No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

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 Staying
Mandate and Vacating Stay of District Court Judgment

APPLICATION FOR ORDER STAYING MANDATE AND VACATING STAY OF DISTRICT COURT JUDGMENT

Richard C. Rybicki
Counsel of Record
Patrick B. Sutton
Deirdre I. Bourdet
EMPLOYMENT LAW ADVOCATES
A Professional Corporation
975-B First Street
Napa, CA 94559
Telephone: (707) 222-6361
Facsimile: (707) 222-6383

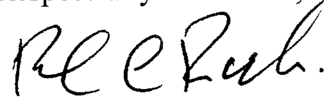
Jeffrey M. Tanenbaum
David L. Bacon
David S. Foster
Sherwin Kaplan
NIXON PEABODY LLP
One Embarcadero Center,
18th Floor
San Francisco, CA 94111
Telephone: (415) 984-8200
Facsimile: (415) 984-8300

Counsel for Applicant
Golden Gate Restaurant Association

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: March 15, 2009

Richard C. Rybicki
Counsel of Record
EMPLOYMENT LAW ADVOCATES
A Professional Corporation
975-B First Street
Napa, CA 94559

Counsel for Applicant
Golden Gate Restaurant Association

TABLE OF CONTENTS

APPLICATION 1

I. INTRODUCTION 2

II. STATEMENT OF THE CASE 3

A. The San Francisco Health Care Security Ordinance 3

B. Proceedings Below 4

1. District Court Judgment Invalidating The Ordinance 4

2. Ninth Circuit Stay, Opinion, And Order On Petition For Rehearing 5

III. AUTHORITY TO STAY MANDATE AND VACATE CIRCUIT COURT STAY 7

A. Factors Considered In Staying Mandate And Vacating Lower Court's Stay 7

B. The Factors Supporting Relief Are Present In This Case 8

1. There Is A Reasonable Probability The Court Will Grant Certiorari 8

a. This Case Presents Nationally Significant Issues 8

b. The Opinion Creates A Dramatic Split Between Circuits 10

c. The Opinion Contradicts Existing Supreme Court Precedent 12

(1) The Opinion Improperly Expands Traditional Areas Of State Regulation 12

(2) The Opinion Contradicts Settled Preemption Law 13

2. There Is A Significant Probability That The District Court Will Be Affirmed 14

a. ERISA Preempts State Laws Bearing A Connection With Or Making Reference To Employee Benefit Plans 14

(1) The Ordinance Bears An Impermissible Connection With Employee Benefit Plans 15

(a) The Ordinance Interferes With A Core Area Of ERISA Concern 16

(b) The Ordinance Interferes With Uniform Plan Design And Administration 19

(c) The Ordinance Imposes Recordkeeping, Inspection And Other Burdens On Plan Sponsors And Administrators 20

(2) The Ordinance Makes Unlawful Reference To Employee Benefit Plans 21

TABLE OF CONTENTS (Cont'd)

C. The Balance Of Equities Favors Staying The Ninth Circuit's Mandate And Vacating Its Stay 24

1. The Public Interest In This Case Extends Far Beyond San Francisco....24

a. Congress Recognized The National Interest In Uniform Employee Benefit Regulation When Enacting ERISA....24

b. Local Regulation Conflicts With The National Health Care Model Underlying Recent Congressional Action 25

2. The Harm To Applicant's Members And The Public Outweighs Any Speculative Harm To City Programs....26

IV. CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Aetna Health Inc. v. Davila
542 U.S. 200 (2004) 14

Alessi v. Raybestos-Manhattan, Inc.
451 U.S. 504 (1981) 14, 16

Bartlett v. Stephenson
535 U.S. 1301 (2002) 8

Boggs v. Boggs
520 U.S. 833 (1997) 13, 15

Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.
519 U.S. 316 (1997) 12, 21

California v. American Stores Co.
492 U.S. 1301 (1989) 8, 11

Certain Named and Unnamed Non-citizen Children and Their Parents v. Texas
448 U.S. 1327 (1980) 7, 10

Curtiss-Wright Corp. v. Schoonejongen
514 U.S. 73 (1995) 16

DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund
520 U.S. 806 (1997) 12

Egelhoff v. Egelhoff
532 U.S. 141 (2001) .... passim

Fort Halifax Packing Co., Inc. v. Coyne
482 U.S. 1 (1987) .... passim

Gade v. National Solid Wastes Management Ass'n
505 U.S. 88 (1992) 13

Golden Gate Restaurant Ass'n v. City and County of San Francisco
535 F. Supp. 2d 968 (N.D. Cal. 2007) 5, 14

Golden Gate Restaurant Ass'n v. City and County of San Francisco
512 F.3d 1112 (9th Cir. 2008) 5, 21, 28

CASES (Cont'd)

Golden Gate Restaurant Ass'n v. City and County of San Francisco
546 F.3d 639 (9th Cir. 2008) .... passim

Golden Gate Restaurant Ass'n v. City and County of San Francisco
__ F.3d __, 2009 U.S. App. LEXIS 5191 (9th Cir. Mar. 9, 2009) .... passim

Golden Gate Restaurant Ass'n v. City and County of San Francisco
Sup. Ct. Case No. 07A654 5

Ingersoll-Rand Co. v. McClendon
498 U.S. 133 (1990) 16, 19, 21

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.
520 U.S. 510 (1997) 16, 17

Lucas v. Townsend
486 U.S. 1301 (1988) 24

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.
514 U.S. 645 (1995) 14, 15

New York Natural Resources Def. Council v. Kleppe
429 U.S. 1307 (1976) 7

Purcell v. Gonzales
127 S. Ct. 5 (2006) 8

Retail Indus. Leaders Ass'n v. Fielder
475 F.3d 180 (4th Cir. 2007) .... passim

Retail Indus. Leaders Ass'n v. Suffolk County
497 F. Supp. 2d 403 (E.D.N.Y. 2007) 8

Rostker v. Goldberg
448 U.S. 1306 (1980) 24

Rush Prudential HMO, Inc. v. Moran
536 U.S. 355 (2002) 14

Shaw v. Delta Air Lines
463 U.S. 85 (1983) .... passim

Standard Oil Co. of Calif. v. Agsalud
633 F.2d 760 (9th Cir.1980) 12

CASES (Cont'd)

Stone & Webster Eng'g Corp. v. Ilsley
690 F.2d 323 (2d Cir. 1983) 12

Times-Picayune Publ'g Corp. v. Schulingkamp
419 U.S. 1301 (1974) 7, 24

Western Airlines, Inc. v. Int'l Bhd. of Teamsters
480 U.S. 1301 (1987) 7

RULES

Sup. Ct. R. 10 8

Sup. Ct. R. 10(c) 12

Sup. Ct. R. 22 13

Sup. Ct. R. 23 1

Sup. Ct. R. 23.3 7

STATUTES

Federal Statutes

22 U.S.C. § 2101(f) 7

29 U.S.C. § 1001(a) 24

29 U.S.C. § 1002(1) 21, 23

29 U.S.C. § 1102(b)(3) 17

29 U.S.C. § 1140 16

29 U.S.C. § 1144 4

29 U.S.C. § 1162(2)(B) 26

Employee Retirement Income Security Act
29 U.S.C. §§ 1001-1461 .... 1, 4

STATUTES (Cont'd)

***Federal Statutes* (Cont'd)**

American Recovery and Reinvestment Act of 2009
Pub. L. No. 111-005, div. B, tit. III, sec. 3001 (Feb. 17, 2009) 2, 9, 25

State Statutes

Cal. Welf. & Inst. § 17000 27

Local Statutes

S.F., Cal., Admin. Code Chap. 14, §§ 14.1 - 14.8 (2007) .... passim

Local Regulations

S.F., Cal., Regulations Implementing the Employer Spending
Requirement of the S.F. Health Care Security Ordinance (2008) .... passim

LEGISLATIVE HISTORY

120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent) 15

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Nos. 06-1840, 06-1901 (4th Cir. Nov. 6, 2006) 18

Brief of the Secretary of Labor as Amicus Curiae Supporting Appellee and Requesting Affirmance, Golden Gate Restaurant Association v. City and County of San Francisco 18, 21, 23

Brief of the Secretary of Labor as Amicus Curiae Supporting Petition for Rehearing En Banc, Golden Gate Restaurant Association v. City and County of San Francisco 18, 23, 24

Edward A. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*
28 Cardozo L. Rev. 847 (2006) 18

Julia Contreras & Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*
19 St. Thomas L. Rev. 105, 136 (2006) 9

SECONDARY AUTHORITIES (Cont'd)

January 2009 *Status Report on the Implementation of the San Francisco Health Care Security Ordinance* 27

Anrica Deb, *Can Healthy San Francisco Withstand the Recession* MISSION LOCAL, March 12, 2009 27

Heather Knight, *Universal Health Care Called S.F.'s Future* S.F. CHRON., Mar. 12, 2009....................27

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APPLICATION FOR ORDER STAYING MANDATE AND 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 ("Golden Gate") respectfully applies for an order staying (or, if necessary, recalling) a mandate of the United States Court of Appeals for the Ninth Circuit and vacating the stay of judgment ordered by a motions panel of that Court. The application pending Petition for Writ of Certiorari is made pursuant to Rules of the Supreme Court of the United States, Rule 22.

I. INTRODUCTION

This matter lies at the center of a national debate over healthcare: may state and 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 had considered this type of legislation in the months preceding this litigation. Even city and county governments had implemented such laws, setting the stage for a patchwork of inconsistent local regulations and an inevitable collision with three decades of nationally uniform plan administration and benefit regulation under ERISA.

The need for nationally uniform benefit regulation has taken on even greater importance in the past several weeks. On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009, a law intended to preserve and create jobs, promote economic recovery, and assist those most affected by the current recession. Central to the Act is one of the most comprehensive healthcare subsidies ever provided to workers: a sixty-five percent subsidy, paid by employers and reimbursed by the federal government, providing extended continuation coverage assistance to employees and their dependants. Significantly, this subsidy was not created to fund any government plan or program. It provides assistance solely to those receiving benefits from an employer who provides, and who *chooses* to continue providing, a private health benefit plan. Congress has long recognized the national interest in employer-provided health care and, this month, it recognized that national interest again.

Local mandates such as San Francisco's Health Care Security Ordinance present a significant obstacle to nationally uniform benefit plan administration. In addition to setting minimum healthcare spending standards, San Francisco's ordinance imposes comprehensive recordkeeping, reporting and enforcement requirements based solely on employment within a single city. The Ninth Circuit nonetheless upheld the ordinance, applying an interpretation of

ERISA preemption at odds with both Supreme Court precedent and recent cases invalidating similar mandates. This ended more than three decades of uniform federal benefit plan regulation, requiring employee benefit plans and their plan sponsors to face, and immediately conform their conduct to, purely local standards. As the Secretary of Labor noted in an *amicus* brief supporting rehearing, "[e]ven if the administrative burden imposed by a single law may be tolerable, the *cumulative burden could be staggering* ..." (emphasis added). Moreover, because the panel's published opinion conflicts with other Circuit law on the same subject, it will cause confusion far beyond San Francisco, requiring employers throughout the nation to closely monitor and plan for similar state and local proposals. Eight Ninth Circuit judges agreed on this point in a dissent to the order denying Golden Gate's petition for rehearing *en banc*, concluding that the opinion "creates a roadmap for the enactment of numerous conflicting health care laws … the very situation Congress strove to avoid when it enacted ERISA." The judges recognized that "[t]his case concerns an issue of exceptional national importance, i.e., national uniformity in the area of employer-provided healthcare."

II. STATEMENT OF THE CASE

A. The San Francisco Health Care Security Ordinance.

The San Francisco Health Care Security Ordinance ("Ordinance") imposes a "health care expenditure" mandate on businesses with twenty or more employees, wherever located, with as few as one employee performing occasional work within the city. *See* S.F., Cal., Admin. Code Chap. 14, §§ 14.1 – 14.8 (2007) (as amended April 2, 2007) ("Ord.") (App. Exh. A). "Health care expenditures" include "any amount paid by a covered employer ... for the purpose of providing health care services for covered employees or reimbursing the cost of such services." Ord. § 14.1(b)(7). Non-compliance results in penalties up to $1000 per week per employee. Ord. § 14.4(e)(1).

The Ordinance imposes a large number of additional obligations as well. Covered employers must maintain "accurate records of health care expenditures," allow access to such records, and annually report any "other information" the City requires. Ord. § 14.3(b). Employers reducing their workforce below Ordinance thresholds must prove that the reduction was not done to avoid coverage, and the City may penalize employers accused of retaliating against or influencing any person who "participated in an action to enforce, inquire about, or inform others" about Ordinance requirements. Ord. §§ 14.4(c), 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") has issued regulations creating additional recordkeeping and reporting obligations, permitting employee complaints and allowing it to order reimbursement of medical expenses should an employer not make required expenditures. *S.F., Cal., Regulations Implementing the Employer Spending Requirement of the S.F. Health Care Security Ordinance* (2008) ("Final Reg.") (App. Exh. B); *see, e.g.,* Final Reg. §§ 8.2(A)(1), 9.2(A), 7.7.

B. Proceedings Below.

1. District Court Judgment Invalidating The Ordinance.

Golden Gate filed this lawsuit on November 8, 2006, contending that portions of the Ordinance were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461; *see* 29 U.S.C. § 1144. The district court granted summary judgment on December 26, 2007, finding that:

- The Ordinance has a prohibited connection with ERISA plans because its local requirements interfere 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 ERISA plans by requiring employers to modify the administration of such plans or to structure additional payments by express reference to amounts paid under existing plans.

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 535 F. Supp. 2d 968 (N.D. Cal. 2007) (App. Exh. C).

2. Ninth Circuit Stay, Opinion, And Order On Petition For Rehearing.

Respondent 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 filed an emergency motion for stay of judgment with the Ninth Circuit's December 2007 motions panel ("Motions Panel"). The Motions Panel granted the stay, holding that the Respondents had a "strong likelihood" of success on appeal. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* ("*Stay Order*"), 512 F.3d 1112, 1119-1125 (9th Cir. 2008) (App. Exh. D). Golden Gate petitioned to vacate the stay but, after ordering additional briefing, Justice Kennedy declined to vacate the *Stay Order* pending expedited appeal in the Ninth Circuit. (*Golden Gate Restaurant Ass'n v. City and County of San Francisco*, Sup. Ct. Case No. 07A654).

The Motions Panel retained the case on the merits and set oral argument for April 17, 2008. Eight national entities filed amicus briefs on Golden Gate's behalf, including the

Secretary of Labor (whose counsel also participated in oral argument). On September 30, 2008, the panel reversed the district court on the bases that:

- A presumption against federal preemption applied because the Ordinance operates in an area of traditional state regulation;
- The Ordinance requires an employer to spend a minimum amount on health care but does not mandate any particular benefits;
- The spending mandate does not require employers to establish new ERISA plans, or to modify existing ERISA plans, as they may pay the City directly; and
- Direct payment to the City does not itself create an ERISA plan, as the resulting administrative obligations do not create the type of "ongoing administrative scheme" ERISA was meant to address.

Golden Gate Restaurant Ass'n v. City and County of San Francisco ("*Opinion*"), 546 F.3d 639 (9th Cir. 2008) (App. Exh. E).

Golden Gate petitioned for rehearing *en banc*, again joined by *amici* including the Secretary of Labor. The petition was denied on March 9, 2009, by published order including an extraordinary twelve-page dissent joined by eight judges (including Chief Judge Alex Kozinski). *Order Denying Petition for Rehearing En Banc* ("*Rehearing Order*"), ___ F.3d __, 2009 U.S. App. LEXIS 5191 (9th Cir. Mar. 9, 2009) (App. Exh. F). Written by Judge Milan Smith, the dissent asserts that the *Opinion* "creates a circuit split with the Fourth Circuit Court of Appeals, renders meaningless the tests the Supreme Court set out in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), conflicts with other Supreme Court cases establishing ERISA preemption guidelines, and, most importantly, flouts the mandate of national uniformity in the area of employer-provided healthcare that underlies the enactment of ERISA." *Rehearing Order* at 2824.

III. AUTHORITY TO STAY MANDATE AND VACATE CIRCUIT COURT STAY

A Circuit Justice has power both to stay the Circuit's final judgment and to vacate its earlier stay permitting enforcement of the Ordinance. Applicant respectfully submits that both actions are necessary to preserve ERISA's uniform regulation of employee benefit plans within San Francisco and throughout the nation.[1]

A. Factors Considered In Staying Mandate And Vacating Lower Court's Stay.

A Circuit Justice may stay enforcement of a circuit court's final judgment pending Petition for Writ of Certiorari. *See* Sup. Ct. R. 23, 22 U.S.C. § 2101(f). A Circuit Justice's authority to dissolve a stay issued by a lower federal court is also "well settled" and is governed by the same "well-established principles" that apply to an application for a stay of a lower court's ruling. *New York Natural Resources Def. Council v. Kleppe*, 429 U.S. 1307 (1976) (MARSHALL, J., in chambers); *Certain Named and Unnamed Non-citizen Children and Their Parents v. Texas ("Non-citizen Children")*, 448 U.S. 1327, 1330 (1980) (POWELL, J., in chambers). Those principles 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 ...; there must be a significant possibility of a reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Non-citizen Children, 448 U.S. at 1330, quoting *Times-Picayune Publ'g Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., in chambers).

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[1] Requesting a stay from the Circuit court would certainly be futile, as the same panel stayed judgment, retained the case on its merits, and issued a published concurrence to the order denying rehearing. Sup. Ct. R. 23.3; *Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1304-1305 (1987) (O'CONNOR, J., in chambers).

B. The Factors Supporting Relief Are Present In This Case.

1. There Is A Reasonable Probability The Court Will Grant Certiorari.

Stay pending certiorari 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). This analysis focuses on whether the underlying issue satisfies criteria for exercise of the Court's discretionary jurisdiction, including the considerations identified 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 to review the Ninth Circuit's decision.[2]

a. This Case Presents Nationally Significant Issues.

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 that will affect the continued viability of our system of employer-provided health care. In recent 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 was preempted by ERISA. *See Retail Indus. Leaders Ass'n v. Fielder* ("*Fielder*"), 475 F. 3d 180 (4th Cir. 2007); *see also Retail Indus. Leaders Ass'n v. 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. Over thirty similar statutes had been proposed to state and local governments in the

[2] The Court may also consider granting certiorari immediately given the *Opinion*'s national significance and the resulting inter-circuit conflict. *Purcell v. Gonzales*, 127 S. Ct. 5 (2006).

months preceding this and the *Fielder* case. *See* Julia Contreras & Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 St. Thomas L. Rev. 105, 136 (2006).

The Ninth Circuit's decision upholding the Ordinance "creates a 'road map for state and local governments'" seeking to implement similar health care spending mandates. *Rehearing Order* at 2824 (dissent by SMITH, J.; KOZINSKI, C.J.; O'SCANNLAIN, KLEINFELD, TALLMAN, BYBEE, CALLAHAN, and BEA, J.). While such mandates may increase access to health care within the jurisdictions where they operate, they will likely lead some employers to spend only the minimum amount required and to reduce or eliminate health care benefits outside those jurisdictions. As the Fourth Circuit recognized, "the categories of ERISA and non-ERISA healthcare spending would not be isolated, unrelated costs" to employers. *Fielder*, 475 F.3d at 197. The incentive to reduce health care spending to the level mandated in each jurisdiction – and to cut or eliminate health benefits where no mandate exists – would further erode the national system of employer-sponsored health care that ERISA was intended to foster.

Recent federal legislation has heightened the national importance of employer-sponsored health care provided through ERISA plans. The American Recovery and Reinvestment Act of 2009 provides generous subsidies allowing workers to receive COBRA continuation healthcare benefits at reduced cost. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-005, div. B, tit. III, sec. 3001 (Feb. 17, 2009). But that subsidy, and any right to benefit continuation, depends on the continued existence of ERISA plans – which employers are free to discontinue at any time. Purely local regulations aimed at concentrating employer payments in a particular jurisdiction, or encouraging the displacement of ERISA-governed benefits by public health programs, would work at cross purposes to this important national measure.

The pressing national debate over improving health care access, and recent nationwide efforts to impose local pay-or-play requirements, demonstrate that certiorari is appropriate to resolve the nationally significant issues presented by this case. *See Non-citizen Children, supra*, 448 U.S. at 1331.

b. The Opinion Creates A Dramatic Split Between Circuits.

The *Opinion* attempted to distinguish the Fourth Circuit's contrary holding in *Fielder* on the grounds that the Maryland pay-or-pay statute offered the employer no reasonable choice but to increase its ERISA contributions. *Opinion*, 546 F.3d at 659-660. It noted that any payments made to the State by employers under the Maryland statute would have been earmarked for general entitlement programs, providing no actual benefits for employees, and that no rational employer would therefore choose to pay money to the State when it could spend the same dollars on employee benefits. The panel held that under the Ordinance, however, money paid to the City does result in a benefit for employees; a rational employer might thus choose to "pay" rather than "play." It determined that the public payment option was reasonable because the City's health plan "provides tangible benefits to employees." *Id.* at 660.

Eight judges of the Ninth Circuit, including its Chief Judge, disagreed, opening their dissent with the observation that "[o]ur decision in this case creates a circuit split with the Fourth Circuit Court of Appeals." *Rehearing Order* at 2824. The judges recognized that the panel had tried to distinguish its opinion from *Fielder* solely on its belief that San Francisco's program provided a more "meaningful" alternative than the state-fund contributions considered by the Fourth Circuit. But agreeing with Golden Gate, the judges observed that "this distinction conflicts with the reasoning of *Fielder*" and its conclusion that, even if there were some "meaningful avenue" by which the employer could incur non-ERISA healthcare spending, the Maryland statute would still have an impermissible "connection with" ERISA plans. *Rehearing*

Order at 2828. This accurately portrays the principal rationale of *Fielder*, which was neither addressed nor distinguished by the *Opinion*. As the Fourth Circuit noted:

> [T]he primary subjects of the [statute] are ERISA plans, and any attempt to comply with the Act would have direct effects on the employer's ERISA plans. If [the employer] were to attempt to utilize non-ERISA health spending options to satisfy [the statute], it would need to coordinate those spending efforts with its existing ERISA plans. ... From the employer's perspective, the categories of ERISA and non-ERISA healthcare spending would not be isolated, unrelated costs. Decisions regarding one would affect the other and thereby violate ERISA's preemption provision.

Fielder, 475 F. 3d at 196-197; *see also Rehearing Order* at 2828 (quoting *Fielder*). The argument that an employer *might* comply with a pay-or-play statute through some way allegedly not governed by ERISA "does nothing to refute the fact that in most scenarios, the Act would cause an employer to alter the administration of its healthcare plans." *Fielder*, 475 F. 3d at 196-197.

The Ninth Circuit failed to distinguish, or even address, the Fourth Circuit's principal reasoning, leading the eight dissenting judges to conclude that "[t]he holdings of *Fielder* and *Golden Gate* stand in clear opposition, and create a circuit split on the issue of whether ERISA preempts 'fair share' or 'play-or-pay' ordinances." *Rehearing Order* at 2829. Plan administrators seeking to reconcile these two decisions will certainly find no less confusion than eight Ninth Circuit judges. The predictable impact of such confusion on nationwide plan administration suggests that at least four Justices would vote to grant certiorari to resolve this conflict regarding the scope of ERISA preemption. *See American Stores*, 492 U.S. at 1305.

c. The Opinion Contradicts Existing Supreme Court Precedent.

(1) The Opinion Improperly Expands Traditional Areas Of State Regulation.

The Ninth Circuit's opinion is predicated on a newly expanded concept of what constitutes a traditional area of state regulation. Its preemption analysis begins with a discussion of cases involving local action in areas historically regulated by the States, noting that such state and local laws "enjoy a presumption against preemption." *Opinion,* 546 F.3d at 647, *citing DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

Application of such a "presumption against preemption" to the Ordinance conflicts with settled Supreme Court authority. In each of the cases cited by the Ninth Circuit, 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 Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* ("*Dillingham*"), 519 U.S. 316, 330 (1997); *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 *Opinion* adopts a presumption far broader than that recognized by this Court, and permits local regulation in an area of core ERISA concern, there is a substantial probability that at least four Justices would vote to grant certiorari to correct significant misapplication of the Court's existing precedents. *See* Sup. Ct. R. 10(c).

(2) The Opinion Contradicts Settled Preemption Law.

The *Opinion* imposes a remarkably limited standard for ERISA preemption, holding that the Ordinance does not bear a "connection with" benefit plans solely because it does not expressly "require any employer to adopt an ERISA plan [or] provide specific benefits through an existing ERISA plan." *Opinion*, 546 F.3d at 655. Because health care payments may be made directly to the City, the court reasoned, employers may technically maintain uniform benefit plans merely by paying any additional amounts directly to local government. The practical impact of this choice is irrelevant, it explained, because additional financial and administrative obligations are placed on *employers* rather than benefit plans themselves. *Opinion*, 546 F.3d at 656-657.

Ignoring the practical effect of a local law – in this case, by adopting an unyielding distinction between "employers" and "plans" – further confuses ERISA by making its *express* preemption clause 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 Ass'n*, 505 U.S. 88, 98 (1992); *c.f. Boggs v. Boggs* ("*Boggs*"), 520 U.S. 833, 841 (1997). The Ninth Circuit's approach would allow state and local governments to sidestep Congressional intent by artfully phrasing employee benefit mandates as "employer expenditure requirements" without regard to the purposes and objectives Congress sought to achieve through ERISA. This would be true regardless of the impact a state or local mandate had on employer conduct or Congressional objectives, making ERISA less preemptive than other federal statutes generally – a result already rejected by this Court. *Boggs*, 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 v. Raybestos-Manhattan, Inc.* ("*Alessi*"), 451 U.S. 504, 525 (1981) ("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 Packing Co., Inc. v. Coyne* ("*Fort Halifax*"), 482 U.S. 1, 16-17 (1987)). Review would allow the Court to address this conflict and to explain, as several Justices have indicated, that its existing authority interprets ERISA at least as broadly as traditional conflict and field preemption principles. *See, e.g., Egelhoff, supra*, 532 U.S. at 152-153 (SCALIA, J., dissent); *id.*, 532 U.S. at 153-154 (BREYER, J., dissent).

2. There Is A Significant Probability That The District Court Will Be Affirmed.

The district court held that the Ordinance was preempted notwithstanding any possibility that employers could satisfy its spending requirement without creating or altering an ERISA plan. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 535 F. Supp. 2d at 976-77. As the dissenting judges noted, the district court's decision was based on sound application of controlling Supreme Court precedent.

a. ERISA Preempts State Laws Bearing A Connection With Or Making Reference To Employee Benefit Plans.

ERISA preemption was designed to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. 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. The Ordinance and pay-or-play laws in general resurrect the very threats that ERISA was designed to eliminate. As explained by Congressman John Dent, a chief architect and sponsor of ERISA:

> 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) (remarks of Rep. Dent), 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*, 520 U.S. at 844. 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.

(1) The Ordinance 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 Ordinance Interferes With A Core Area Of ERISA Concern.

The minimum expenditure requirement is, however artfully styled, 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*, 451 U.S. at (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.*, 520 U.S. at at 515-516; *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 state and local governments to mandate minimum health care payment levels and complex administrative and reporting rules 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) ("DOL *Fielder* 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 Secretary of Labor has consistently taken the same position in this case as well. In its *amicus* brief on the merits, the Solicitor of Labor argued that an employer "can maintain uniformity only by changing the benefits under its existing ERISA plan [or] give San Francisco employees different or additional benefits." It concluded that "[n]o matter how it proceeds, the employer would have to adjust its administrative practices to reflect the unique administrative requirements, terms, and prohibitions of the San Francisco law, such as special rules for calculating hours worked inside and outside San Francisco, restrictions on a plan's ability to require employee contributions as part of a health insurance program, detailed recordkeeping mandates, and the Ordinance's provisions on the quarterly timing for determining an employer's compliance with the contribution mandates." *Brief of the Secretary of Labor as Amicus Curiae Supporting Appellee and Requesting Affirmance*, ("DOL *Golden Gate* Brief") (App. Exh. H), p. 26-27; *see also Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Rehearing En Banc* ("DOL *Rehearing* Brief") (App. Exh. I), p. 15 (citing DOL *Golden Gate* Brief).

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 purpose in an area of core ERISA concern, and is thus preempted. *Egelhoff*, 532 U.S. at 147.

(b) The Ordinance 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. The Court identified this problem in *Fort Halifax*, 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." 482 U.S. at 12.

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*, 482 U.S. 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.[3] 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 Ordinance Imposes Recordkeeping, Inspection And Other Burdens On Plan Sponsors and Administrators.

The Ordinance places specific, complex 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

[3] The Ninth Circuit dissenting judges voiced this concern expressly. Judge Smith wrote "[I]f we consider the possibility of numerous cities, counties and states enacting similar laws, the burden this places on employers is potentially very great, thereby encouraging affected employers to drop their ERISA plans as a cost saving measure." *Rehearing Order* at 2834.

"'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); *see also* DOL *Golden Gate* Brief (App. Exh. H), p. 26-27. In short, the uniform administrative environment envisioned by ERISA's framers no longer exists so long as the Ordinance is in effect.

(2) The Ordinance Makes 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. The existence of such plans is plainly essential to the Ordinance's operation, as it calculates an employer's liability by reference to 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 or changing ERISA plans" allowing the Ordinance to operate without express reference to ERISA-regulated benefits. *Stay Order*, 512 F.3d at 1119. 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.

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 (Ord. § 14.3(b)), calculating the percentage of paid time off attributable to time worked inside and outside of San Francisco (Final Reg. § 6.1(C)(1)(b)); determining the time telecommuters employed outside the City 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" (Ord. § 14.1(b)(4)); 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); and maintaining documentation sufficient to prove that any reduction in force was not done to avoid obligations under the Ordinance (Ord. § 14.4(c); Final Reg. § 7.5). These obligations require "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). This point was made forcefully and repeatedly by Golden Gate, its *amici* and – most significantly – the Secretary of Labor. *See* DOL *Golden Gate* Brief (App. Exh. H), pp. 12-19; DOL *Rehearing* Brief (App. Exh. I), pp. 8-14. As the Secretary argues: "There is no relevant difference between an employer's decision to provide benefits through [Healthy San Francisco] or to provide benefits through the purchase of insurance – in both cases, the employees receive their benefits through a third party and the program is substantially administered through a third party." DOL *Rehearing* Brief, p. 10. Accordingly, payments directly to the City *do not* create a "means other than establishing or changing ERISA plans" or avoid reference to such plans under *Fort Halifax*.

C. The Balance Of Equities Favors Staying The Ninth Circuit's Mandate And Vacating Its Stay.

Comparison of the interests at issue demonstrates that the Ninth Circuit's mandate should be stayed, and its *Stay Order* vacated, pending Golden Gate's Petition for Writ of Certiorari. *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 Publ'g 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. In this action, staying the Ninth Circuit's judgment and dissolving its stay serves public interests much broader than the Applicant's alone. Indeed, given the national significance of the legal questions raised in this action, such action would serve the very interests identified by Congress when it crafted ERISA.

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

a. Congress Recognized The National Interest In Uniform Employee Benefit Regulation When Enacting ERISA.

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 federal preemption was an essential part of this statutory scheme. The Ninth Circuit's decision destroys national uniformity and creates exactly the regulatory inconsistency that motivated Congress to enact a preemptive federal statute in this area. *See, e.g., 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.

b. Local Regulation Conflicts With The National Health Care Model Underlying Recent Congressional Action.

Local interference with uniform employee benefit standards presents a significant potential obstacle to the comprehensive health care model underlying the American Recovery and Reinvestment Act of 2009. Under the Act, employees losing work between September 30, 2008, and December 31, 2009, are eligible to receive a sixty-five percent subsidy of their own and their dependants' COBRA continuation coverage. This massive program demonstrates both the continuing importance of our nation's current employer-provided health care model and the role of that model – however imperfect – as the front-line source of benefits for American workers.

Viewed locally, San Francisco's Ordinance conflicts with the national model recently reaffirmed by Congress. If contributions to the City's program do not create an ERISA plan, then employer funds placed in the program will be diverted to a health system providing no guaranteed continuation rights and no eligibility for the current federal COBRA subsidy. Workers whose employers choose to make payments directly to the City (rather than taking the Ninth Circuit's suggestion that they administer both local contributions and separate benefit plans) will be left out of the recovery package altogether.

Viewed nationally, laws like the ordinance threaten the very model relied on by Congress when developing the recovery package. The Act already requires employers to "advance" COBRA subsidies to their former employees and dependants, recovering that money only later by tax credit or federal reimbursement. Adding a patchwork of local regulation to the financial and administrative burden already created by the federal subsidy would create a heavy

disincentive for employers to retain existing benefit plans. After all, employers are only required to make continuation coverage available so long as they choose to continue providing benefits to their remaining employees. COBRA continuation coverage terminates as soon as an employer "ceases to provide any group health plan to any (current) employee." 29 U.S.C. § 1162(2)(B). This result is neither unforeseeable nor unlikely. It is not unforeseeable, as even the dissenting Ninth Circuit judges recognized that local regulation would encourage affected employers "to drop their ERISA plans as a cost saving measure." *Rehearing Order* at 2834. And it certainly is not unlikely given that the most vulnerable employers – those for whom economic conditions have forced the most layoffs – will bear the greatest burden under the new stimulus law. Congress' recognition that employer-provided health care would be threatened by inconsistent local regulation rings true now, more than ever.

2. The Harm To Applicant's Members And The Public Outweighs Any Speculative Harm To City Programs.

The harm to Applicant's members as a result of the Ninth Circuit's decision is immediate and substantial. They, as well as all other covered businesses wherever located, are subject to a host of inconsistent recordkeeping and administrative requirements unique to San Francisco. The harm does not end with new administrative burdens and expenses. Each quarter brings a new payment deadline under the Ordinance, forcing employers to make payments to San Francisco if they have not already spent a sufficient amount on 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 granted, the status quo

ante will be reinstated and future harm can be prevented pending determination of the lawfulness of the Ordinance.

By comparison, any harm to the City or its residents is speculative. The City's health coverage programs are funded only in part by the employer spending mandate at issue. Local taxes, grants, and other City revenues fund the overwhelming majority of the program's $200,000,000 budget, making it unlikely that such programs would be discontinued in the absence of such funding. *See* January 2009 *Status Report on the Implementation of the San Francisco Health Care Security Ordinance* (App. Exh. J), p. 13 ($14.218 Million committed to Healthy San Francisco by local employers); Anrica Deb, *Can Healthy San Francisco Withstand the Recession*, MISSION LOCAL, March 12, 2009 (App. Exh. K) (citing approximately $200 Million Healthy San Francisco budget). Further, the Motions Panel tellingly did not conclude that people would be denied health services if implementation of the employer mandate were delayed pending its decision on the merits. Rather, it concluded that some in need of medical services would look to other existing healthcare resources and opined that others without formal "health coverage" would be less likely to do so. *Stay Order*, 512 F.3d at 1125. 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, City officials recently reiterated their commitment to maintain the HAP "under any financial situation." Heather Knight, *Universal Health Care Called S.F.'s Future*, S.F. CHRON., Mar. 12, 2009 (App. Exh. L), at B-1 (quoting public health chief Dr. Mitchell Katz). Although budget difficulties have led the City to make some cuts in its public health programs, Mayor Gavin Newsom recently stated that San Francisco has "spent more money on primary care than any other city in America." *Id.* Thus, as the Motions Panel previously acknowledged, if employer contributions are ended "[t]he City will

incur some otherwise avoidable financial costs … for some individuals who would otherwise be covered under the Ordinance will seek emergency treatment from San Francisco General Hospital or City health clinics." *Stay Order*, 512 F.3d at 1125. Because uninsured residents have access to existing health service options, any injury to them resulting from a stay of the Ninth Circuit's mandate is speculative at most and outweighed by heavy national interests.

IV. CONCLUSION

The Ninth Circuit's *Opinion* ended more than three decades of national uniformity under ERISA, exposing employers and their benefit plans to inconsistent local and state regulation. This inconsistency threatens national interests long recognized under ERISA and more recently relied on as part of Congress' 2009 stimulus package. For these reasons, as argued above, Golden Gate Restaurant Association respectfully requests that the Circuit Justice stay (or, if necessary, recall) the Ninth Circuit's mandate, vacate its *Stay Order*, and restore the national status quo pending Petition for Writ of Certiorari.

Respectfully Submitted,

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Richard C. Rybicki
Counsel of Record
EMPLOYMENT LAW ADVOCATES
A Professional Corporation
975-B First Street
Napa, CA 94559

Counsel for Applicant
Golden Gate Restaurant Association