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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

As the Petition demonstrates, the Ninth Circuit's decision, unless reversed, will undermine ERISA's central purpose of having federal law, not state or local law, regulate the design, funding and administration of employee benefit plans. The decision will effectively nullify Congress's goal of fostering the growth and development of a purely voluntary system of cost-effective plans with nationally-uniform benefits, benefit levels and administrative practices governed by a single body of federal law.

In the sharpest of conflicts with ERISA, the "pay-or-play" and "fair-share" laws require the "'tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction,'" *see, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001), while upending ERISA's purpose of "minimiz[ing] the need for interstate employers to administer their plans differently in each State." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983).

ERISA's preemptive scope ensures that plan sponsors may enjoy economies of scale in setting up and administering a nationally-uniform system of employee benefit plans. Nationally-uniform plans may provide better benefits and higher payment levels than smaller, localized plans set up and administered on a person-by-person or location-by-location basis. If state or local laws shatter these economies of scale, the additional high costs of healthcare and administration services ultimately will fall on the workers' shoulders in the form of less benefits, *see, e.g., Egelhoff*, 532 U.S. at 149-150, lower wages, or fewer jobs, all contrary to ERISA's goals.

Respondent's opposition ignores these overarching ERISA considerations in favor of a parochial "San Francisco first" approach. In so doing, Respondent attempts to raise emotional appeals and distracting non-issues, while steadfastly denying the dramatic conflict between the Fourth and Ninth Circuits. Respondent also tries, unsuccessfully, to defend the Ninth Circuit's decision which, through incorrect readings of the statute and case law, subverts rather than upholds this Court's carefully-crafted ERISA preemption standards and the important ERISA goals they protect.

Properly viewed, Respondent's arguments spotlight the compelling reasons this Court should grant, not deny, the Petition.

I. THIS CASE PRESENTS A QUESTION THAT IS BOTH RECURRING AND OF EXCEPTIONAL NATIONAL SIGNIFICANCE

Respondent argues that Petitioner greatly exaggerates the impact of the Ninth Circuit's decision. (Brief in Opposition ("Opposition"), 31-35). Respondent misses the mark.

Larger forces are at play than just San Francisco's Health Care Security Ordinance. There is a clear conflict between the Fourth and Ninth Circuits on whether ERISA preempts "pay-or-play" or "fair-share" laws, and employers as well as states, cities and counties need to know what they can and cannot do. Under currently harsh economic conditions, more and more jurisdictions will likely experiment with healthcare reform models and employer mandates similar to San Francisco's local clinic-based program until there is definitive Supreme Court guidance.

Eight of the Ninth Circuit Judges dissenting from the denial of *en banc* rehearing recognized this crucial point. Concluding that "this case concerns an issue of exceptional national importance," they observed that the "panel decision creates a 'road map for state and local governments' seeking to regulate employee health plans despite ERISA's preemptive scope." (App. at 58a, 49a (citation omitted)). Similarly, the Secretary of Labor accurately stated in her *amicus* brief supporting rehearing: "this case raises a recurring issue of exceptional importance concerning the extent to which ERISA permits recent attempts by state or local governments to require employers

to pay for or provide medical benefits for their employees" (*id.* at 72a).

Two preeminent ERISA scholars have singled out the Fourth and Ninth Circuit decisions as worthy of close study and contrast. Edward A. Zelinsky, "Employer Mandates and ERISA Preemption: A Critique of *Golden Gate Restaurant Association v. San Francisco*," Cardozo Legal Studies Working Paper No. 246, 31 (2008), *available at* http://ssrn.com/abstract=1299128 ("Zelinsky Working Paper 246") ("At some point, it will be necessary for the Supreme Court to resolve the conflict represented by *Fielder* and *Golden Gate II*"); John H. Langbein, *et. al*, *Pension & Employee Benefit Law* (4th ed. 2006) (2009 Supplement, containing both the *Fielder* and *Golden Gate II* texts, the only opinions reprinted other than Supreme Court opinions). *See also* Joshua Waldbeser, Case Note: *"Golden Gate Restaurant Association v. . . . San Francisco*: Setting the Stage for Supreme Court Review of the Most Important Preemption Matter in the History of ERISA," 41 J. Marshall L. Rev. 995 (2008).

As of 2006, "pay-or-play" laws and "fair-share" laws had been proposed or were under consideration by at least 30 states as well as local jurisdictions across the country.[1] Seven "pay-or play" or "fair-share" laws have already been enacted (Hawaii; San Francisco; Massachusetts; Vermont; Maryland (struck down); Suffolk County (struck down); New York City (not enforced due to concerns over ERISA preemption).[2] In view of the sharply conflicting decisions from the

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[1] Julia Contreras and Orly Lobel, "Wal-Martization and the Fair Share Health Care Acts," 19 St. Thomas L. Rev. 105, 136 (2006).

[2] *Id.*; Petition at 6.

Fourth and Ninth Circuits, many proposals are on "hold."

All eyes are now on this Petition for Writ of Certiorari to see whether this Court will intervene. If not, it is reasonable to expect a far more rapid growth in "pay-or-play" and "fair-share" laws from coast-to-coast.

II. THIS IS AN APPROPRIATE CASE FOR SUPREME COURT REVIEW

Because of the emotional tone in Respondent's Brief in Opposition, a few words of background are necessary to clear the air about the appropriateness of this case for Supreme Court review.

Notwithstanding Respondent's quibbles (Opposition, 35-37), this case contains a detailed and fully-developed record sufficient for this Court to decide the question presented. The District Court ruled on the Ordinance in an exhaustive manner (App. at 83a-103a), as did the Ninth Circuit, twice (App. at 1a-40a, 41a-61a).

Respondent states that there has been a "health care crisis" in San Francisco; the Ordinance has caused the "number of uninsured" to decline by tens of thousands; and reversal of the Ninth Circuit's decision will have a devastating impact because the employer-contribution mandate is an "interlocking component[]" with the "public" program. (Opposition, 1, 37). These assertions are overstated, unsupported and, above all, irrelevant to the Petition.

Respondent concedes that prior to the Ordinance, roughly 90% of medium and large businesses in San Francisco provided employee health insurance. (Opposition, 3). This suggests that the real problem

has not been a healthcare crisis at the employer level. Rather, it suggests that the difficulty is San Francisco wants to provide more generous healthcare benefits to all of its residents than its tax base will sustain.

The Health Access Plan ("HAP") established by the Ordinance is not insurance. Nor is it portable. The HAP consists of local clinics for city residents. The "Healthy San Francisco" website summarizes its limitations correctly:

> Healthy San Francisco is not insurance. . . . The program does not include vision or dental care. If you receive medical care outside of San Francisco for any reason, Healthy San Francisco will not pay for it.[3]

Respondent's claim that San Francisco's public health program will be devastated if the Ninth Circuit's decision is reversed is not true. The City's published statistics show that the overwhelming majority of HAP funding comes not from employer contributions, but from local taxes, grants and other San Francisco revenues.[4] Moreover, employer contributions to HAP equal less than four-tenths of one percent of the City's annual budget.[5] "Healthy San Francisco" is not at risk.

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[3] www.healthysanfrancsisco.org, last visited on Aug. 25, 2009.

[4] *See* July 2009 Status Report on the Implementation of the San Francisco Health Care Security Ordinance; at 13, 16 ($113.2 million funding; with $22.643 million from employers), *available at* www.healthysanfrancisco.org/about-us.Reports.aspx.

[5] Mayor's Proposed City Budget 2009-2010, 21 ($6.6 billion budget), www5.2/gov.org/.../2009/...mayor-newsom-releases-2009.

Respondent also attempts, unsuccessfully, to argue that the ERISA preemption issue will become moot if national healthcare reform legislation is enacted. (Opposition, 39). None of the federal proposals deals with preemption of state and local employer mandates either through an amendment to ERISA or otherwise.[6] The Fourth Circuit and Ninth Circuit decisions will remain in sharp conflict.

Further, if there is a legislative stalemate, the ERISA preemption issue will become even more acute because additional state and local governments may feel compelled to enact "pay-or-play" or "fair-share" laws based on a "tested" model such as San Francisco's Ordinance. Respondent never explains how the nation's employee benefit plan system and the employer community will survive if 50 states and over 38,000 counties, cities and towns experiment with various types of "pay-or-play" or "fair-share" laws.

If, as San Francisco urges,[7] states, cities and counties follow its model of local clinics with employer mandates, the results will also be draconian. First, there will be an enormous disruption of a nationally-uniform and cost-effective system of employee benefit plans that is ERISA's paradigm. Second, when a person with protection similar to the HAP travels to another city, county or state, the clinic's protection is left behind. Each local jurisdiction will be providing only basic clinic care for its own residents. All of this

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[6] A proposed amendment to H.R. 3200 provides an ERISA preemption waiver for certain state single-payer systems.

[7] Jason Dearen, "Federal Court Upholds San Francisco Healthcare Program," *Los Angeles Times*, Sept. 30, 2008 (quoting City Attorney Dennis Herrera).

will lead to a balkanization and shrinkage of employee healthcare, the opposite of ERISA's goal.

San Francisco's conundrum illustrates that healthcare reform is a national problem—one perhaps best resolved by affordable health insurance coupled with tax-incentives and subsidies—that requires national healthcare and health insurance reforms, all in harmony with ERISA's goal of allowing cost-effective, nationally-uniform employee benefit plans.

III. THIS COURT SHOULD PROMPTLY RESOLVE THE CONFLICT BETWEEN THE FOURTH AND NINTH CIRCUIT DECISIONS

Respondent denies any conflict between the Ninth Circuit's decision and *Retail Indus. Leaders Assoc. v. Fielder*, 473 F.3d 180 (4th Cir. 2007). Respondent overlooks most of the *Fielder* court's analysis and ignores the many similarities between the laws considered in each case.

The Fourth Circuit explained that under the Maryland statute, "the only rational choice employers have . . . is to structure their ERISA healthcare plans so as to meet the minimum spending threshold." *Fielder*, 473 F.3d at 196. San Francisco employers spending less than the mandated amounts on an existing plan will feel compelled to raise their expenditures, just as in *Fielder*. Those paying nothing will also feel compelled to establish a healthcare plan matching the Ordinance's rate, just as in *Fielder*. In both cases, a rational employer is likely to conclude that because the local-government program produces either no benefit for employees (Maryland), or a local-clinic benefit that is not insurance and not portable (San Francisco), the appropriate response is to raise the

existing contribution level, or establish a new plan, to square with the law. Each rational employer, whether in Maryland or San Francisco, must design or abandon plans using the local law as the yardstick. Although there is a difference between the laws, it is only a difference in degree.

While the Fourth Circuit concluded the Maryland Act offered no reasonable alternative for employers to comply without altering an ERISA plan, it pointedly rejected the one-dimensional litmus test adopted by the Ninth Circuit. As explained by Respondent, the Ninth Circuit held that a local jurisdiction may impose any restriction or obligation on a plan sponsor as long as the law contains a "reasonable" alternative to compliance that does not require the sponsor to create or alter an existing ERISA plan. (Opposition, 8, 11, 14).

ERISA preemption does not turn on alternatives to compliance. Citing *Egelhoff*, 532 U.S. at 151, the Fourth Circuit correctly held that a "state law that directly regulates the structuring or administration of an ERISA plan is not saved by inclusion of a means of opting out of its requirements. *Fielder*, 473 F.3d at 192. Although Respondent now contends that this issue was "not presented to, or considered by, the Ninth Circuit" (Opposition, 16), eight dissenting Judges from the denial of rehearing *en banc* properly criticized the panel decision for attempting to ignore this portion of *Fielder*'s holding, a portion that demonstrates the very conflict the panel tried to deny. (App. at 54a-55a).

IV. THIS COURT SHOULD PROMPTLY REAFFIRM THAT ERISA PREEMPTS LAWS MANDATING EMPLOYER CONTRIBUTIONS FOR EMPLOYEE BENEFITS

Respondent also contends that the San Francisco Ordinance escapes preemption because, in its view, ERISA preempts only laws relating to employee benefits, but not laws mandating employer contributions (or "expenditures" as Respondent prefers to say) necessary to fund the benefits. (Opposition, 24-31). The Ninth Circuit's distinction between "benefits" and "contributions" is sophistry. Professor Zelinsky carefully explains that this distinction "does not withstand analysis":

> There is no support in the statute or in the Supreme Court's case law for this benefits/ contributions distinction . . . .[8]
>
> The San Francisco ordinance does not merely "relate to" ERISA plans. The ordinance intrudes deeply and comprehensively into such plans, even more deeply and comprehensively than did the Maryland Wal-Mart law.[9]

This Court should promptly intervene in order to reaffirm and apply the proper ERISA preemption standard it has carefully-framed over the past 25 years. In protecting ERISA's goal of cost-efficient, uniform nationwide plans, this Court has held that ERISA preempts *all* state and local laws, such as the Ordinance, that "prohibit" what is "permitted" by federal law, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658

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[8] Zelinsky Working Paper 246, 20.

[9] *Id.* at 29.

(1995), "mandate[] employee benefit structures", *id.*, require a sponsor to create, alter or amend an ERISA plan, *Egelhoff*, 532 U.S. at 145-146, or impose "different regulations on plans and plan sponsors from jurisdiction to jurisdiction," regardless of the existence of an "opt out" provision, *id.* at 145-146.

Similarly, ERISA preempts all state and local laws—similar to the Ordinance—mandating employer contributions for group health-insurance, with a non-compliance penalty, *e.g., Standard Oil Co of Calif. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981), requiring plans to provide specific types of benefits, *Shaw*, *supra*, or requiring employers to provide benefits equal to a specific standard, *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129-130 (1992).

Further, Respondent argues that the Ordinance escapes ERISA preemption because it operates only indirectly on employers and employee benefit plans, similar to the New York fee-surcharge statute in *Travelers, supra*. (Opposition, 12). Professor Zelinsky pinpointed this error with accuracy:

> San Francisco's employer mandate is explicitly and narrowly targeted only at employers and their health care plans, whether these plans self-insure, purchase coverage from insurers or other providers, make ongoing payments to the City, or do some combination of these.
>
> . . .
>
> This employer mandate is no less direct and targeted because it decrees the contributions which

employers' plans must receive rather than the benefits such plans must pay.[10]

The Ordinance also violates the "connection with" and "reference to" prongs of ERISA's preemption standard because the City-payment-option itself requires the creation of an ERISA plan. The employer's ongoing-contributions to HAP and compliance with a maze of recordkeeping and reporting and disclosure rules establish an ERISA health "plan, fund, or program" for its employees financed "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). For ERISA's purposes, an employer's HAP-contributions are indistinguishable from premium payments to an insurance company or a PPO for health-coverage that result in an ERISA plan.[11]

In arguing the City-payment-option does not involve an ERISA plan, Respondent simply repeats a fundamental error by the Ninth Circuit. (Opposition, 20-21).[12] For an ERISA plan to exist, there is no requirement that the employer hold trust fund assets

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[10] Zelinsky Working Paper 246, 27.

[11] *Id.* at 8.

[12] Respondent also asserts that the Ordinance escapes preemption because it "is utterly indifferent to whether an employer has an ERISA plan." (Opposition, 15). The ERISA preemption standard is not "indifference" but this Court's fine-tuned standard, described above. Further, a primary purpose of the Ordinance's contribution-mandate is to encourage employers to retain existing ERISA plans, thus avoiding a flight to less expensive public options ("crowding out") (*see Amicus* Briefs of Zazie and Medjool Restaurants for Respondent, 26). Petitioner presented unrebutted evidence to the District Court showing that Respondent's Board of Supervisors believed and intended that the Ordinance would help to avoid this effect. (Declaration of Patrick Sutton, Document 57, filed 8/3/07).

for ERISA to protect from mismanagement. The Ninth Circuit seized on ERISA's general prohibitions against employer mismanagement of plan assets to read into ERISA's broad definition of "employee welfare benefit plan" a limitation that Congress itself chose not to insert. Most ERISA-covered employee welfare benefit plans, including insured and PPO-modeled healthcare plans, do not involve the handling of plan assets.[13] The Ninth Circuit's theory is a "classic legal argument which proves too much" since very few, if any, insured health-plans, third-party administered plans, or HMO-plans would be ERISA-covered under this restrictive standard."[14]

Lastly, Respondent protests that Petitioner's City-payment-option argument lacks authority. (Opposition, 19-23). The Secretary of Labor's *amicus* brief,[15] however, and Paul J. Ondrasik, *et al.*, "ERISA Preemption and State Health Care Reform," Infrastructure, Vol. 47, No. 4, 4 (2008) American Bar Association, concluded that an employer's use of the City-payment-option creates an ERISA plan within the statutory definition, thus triggering preemption. After a detailed analysis, Professor Zelinsky concluded that a Supreme Court holding that ERISA preempts the Ordinance, based on an application of the statutory definition to the City-payment-option, is "the most compelling of the possible dispositions."[16]

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[13] *See, e.g., Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994); *Brundage-Peterson v. Compcare Health Services Ins. Co.*, 877 F.2d 509, 511 (7th Cir. 1989).

[14] Zelinsky Working Paper 246, 13, 16, 19.

[15] App. at 85-86a.

[16] "*Golden Gate III*, ERISA Preemption, and the San Francisco Health Care Security Ordinance," Cardozo Working Paper No. 261 (Apr. 2009), 16, *available at* http://ssrn.com/abstract=1396356.

CONCLUSION

For the foregoing reasons, as well as on the grounds advanced in the Petition and by the *amici curiae*, a Writ of Certiorari should issue to review the opinion of the Ninth Circuit in this case.

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