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, *et al.*,
Intervenors/Respondents.

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

PETITIONER'S REPLY TO SOLICITOR GENERAL'S BRIEF

Of Counsel:

RICHARD C. RYBICKI
PATRICK B. SUTTON
DEIRDRE I. BOURDET
RYBICKI & ASSOCIATES P.C.
975-B First Street
Napa, CA 94559
(707) 222-6361

CHARLES M. DYKE *
JEFFREY M. TANENBAUM
SHERWIN KAPLAN
DAVID S. FOSTER
NIXON PEABODY LLP
1 Embarcadero Center
18th Floor
San Francisco, CA 94111
(415) 984-8200
cdyke@nixonpeabody.com

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

Whether ERISA section 514(a), 29 U.S.C. § 1144(a), preempts local laws mandating ongoing employer contributions for employee health benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements, a question on which the courts of appeals are in conflict.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Blank Page

IN THE

Supreme Court of the United States

No. 08-1515

GOLDEN GATE RESTAURANT ASSOCIATION,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

SAN FRANCISCO CENTRAL LABOR COUNCIL, *et al.*,
Intervenors / Respondents.

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

PETITIONER'S REPLY TO SOLICITOR GENERAL'S BRIEF

In accordance with Supreme Court Rule 15.8, Petitioner respectfully submits this Reply to the Solicitor General's Brief.

I. INTRODUCTION.

In the Ninth Circuit, the Department of Labor filed an amicus brief arguing, correctly, that this case raises "an important question" and that the employer mandate in San Francisco's Ordinance is completely preempted by ERISA because it requires employee

benefit structures or their administration and it interferes with uniform plan administration. Labor Secretary's Amicus Brief at 1, 8-9. After the panel upheld the Ordinance, the Department of Labor took a full month to consider the court's opinion, then filed a second amicus brief supporting Petitioner's request for a rehearing en banc and arguing, once again correctly, that this case raises "a recurring issue of exceptional importance," that the Ordinance is clearly preempted because it mandates employee benefit structures or their administration and interferes with uniform plan administration, and that the panel's decision conflicts with *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), and with this Court's ERISA preemption cases. Labor Secretary's Brief in Support of Rehearing ("DOL Rehearing Brief") at 7, 14-17.

In the 19 months that have since passed, the government has had a change in administration and a change of heart, at least in part. In this Court, the Solicitor General and the Department of Labor now argue that the ERISA preemption question in this case is not very important and that the Circuit conflict may merely reflect "tension" between the Fourth and Ninth Circuits. Significantly, however, they do not reverse themselves on the underlying legal merits – they do not claim that the San Francisco Ordinance actually survives ERISA preemption.

They seek to justify their partial reversal by asserting that passage of the Patient Protection and Affordable Care Act,[1] as amended[2] (the "PPACA"),[3]

---

[1] Pub. L. No. 111-148, 124 Stat. 119.

[2] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

reduces the likelihood that state and local governments will adopt new employer spending requirements. But the only affirmative evidence bearing on this theory tends to refute it. San Francisco's Mayor and Department of Public Health Director have recently vowed to keep the City's health care program under the Ordinance intact because they say it is needed to fill "holes" in PPACA's coverage.

By reversing itself in part to now advocate that the Ninth Circuit's departure from ERISA preemption law be allowed to stand, the government unintentionally amplifies the need for clarification by this Court that ERISA preempts state and local mandates—regardless of whether the mandates are for benefits or contributions—and that local jurisdictions may not pass laws that balkanize the regulation of employee benefit plans. The Court therefore should grant the petition and decide the important question presented by this case.

II. THE PPACA DOES NOT COUNSEL AGAINST GRANTING THE PETITION.

The Solicitor General invokes Congress's recent passage of the PPACA to make a two-fold argument against granting the Petition.

First, the SG argues that because the PPACA "will almost certainly significantly increase health care coverage" in the United States, the new law "make[s] it much less likely that States and localities will

---

[3] The House Office of the Legislative Counsel has created a consolidated document that integrates the original and amending provisions of Public Law Nos. 111-148 and 111-152 into a single text. *See* http://www.ncsl.org/documents/health/ppaca-consolidated.pdf.

choose to adopt their own health care programs." SG's Brief at 15. This according to the SG "reduces substantially the ongoing importance of the question whether ERISA preempts state and local health care programs like the [Ordinance]." *Id.* We respectfully disagree with the government on at least two levels.

At the most basic level, the government's position is undermined by the very party the government seeks to support. Twice since Respondent filed its opposition brief, San Francisco's Mayor and Department of Health Director have publicly stated their commitment to maintaining San Francisco's health care program under the Ordinance, which they say is vitally needed to fill "major holes" in the new federal program.[4] The Mayor's rationale for maintaining the Ordinance applies with equal force to every state and major city in the country. The government offers no reason to believe that other cities or states will not want to establish their own fill-the-holes programs.

At a broader level, it is important to keep in mind that the Ninth Circuit's rationale is not limited to health care programs. It can be applied with equal force to other welfare benefit programs, even to

---

[4] *See* Heather Knight, *Healthy San Francisco Expected To Continue*, S.F. Chron., Mar. 23, 2010, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/23/MN4V1CJO00.DTL ("[O]n Monday, Mayor Gavin Newsome and Public Health Chief Mitch Katz said they are dedicated to ensuring the viability of Healthy San Francisco because major holes in the national plan, if signed into law, will leave out thousands of local residents."); Victoria Colliver, *National Plan Wouldn't Mean End of Healthy S.F.*, S.F. Chron., Nov. 23, 2009, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/23/MNC31ALDNM.DTL (noting similar point being made by San Francisco Department of Public Health Director).

pension programs. It is difficult to overstate the importance of the issue.

Second, the Solicitor General argues that the PPACA *might* bear on whether the Ordinance is preempted, so therefore the Court should decline to hear the case now. SG's Brief at 15. But the PPACA itself does not preempt state and local "play or pay" laws, nor does it exempt them from ERISA's preemption regime. Petitioner's Supp. Brief at 2-7. It is silent.

The government's argument, nonetheless, invites readers in opaque language to assume that state or local employer mandates like San Francisco's *may* qualify for official sanction under the PPACA's provisions establishing "insurance exchanges" and, if so, *may* be saved from ERISA preemption. But the government never quite explains how this is possible, and a review of the statutory text shows that it plainly is not.

The PPACA sections cited by the government require the states or, upon their failure to act, the federal government to establish insurance exchanges through which individuals and small businesses can purchase health insurance that meets minimum specified coverage standards. *See* PPACA §§ 1311(b), 1321(c); *see also* Brian Kopp et al., "New Federal Health Care Reform Legislation – Its Impact on Employers and Employee Benefit Plans," 10 *Bender's Labor and Employment Law Bulletin* 197, 201 (May 2010). After 2016, states may apply for a "waiver" of

certain statutory requirements "with respect to health insurance coverage." PPACA § 1332(a)(1).[5]

Contrary to the government's speculation, nothing in the PPACA's waiver provision so much as hints that a state or local government may adopt a "play or pay" mandate as part an alternative program that can be removed from ERISA's preemptive reach through a waiver. A waiver can only be granted if the Secretary of the Health and Human Services makes certain determinations that meet statutory criteria, none of which contemplate the existence of a state or local "play or pay" program. To ensure that the government ***cannot*** grant the very waiver the SG's brief suggests might be available, the statute affirmatively provides: "The Secretary may not waive under this section any Federal law or requirement that is not within the authority of the Secretary." PPACA § 1332(c).

This last point is worth considering further, because it completely refutes the government's argument that 29 U.S.C. section 1144(d)—which provides that nothing in ERISA's general preemption rule in section 1144(a) shall be construed to "impair" any other federal law—might be implicated by a PPACA

---

[5] The applicable statutory requirements are those: (i) relating to the "qualified health plans" and "essential health benefits" that must be available for purchase through the state insurance exchanges, PPACA §§ 1301 to 1304; 1401(a) (adding new 26 U.S.C. § 36B), 1402; (ii) governing the establishment and maintenance of the insurance exchanges themselves, *id.* §§ 1311 to 1313; and (iii) contained in the employer and individual mandates that the PPACA adds to the Internal Revenue Code, *id.* §§ 1501(b) (adding new 26 U.S.C. § 5000A); 1513 (adding new 26 U.S.C. § 4980H). *See* PPACA § 1332(a)(2).

waiver. PPACA section 1332(c) expressly precludes that possibility. There is no credible basis for claiming that the San Francisco Ordinance and similar employer mandates might be shielded from ERISA preemption under these or any other provisions of the PPACA.

The government additionally argues that San Francisco's Ordinance *may* be preempted by the PPACA because it is a local law that might not be captured by the PPACA's savings clause, which merely references "state" laws, not local laws. *See* PPACA § 1321(d).[6] But under this Court's existing cases, it appears that the reference to "state" laws includes local laws, in the absence of a clear expression of congressional intent to the contrary. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) (holding that federal statute expressly allowing "State" regulation but remaining silent on local laws does not contemplate preemption of local laws); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002) (following *Mortier* even when the statutory scheme uses the phrase "a State or political subdivision of a State" in one section and the lone term "State" in another). Even if the Ordinance is not saved by section 1321(d), the fact that it is separately preempted by the PPACA is not a reason for the Court to avoid resolving the conflict in the circuits over the straightforward and important question of whether ERISA trumps "play or pay" laws such as the Ordinance.

---

[6] Section 1321(d) is discussed at greater length in Petitioner's Supplemental Brief, and provides: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."

III. CONTRARY TO ITS CURRENT POSITION, THE DEPARTMENT OF LABOR PREVIOUSLY HAD NO DIFFICULTY SEEING THE PANEL'S INCORRECT APPLICATION OF THIS COURT'S ERISA PREEMPTION CASES OR THE CONFLICT WITH *FIELDER*.

In this Court, the government devotes more than four pages to arguing that the panel's decision does not "directly" conflict with either this Court's ERISA decisions or the Fourth Circuit's decision in *Fielder*, which the government now says is merely in "tension" with the panel's decision. SG Brief at 17-21. But the government's argument is completely undermined by the far more persuasive case to the contrary that the government made in the Ninth Circuit.

There, the Department of Labor made two simple and devastating points. First, the Department explained, under this Court's ERISA preemption cases, "29 U.S.C. § 1144(a) is 'intended to ensure that plans *and plan sponsors* would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives *among states* or between states and the Federal Government . . . [and to prevent] the *potential for conflict* in substantive law.'" DOL Rehearing Brief at 14 (emphasis, ellipses and brackets supplied by Labor Department) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) and citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)). The Ninth Circuit, the Department explained, failed to consider the potential for conflict with "play or pay" laws that other jurisdictions have enacted or considered, and instead imposed an impermissible

burden on plan sponsors and administrators to monitor, coordinate and comply with differing obligations. *Id.* at 15.

Second, the Department quoted from *Fielder* at length to demonstrate that the Fourth Circuit's decision was not based solely on its conclusion that the only way to comply with the Maryland law was to adopt or amend an ERISA plan. As the Department's brief cogently explained:

> The court reasoned that because 'the vast majority of any employer's health care spending occurs through ERISA plans . . . the primary subjects of the [law] are ERISA plans, and any attempt to comply with the [law] would have direct effects on the employer's ERISA plans.' *Id.* The court further reasoned that 'a proliferation of similar laws in other jurisdictions would force [employers] to monitor these varying laws and manipulate [their] healthcare spending to comply with them, and that such efforts would deny covered employers a uniform nationwide administration of their healthcare plans.' *Id.* at 197.

DOL Rehearing Brief at 17 (brackets and ellipses supplied by Labor Department). The Department then explained that the Ninth Circuit's decision was in conflict with *Fielder* because it "failed to address the Fourth Circuit's conclusion that even if an employer has meaningful ways to comply with a healthcare spending requirement without affecting ERISA plans, the law is still preempted because of its interference with the employer's ability to administer a uniform nationwide healthcare plan." *Id.* Earlier this term, this Court made very similar "uniformity" points in articulating ERISA's "guiding principles." *Conkright v. Frommert*, 130 S. Ct. 1640, 1648-51

(2010); *see* Petitioner's Supplemental Brief at 7-9 (discussing *Conkright*).

Nothing the government says in its brief now even comes close to detracting from the compelling points it previously advanced in the Ninth Circuit. Moreover, the Solicitor General's argument here that "the Fourth Circuit's view that the Maryland law would disrupt uniformity of plan administration also reflected in part that court's conclusion that the state-payment option was not a realistic alternative for Wal-Mart" is completely refuted by the government's brief in the court below. *Compare* SG Brief at 19 *with* DOL Rehearing Brief at 17.

IV. THE GOVERNMENT'S FOCUS ON A REGULATION THAT THE LABOR DEPARTMENT NEVER PROMULGATED IS WHOLLY MISPLACED.

The government notes that the Labor Department considered, but decided not to promulgate after the PPACA's passage, a regulation "'clarifying the circumstances under which health care arrangements established or maintained by state or local governments for the benefit of non-governmental employees do not constitute an employee welfare benefit plan' covered by ERISA." SG Brief at 12. Had it done so, the government argues, the regulation would have been entitled to *Chevron* deference. *Id.* at 12-13. From this the government asks the Court to draw two inferences: that the contemplated regulation "*could* have altered the preemption analysis in this case" and that the government's decision not to proceed supports its contention that the PPACA re

duces the importance of the question presented in this case. Neither inference is warranted.

First, whether the contemplated regulation "could" have altered the preemption analysis is irrelevant, as the Department never adopted it. In the absence of a genuine legislative regulation that satisfies each *Chevron* element, the government's flip-flop on the issues, occurring within the same case no less, precludes it from receiving any deference whatsoever. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (holding that government's flip-flop in case where agency litigating position is "wholly unsupported by regulations, rulings, or administrative practice" not entitled to deference). Moreover, it is hard to imagine a regulation of the sort mentioned by the government that properly could circumscribe ERISA's preemptive scope under 29 U.S.C. section 1144(a).

Second, the government neglects to mention that its published notice of intended rulemaking provoked strong criticism from the ERISA and business communities.[7] It is at least as inferable that the proposed regulation was dropped in response to the criticism as it was due to a belief that the importance of ERISA's preemption of "play or pay" laws was reduced by the PPACA's passage.

V. CONCLUSION.

The government's argument that the PPACA reduces the need for granting the Petition holds no

---

[7] A letter protesting the proposed regulation from the American Benefits Council and 12 other organizations representing plan sponsors, for example, can be found at http://americanbenefitscouncil.org/documents/erisa_omb-letter032910.pdf.

water. Its other arguments fare even worse, toppling mostly from the pull of the government's earlier opposing positions on the same points. Telling in the government's brief is what it does not say – it does not argue that the Ordinance survives ERISA preemption. This is a remarkable concession by the government given the weakness of the arguments it does make. The question presented in this case and the conflict in the circuits remains urgently in need of resolution. The new position taken by the government, if anything, increases the necessity for this Court to clarify the scope of ERISA preemption, especially in the context of a state or local government imposing new employer mandates, the scope of which can be determined only by reference to ERISA covered employee benefit plans.

Respectfully submitted,

Of Counsel:

RICHARD C. RYBICKI
PATRICK B. SUTTON
DEIRDRE I. BOURDET
RYBICKI & ASSOCIATES P.C.
975-B First Street
Napa, CA 94559
(707) 222-6361

CHARLES M. DYKE *
JEFFREY M. TANENBAUM
SHERWIN KAPLAN
DAVID S. FOSTER
NIXON PEABODY LLP
1 Embarcadero Center
18th Floor
San Francisco, CA 94111
(415) 984-8200
cdyke@nixonpeabody.com

* Counsel of Record

June 7, 2010