.

funding public health initiatives. As this Court noted in *Fort Halifax Packing Co.*, "ERISA's pre-emption provision does not refer to state laws relating to 'employee benefits,' but to state laws relating to 'employee benefit *plans*." 482 U.S. at 7.

As for employers who do provide benefits, the suggestion that a competent employer does not know what its benefits cost is hard to understand. If the benefits are provided according to a uniform plan, the employer can use an average cost to comply with the HCSO and need not look employee by employee.[7] Pet. App. 141a (OLSE Reg. No. 6.2(B)(1)). Given that the average cost of benefits exceeds the City's mandatory expenditures, almost all such employers will owe nothing further.

If the benefits are provided in a non-uniform manner (i.e. on an individual basis), then the employer's existing business records should reveal the relevant expenses for each employee. Taking a credit for these expenses in this context is no more difficult than seeking an income tax deduction for the same expenses, so unless an employer is providing benefits but not seeking the tax deduction to which it is entitled (a virtual impossibility) there should be no incremental burden in calculating what, if anything, the City is owed.

Nibbi Brothers is in a strong position to evaluate Petitioner's claims—it is precisely the type of multi-jurisdictional employer with changing worksites and a highly variable workforce that would be most impacted by differing standards across jurisdictions. Indeed, Nibbi has long experience dealing with this

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[7] Self-insured employers can comply in the same average-expense fashion. Pet. App. 141a (OLSE Reg. No. 6.2(B)(2)).

type of jurisdictionally-based, per-employee accounting. Nibbi Brothers' employees' wages are governed by master agreements between the relevant unions and Nibbi Brother's Contractors' Association, the Construction Employers' Association. The standard formula for employee pay in such contracts requires an hourly wage and hourly fringe benefit payments. For example, the Northern California Carpenters master contract requires separate hourly amounts for wages, health and welfare, pension, vacation, work fees, training, and annuity payments. The amounts may vary depending on the location of the job. Nibbi Brothers understands that a similar pay structure is used in most construction contracts nationwide. Complying with these master agreements requires Nibbi Brothers to record, for each employee, when that employee worked, where the job was, the number of hours, and then to apply the various line item formulas to that data—precisely the type of calculation required by the HCSO.

Of course, there are innumerable differences between ordinary employment and a union contract. The point, however, is that location-specific pay differentiation is commonly and regularly negotiated at arms-length between industry groups and unions. If it was commercially impractical—if complying with such varying standards would "overload the largest human resources departments and the most expensive software-systems" as Petitioner claims—then such requirements would *not* be commonly and freely undertaken by employers. That they are demonstrates the *lack* of any significant burden. Contrary to Petitioner's insistence, there is simply no reason even a fairly rudimentary human resources/payroll system would be "overloaded" or "overwhelmed" by laws like the HCSO.

B. The Record Keeping and Reporting Requirements Are Simple

As with calculating the amounts owed, record keeping and reporting under the HCSO are very simple and bear no resemblance to the logistical nightmare imagined by the Petitioner. The HCSO requires employers to maintain very few records, and frankly they are records that any employer should maintain anyway. First, employers are required to maintain *the same* pay records that California state law already requires. Pet. App. 143a (OLSE Reg. No. 7.2(A)(1)). Complying with pre-existing state law is in no way burdensome.

Second, the employer is required to have the address, telephone number and first day of work of all employees. Pet. App. 143a (OLSE Reg. No. 7.2(A)(2)). Again, all but the telephone number is already required to be maintained by law,[8] and any ordinary personnel file or database would include the employee's phone number.

Third, the employer must have records showing compliance with the Ordinance. No specific form of record is required. Pet. App. 143a (OLSE Reg. No. 7.2(A)(3)). As discussed above, compliance is easily measured based on the records most employers keep, so only a small amount of effort would be required to document that compliance.

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[8] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires all States and the federal government to establish databases requiring employers to report the name, address, social security number and start date of all new employee hires or re-hires. 42 U.S.C. § 653a (2009); Cal. Unemp. Ins. Code § 1088.5 (2009).

Finally, any waivers signed by employees, and any notices to the employees of payment to the City, must be maintained. Pet. App. 144a (OLSE Reg. No. 7.2(A)(4)-(5)). Here too, ordinary personnel file practices would include retention of these documents in any event.

Neither Petitioner nor any of its *amici* provide any explanation for their contention that these record keeping requirements are burdensome, confusing, or even that they require anything in excess of what employers maintain in the ordinary course of business. Nibbi Brothers, for example, fully complies with the HCSO through use of records it was maintaining long before the ordinance was enacted. There is no record evidence of any employer having to incur meaningful additional expenses to comply with the HCSO's record keeping requirements, much less a showing of the crushing burden claimed by Petitioner.

As for the annual reporting requirement, it too is extraordinarily simple. The City provides a single page form to list the number of employees in various categories per quarter, total hours (not per person hours), and relevant overall spending amounts (not per-person spending).[9] The form is in no way burdensome.

At bottom there simply is no basis for the Petitioner's insistence that the HCSO's record keeping and reporting requirements are burdensome to employers. To the contrary, they simply require the type of ordinary data collection in which any modern business should already have been engaged as a matter of due course.

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[9] *See* http://www.sfgov.org/site/olse_page.asp?id=99346.

C. None of These are Obligations of the ERISA Plan Administrator In Any Event

Finally, and most importantly for ERISA preemption purposes, none of the recordkeeping or reporting requirements are imposed on ERISA plans or plan administrators. The HCSO's requirements uniformly apply to *employers* irrespective of whether they sponsor ERISA plans. No ERISA plan administrator is required to do anything under the HCSO. These *employer* reporting requirements no more affect ERISA plans than an employer's right under state (and federal) income tax law to deduct health care premiums by reporting those premiums on its tax returns.

Thus, there is absolutely no record basis or, we submit, basis in reality, for the alleged fear that the Ninth Circuit's decision in *GGRA II* will result in administrative burdens or confusion for multi-jurisdictional employers. Indeed, Nibbi Brothers' experience shows that no such burdens exist. Nibbi Brothers believes that analysis of important legal questions should be based on a developed evidentiary record, not on whatever wild speculation and worst case scenarios political opponents of a creative new solution are able to dream up. In evaluating the petition before the Court, Nibbi Brothers respectfully requests that the Court disregard the unsupported and unexplained generalizations presented by Petitioner and its *amici* concerning the supposed burden created by laws like the HCSO.

CONCLUSION

San Francisco's Health Care Security Ordinance is a creative legislative attempt to broadly distribute the cost of health care for the area's uninsured. The Ninth Circuit correctly determined that the ordinance is not preempted by ERISA, and the petition for *certiorari* should be denied.

Respectfully submitted,

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