No. 08- ___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

San Francisco's Health Care Security Ordinance—a "pay-or-play" law—mandates either ongoing employer contributions at set minimum rates for employee health-benefits or equal payments to the City's Health Access Program, along with extensive recordkeeping and reporting and disclosure requirements. In a decision directly conflicting with Supreme Court ERISA preemption decisions, the Ninth Circuit rejected petitioner's ERISA-preemption challenge despite repeated *amicus* support by the Secretary of Labor. Identifying "an issue of exceptional national importance," an eight Judge dissenting opinion from denial of rehearing *en banc*, including Chief Judge Alex Kozinski, observed that the decision "creates a circuit split with the Fourth Circuit . . . , renders meaningless the [ERISA preemption] tests the Supreme Court set out in *Shaw v. Delta Airlines* . . . , and disregards the "need for nationally uniform plan administration." It also warned that the decision "will undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures, thereby creating the very kind of health care balkanization ERISA was intended to avoid."

The Question Presented is:

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.

RULE 14.1(b) LISTING AND RULE 29.6 NOTATION

Petitioner is the Golden Gate Restaurant Association. Respondent is the City and County of San Francisco. Intervenors/Respondents are the San Francisco Central Labor Council, Service Employees International Union, Local 1021, SEIU United HealthCare Workers-West and UNITE HERE! Local 2.

Petitioner is a private non-profit corporation. It has no parent company and there is no publicly owned company that owns any stock of the petitioner.

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Petitioner, Golden Gate Restaurant Association ("Golden Gate"), respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, an opinion which conflicts with *Retail Industry Leaders Ass'n v. Fielder*, 473 F.3d 180 (4th Cir. 2007).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 546 F.3d 639 (9th Cir. 2008), and is reprinted in the Appendix ("App.") at 1a to 40a. The concurring and

dissenting opinions to the denial of rehearing *en banc* (App. 41a to 61a) are reported at 558 F.3d 1000 (9th Cir. 2009). The Secretary of Labor's *amicus* brief in support of rehearing appears at App. 62a to 82a. The District Court's opinion granting summary judgment to Golden Gate (App. at 83a to 103a) is reported at 535 F.Supp.2d 968 (N.D. Cal. 2007). The relevant provisions of San Francisco's Health Care Security Ordinance and regulations appear at App. 106a to 158(a).

JURISDICTION

The Court of Appeals' order denying rehearing *en banc* was entered on March 9, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal statute involved in this case are reproduced at App. 104a to 106a.

STATEMENT OF THE CASE

This case raises a critically important, recurring question relating to the preemptive scope of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. The controversy, which has already divided the circuits, centers on recent attempts by state and local governments to mandate employer contributions for employee health-benefits through the device of "pay-or-play" laws, sometimes known as "fair-share" laws.

Employee benefit plans are "affected with a national public interest"[1] as reflected in the current healthcare-reform efforts at the national level.

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[1] ERISA section 514(a), 29 U.S.C. § 1144(a).

ERISA governs employee benefit plans and establishes a scheme which encourages, but does not mandate, that employers provide benefits for their employees.[2] Although ERISA sets "various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility" for plans, "private parties, not the Government, control the level of benefits."[3] Congress designed this flexibility to encourage employers to adopt uniform employee benefit plans with streamlined administration and initially generous benefits, knowing they may amend or terminate the plans at any time.[4]

ERISA's preemption provision is at the very heart of the statute. This provision protects ERISA's central goals including the autonomy of plan sponsors to decide whether to provide plans at all and, if so, to establish plans with cost-effective, nationally-uniform benefits, benefit levels and administration.[5] Ensuring these objectives, ERISA preempts state and local laws that "prohibit" what is "permitted" by federal law,[6] "mandate[] employee benefit structures,"[7] impose "different regulations on plans and *plan sponsors* from jurisdiction to jurisdiction,"[8] or permit par-

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[2] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

[3] *Curtiss-Wright Corp. v. Schoonenjongen*, 514 U.S. 73, 78 (1995).

[4] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

[5] *Shaw*, 463 U.S. at 105 n. 25; *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995).

[6] *Travelers*, 514 U.S. at 658.

[7] *Id.*

[8] *Egelhoff v. Egelhoff,* 532 U.S. 141, 146-147 (2001)(emphasis added).

ticipants to obtain "benefits in excess of what plan administrators intended to provide, and in excess of what the plan provides to employees in other states."[9]

A. Development of "Pay-Or-Play" Laws and the Challenge to These Laws

Although "pay-or-play" laws are recent developments, their DNA traces back to the employer mandated-contributions and noncompliance-penalty provisions of the Hawaii Prepaid Health Care Act held ERISA-preempted over a quarter century ago. *Standard Oil Co. of Calif. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981).[10]

Congress wanted to leave employee welfare benefit plans completely voluntary.[11] As a result, plan sponsors have the right under ERISA "for any reason at any time, to adopt, modify, or terminate welfare plans."[12] Congress knew that if it placed a heavy regulatory-hand on welfare plans, as it did with pension plans in terms of regulating minimum participation, funding, vesting and plan termination, employers would be likely to abandon health-plans entirely, the exact opposite of Congress's goal.

One of Congress's purposes in enacting ERISA's broad preemption provision was to foreclose the employer contribution mandates in the health-reform

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[9] *Id.*

[10] Shortly thereafter, Congress amended ERISA to provide a narrow exemption for the Hawaii Act, making clear that the amendment did not establish a precedent for amendments for any other state laws Pub.L.No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983).

[11] *Curtiss-Wright.*, 514 U.S. at 78.

[12] *Id.*

statutes that were precursors to the "pay-or-play" laws. These statutes included the Hawaii Act and a similar measure that was being considered in California.[13] The sheer number of the nation's political subdivisions—50 states and over 30,000 cities, counties and towns—ruled out the feasibility of local experiments with mandates applicable to sponsors of multistate plans. The spread of local mandates would collapse the nation's employee benefit plan system.

Congress also recognized that a state-by-state approach to employee benefits—rather than the carefully-balanced national approach adopted by ERISA—would unravel the great legislative compromise leading to ERISA's enactment.[14] Business and labor groups agreed to the continued voluntary nature of the employee benefit plan system, one to be governed by robust federal regulatory standards nationwide. This was only in exchange, however, for a broader-than-originally-proposed, "deliberately expansive"[15] preemption provision. ERISA sweeps aside not just state laws regulating areas specifically-covered by ERISA, but all state regulation in the employee benefit field outside of laws regulating insurance, banking or securities.[16]

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[13] *See* Michael S. Gordon, "Health Care Reform: Managed Competition and Beyond," Employee Benefits Research Institute, Issue Brief No. 135, 28-30 (March 1993).

[14] *See* Michael S. Gordon, "Introduction: The Social Policy Origins of ERISA," *Employee Benefits Law* (S.J. Sacher and J.I. Singer, eds., ABA, 2d ed., 2000), at c-cii.

[15] *Pilot Life Ins. Co. v. Dedeaux*, 491 U.S. 41, 46 (1987).

[16] ERISA sections 514(a), (b)(2)(A), 29 U.S.C. §§ 1104(a), (b)(2)(A).

The Ninth Circuit's decision demonstrates that Congress's concerns in 1974 are valid today. In addition to the "pay-or-play" law in San Francisco's Health Care Security Ordinance, Massachusetts has a "fair-share" law requiring certain employers to provide group health-insurance and pay premiums in set-amounts or face a penalty.[17] At the time this litigation was filed, at least 15 other states, including New York, New Jersey, Connecticut and Illinois, had comprehensive healthcare-reform bills or proposals under review.[18]

One of the many problematic aspects of the "pay-or-play" laws and proposals is that they impose not only differing employer minimum-contribution mandates based on different formulas, but also differing alternative government assessments and differing requirements for recordkeeping and reporting and disclosure. The laws also cause the siphoning of benefits from jurisdictions which do not have such laws to those which do. The laws apply both to local employers and employers located anywhere with a minimum threshold of local employees.

While well-intentioned, a "pay-or-play" approach focuses exclusively on local concerns and interests at the unacceptable cost of upending two of ERISA's most important principles. The first principle is that

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[17] MASS. REGS. CODE tit. 114, chap. 5, §§ 16.03(3)(c-d) (2009).

[18] *See* Peter Marathas, Jr., Robert W. Rachal and Yolanda Montgomery, "United States: Pay-or-Play State Health Insurance Laws and ERISA Preemption," *HR Advisor*, Vol. 14, No. 3, May/June 2008, 1-2. New Jersey's proposed "health-care-expenditures" bill is in A. 1966, 213th Leg., 2008-2009 Sess. Connecticut's proposed bill for employer contributions to a state-operated-healthcare-fund is in H.B. 6600, 2009 Gen. Assem. Reg. Sess., § 15(e).

employee benefit plans, including health-plans, are to be completely voluntary,[19] not subject to any mandates including employer contributions.[20] The second principle is that if a sponsor sets up a plan, the "'tailoring of plans and *employer conduct* to the peculiarities of the law of each jurisdiction' is exactly the burden that ERISA seeks to eliminate." *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)(emphasis added). Moreover, there are many types of state-and-local fees and assessments that can fund healthcare-reform without doing what ERISA proscribes—"mandat[ing] employee benefit structures or their administration"[21] and "interfer[ing] with nationally uniform plan administration."[22]

Concerned about the extraordinary costs of compliance with diverse and conflicting "pay-or-play" laws and the resulting employee layoffs, business-relocations and closures, employer associations have challenged a number of these laws as ERISA-preempted.

In *Retail Indus. Leaders Ass'n v. Fielder*, 473 F.3d 180 (4th Cir. 2007), the Fourth Circuit sustained an employer association's ERISA preemption challenge to Maryland's "fair-share" law. The Secretary of Labor's *amicus* briefing supported this challenge, arguing that the law negated the "fundamental goal of ERISA preemption – the establishment of a uniform regulatory regime over employee benefit plans."[23]

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[19] *Curtiss-Wright, supra.*

[20] *Agsalud, supra.*

[21] *Travelers*, 514 U.S. at 658.

[22] *Egelhoff*, 532 U.S. at 148.

[23] Brief as *Amicus Curiae* at 10, available at http://www.dol.gov.sol/media/briefs/RILA(A)-11-07-2006.htm

The statute required large employers either to pay at least a specified percentage of total payroll for employees' health-insurance costs or to pay the shortfall as a penalty to the state for general-entitlement purposes. It also required employers to report annually the number of employees and the percentage-of-payroll spent on health-insurance.

Relying on *Fielder*, *supra*, a District Court in the Eastern District of New York held that ERISA preempts a Suffolk County "fair-share" law which required certain employers to provide at least $3.00 per hour in health-benefits to their employees, or to pay a civil penalty for the shortfall. *Retail Indus. Leaders Ass'n v. Suffolk County*, 497 F.Supp.2d 403 (E.D.N.Y. 2007).

The Ninth Circuit's decision in this case stands in direct conflict with *Fielder*, *supra*. The decision undoubtedly will lead to the development of more "pay-or-play" laws, as pointed out by the San Francisco City Attorney's description of the decision as "a road map for state and local governments" seeking to enact "fair share" laws.[24]

B. San Francisco's Health Care Security Ordinance

San Francisco's "pay-or-play" law is part of its Health Care Security Ordinance, S.F. Cal. Admin. Code, Ch. 14, which became effective in 2008.

The San Francisco Ordinance created the Health Access Program, known as "HAP." The HAP pools risks among program-participants and, through its

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

third-party administrator, maintains a network of approved San Francisco hospitals and clinics in much the same way as a private-HMO or PPO.

Local taxes, grants and other San Francisco revenues fund the overwhelming majority of the HAP's budget.[25] The HAP is open to uninsured City residents regardless of employment status. A resident may receive discounted medical services through the HAP by becoming a "participant" and paying quarterly income-based premiums, known as "participation fees."

If the Ordinance had stopped here, ERISA's preemption rules would not come into play. San Francisco went further, however, also requiring employers to provide ongoing funding for their employees' healthcare and follow an ongoing administrative scheme with extensive recordkeeping, reporting-and-disclosure and inspection dictates.

The Ordinance's expenditure rules cover "health care services" which are defined as including "medical care, services, or goods." That definition is virtually identical to ERISA section 3(1)'s definition of the benefits provided by an employee welfare benefit plan as including "medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). The Ordinance's expenditure rules apply to employers with twenty-or-more employees,[26] wherever located, so long as at

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[25] *See January* 2009 Status Report on the Implementation of the San Francisco Health Care Security Ordinance, 13.

[26] Employees are covered if they are employed for at least 90 days and perform at least 8 hours of work per week in San Francisco.

least one employee performs occasional work within the City.[27]

Employers have only two viable options to satisfy the mandate, both of which are ERISA-covered. The first is to establish their own health-plans, whether through group insurance or otherwise. Alternatively, under a "City-payment-option," employers may enroll their employees with the City and make quarterly-payments to the HAP. If eligible employees sign up for HAP, the employer contributions are allocated to them and reduce their participation fees by 75%.[28]

The Ordinance and City regulations impose a maze of ongoing administrative obligations, which are characteristic of "pay-or-play" laws. Among other administrative burdens, employers must differentiate hours worked by employees inside and outside of the jurisdiction; differentiate hours paid to "managerial," "supervisory" or "confidential" employees after making a discretionary determination on exemptions; track and report employment data for all companies in the same "controlled-group," wherever located; differentiate and report health-expenditure amounts, including making annual-reports to the jurisdiction and quarterly-reports to individuals; and maintain sufficient documentation to prove that any reduction-

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[27] The 2009 rate is $1.23-per-hour for employers with 20-99 employees, and $1.86-per-hour for employers with 100-or-more employees.

[28] Eligible employees are City-residents who meet certain family-income-levels, have been uninsured for at least 90-days, are not eligible for public assistance and are between ages 18-and-64. For ineligible employees, the employer contributions fund health-savings-accounts which are ERISA-covered. Employee Benefits Security Administration, U.S. Department of Labor, Field Assistance Bulletin 2004-1 (Apr. 7, 2004).

in-force was not implemented to avoid the law's obligations. Non-compliance results in substantial daily administrative and civil penalties and attorney's fees and costs of enforcement.

If the Ninth Circuit's decision is allowed to stand, an employer with just 10 locations in different parts of the country could also easily face 10 different sets of such complex laws. An employer with 100 locations could face far more.

C. The District Court Proceeding

On November 8, 2006, Golden Gate filed a lawsuit in the District Court for the Northern District of California contending that ERISA bars the Ordinance's health-contributions mandate both through express and conflicts preemption. Golden Gate made four basic arguments.

First, as in *Fielder*, *supra*, ERISA preempts the contributions-mandate because it is, however artfully styled, an ERISA-preempted benefits-mandate. It requires employers to fund employee benefits for healthcare, and only healthcare, at set-minimum levels. It has an impermissible "connection with" ERISA plans because it interferes, in the same way as a benefits-mandate, with an employer's fundamental authority to decide whether to establish plans and to achieve cost-savings by setting nationally-uniform benefits, benefit levels and administrative practices.

Second, the Ordinance has an impermissible "connection with" ERISA plans *regardless* of the option chosen, because all of the options involve ERISA plans. Under the "City-payment-option," the employer establishes an ERISA plan for its employees in the same manner as it establishes an ERISA plan by paying group health-insurance premiums.

Third, even if the "City-payment-option" did not involve an ERISA plan, ERISA preempts the Ordinance because, as in *Fielder*, the law requires a "reference" to the employer's existing ERISA plan to see whether the required contribution levels are met.

Fourth, as in *Fielder*, ERISA preempts the Ordinance under conflicts preemption because it frustrates ERISA's objectives of an economical, voluntary plan system allowing nationally-uniform benefits, benefit levels and administrative practices.

On December 21, 2007, the District Court granted summary judgment to Golden Gate. The court held that the Ordinance has a prohibited "connection with" ERISA plans because its local requirements interfere with nationally-uniform plan administration; by mandating minimum-health expenditures, it regulates the types of benefits provided by ERISA plans; it imposes recordkeeping, inspection and other administrative burdens related to plan administration; and it makes unlawful reference to ERISA plans by requiring employers to modify plan administration or to structure additional payments by reference to amounts paid under existing plans. *Golden Gate Restaurant Association v. City and County of San Francisco*, 535 F.Supp.2d 968 (N.D.Cal. 2007). App. at 83a to 103a.

D. Ninth Circuit Stay, Opinion, and Order on Petition for Rehearing

On December 27, 2007, the City and several intervenors filed an emergency motion for stay of judgment with the Ninth Circuit's December 2007 motions panel. The motions panel, consisting of Judges Goodwin, W. Fletcher and Reinhart, granted the

stay.[29] Golden Gate petitioned to vacate the stay but, after ordering further briefing, Justice Kennedy declined to vacate the stay order.

The motions panel retained the case on the merits. The Secretary of Labor along with eight national entities filed *amicus* briefs supporting ERISA preemption.

On September 30, 2008, the Ninth Circuit reversed the District Court. The court held that a presumption against preemption applies because the Ordinance operates in an area of traditional state regulation; the Ordinance does not require employers to establish or to modify ERISA plans; the "City-payment-option" does not create an ERISA plan, because its administrative obligations do not involve an "ongoing administrative scheme" regulated by ERISA; and preemption is triggered by mandated-benefit laws, not by laws mandating contributions to pay for benefits. The court also declared that its holding does not conflict with *Fielder*, *supra*. *Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639 (9th Cir. 2008) ("*Golden Gate II*"). App. at 15a to 40a.

Golden Gate petitioned for rehearing *en banc*, again joined by *amici* including the Secretary of Labor who stated that the case involves a "recurring issue of exceptional importance." App. at 72a. Among other points, the Secretary argued that all options under the Ordinance involve ERISA plans and that *Golden Gate II* failed to apply properly the Supreme Court's ERISA preemption tests and reached a result inconsistent with *Fielder*, *supra*. App. at 72a to 81a.

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[29] *Golden Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112, 1119 (9th Cir. 2008).

On March 9, 2009, the Ninth Circuit denied rehearing. *Golden Gate Restaurant Association v. City and County of San Francisco*, 558 F.3d 1000 (9th Cir. 2009), App. at 41a to 61a. The order included a strong 11-page dissent joined by eight Judges, including Chief Judge Alex Kozinski.

The dissent described the case as involving "an issue of exceptional national importance." App. at 58a. "A currently non-complying employer in San Francisco," the dissent explained, "has the same choice as a non-complying employer in Maryland: Make a payment to the government or change its current ERISA plan." App. at 54a. The dissent added: "[p]er *Egelhoff*, a law like the San Francisco ordinance is ERISA-preempted because it frames employers' choices in this fashion." "Further," it wrote, "allowing San Francisco to pose such a choice would strike at the heart of ERISA because plan administrators would have to account for potential opt-out provisions in all 50 states." App. at 56a.

The dissent faulted the panel decision for creating a circuit split, rendering meaningless this Court's ERISA preemption tests in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and conflicting with other Supreme Court decisions. App. at 49a. It warned that the decision "will undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures, thereby creating the very kind of health care balkanization ERISA was intended to avoid." App. at 60a.

On March 30, 2009, Golden Gate's Application to Justice Kennedy to stay the mandate of the Ninth

Circuit pending petition for writ of certiorari was denied, after a request for further briefing.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT AND RECURRING ERISA PREEMPTION ISSUE IN DIRECT CONFLICT WITH THE FOURTH CIRCUIT.

Once again the Ninth Circuit has brought itself sharply into conflict with another circuit on an important, recurrent federal issue which requires uniformity nationwide. The decision creates a direct conflict among ERISA preemption holdings in the circuits which only this Court can resolve.

A. The Circuits are Clearly Divided on Whether ERISA Preempts "Pay-Or-Play" Laws

In *Fielder*, *supra*, the Fourth Circuit struck down Maryland's "fair-share" law, while the Ninth Circuit's *Golden Gate II* decision upheld San Francisco's "pay-or-play" law.

The circuit split is at ERISA's epicenter, the dividing line between federal and state-and-local powers. The "pay-or-play" and "fair-share" laws prohibit what ERISA permits.

ERISA preempts state and local laws if they conflict with "an area of core ERISA concerns" or its "principal goals."[30] ERISA's paramount concerns and goals include giving plan sponsors the autonomy to decide whether to offer employee benefits[31] and to

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[30] *Egelhoff*, 532 U.S. at 146-147.

[31] *Curtiss-Wright, supra.*

design and administer plans in a cost-effective, uniform national regulatory environment.[32] ERISA's purpose also includes ensuring that employers will not be put to "the choice of operating separate ongoing benefit plans or a single plan subject to different regulatory requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 16-17 (1987). Further, ERISA's purpose includes ensuring that plan sponsors and plans will not be required to "calculate benefit levels" differently from jurisdiction to jurisdiction.[33]

Maryland's "fair-share" law required employers of a certain size to spend at least 8% of their total payrolls on employees' health-insurance or to pay the shortfall to the state as a penalty. The Fourth Circuit framed its ERISA preemption holding on two bases.

The Fourth Circuit concluded that ERISA preempts the "fair-share" law as having an impermissible "connection with" ERISA plans, even if there were some "meaningful avenue" by which employers would incur non-ERISA health-spending. Compliance would have direct effects on the employers' ERISA plans. If employers attempted to use non-ERISA spending options, employers would need to coordinate those spending efforts with existing ERISA plans. The categories of ERISA and non-ERISA health-spending would not be isolated, unrelated costs for the employer. Decisions regarding one would impact the other. *Fielder*, 473 F.3d at 196-197.

Supporting this basis, the Fourth Circuit explained that Maryland law, coupled with a proliferation of similar laws, would constantly force employers to

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[32] *Shaw*, 463 U.S. at 105 n. 25; *Travelers*, 514 U.S. at 657-658; *Egelhoff*, *supra*.

[33] *Travelers*, 514 U.S. at 657-658.

monitor state-law developments and "manipulate heath care spending to comply with them," thereby conflicting with *Egelhoff*, *supra*. *Fielder*, 473 F.3d at 197. *Egelhoff held* that ERISA preempted a state law that operates to revoke the designation of a divorced spouse as a life insurance beneficiary, even though the plan could opt out by a simple plan amendment saying that the state law did not apply. The state law had an impermissible "connection with" plan administration by requiring plan administrators "to maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary." 532 U.S. at 151. Citing *Egelhoff*, the Fourth Circuit held that a "state law that directly regulates the structuring or administration of an ERISA plan is not saved by inclusion of a means for opting out of its requirements." *Fielder*, 473 F.3d at 192.

The Fourth Circuit also concluded that ERISA preempts the law because it has an impermissible "connection with" ERISA plans by offering employers no reasonable choice but to increase contributions to their ERISA healthcare plans. The state would earmark employer shortfall payments for general-entitlement programs, thus conferring no benefit on the employees. Reasonable employers would not spend their money in that fashion. *Fielder*, 473 F.3d at 196.

In contrast, the Ninth Circuit held that ERISA preemption extends only to benefits-mandates, not to contributions-mandates, and the latter do not interfere with ERISA's goals including uniform plan administration within a single jurisdiction. App. at 41-43a, 37-48a. The court, however, refused to follow an essential step in this Court's preemption analysis: a consideration of the law's impact on uniform plan

administration for multistate plans and the potential for increased burdens if other jurisdictions enacted similar laws. *Egelhoff*, 532 U.S. at 151.

The Ninth Circuit attempted to distinguish *Fielder* on the ground that the Maryland statute offered the employer no reasonable choice but to increase its ERISA contributions. The Ordinance avoids preemption, the court concluded, because the "City-payment-option" results in a benefit for employees; hence, a rational employer might choose that option. App. at 45-46a. The court neither addressed nor attempted to distinguish the Fourth Circuit's holding that even if there were some meaningful choice for an employer, ERISA preempts the law because it requires employers to coordinate their ERISA spending with non-ERISA spending and constantly to monitor other laws.

The Ninth Circuit's decision is in clear conflict with the Fourth Circuit's decision. The Ninth Circuit's attempted distinction of the cases does not withstand scrutiny.

ERISA preemption does not rise or fall based on the relative attractiveness of options to creating or amending an ERISA plan. ERISA preempts a law if it conflicts with the Act's purposes by putting the employer to a choice of either restructuring its plan or plan administration, or opting out while keeping its eyes on other spending-mandates. *Egelhoff*, 532 U.S. at 151.

ERISA also preempts a law which forces employers to make choices—even rational ones—that would result in "different obligations in different states," since this by itself would defeat ERISA's stated goal of uniformity in plan administration. *Egelhoff*, 532 U.S. at

148. Moreover, even if an employer has what appears to be a "rational" opt-out choice of one government-administered health program, the choice is far from "rational" when the employer may have to confront "rational" choices in different states, cities and counties. As noted by the Secretary of Labor's *amicus* brief, "[e]ven if the administrative burden imposed by a single law may be tolerable, the cumulative burden could be staggering." App. at 91a.

Eight dissenting Ninth Circuit judges found that the panel decision's distinction based upon the reasonableness of the "City-payment-option" "conflicts" with *Fielder*. App. at 53a. The dissent also pointed out that the decision conflicts with ERISA preemption standards set forth in Supreme Court decisions including *Shaw*, *supra*, and *Egelhoff*, *supra*. App. at 61a, 57a. The dissent concluded that "[t]he holdings of *Fielder* and *Golden Gate* stand in clear opposition, and create a split on the issue of whether ERISA preempts 'fair-share' or 'pay-or-play' ordinances." App. at 54a-55a.

Swift intervention by this Court is essential. The Ninth Circuit's decision causes a circuit split destroying national uniformity in not only the voluntary nature of health-plans, but also in plan design, benefit levels and administration, the very factors which allow cost-effective plans. This split is certain to widen in the future as additional states, cities and counties, seeking to cut government spending in harsh economic times, enact "pay-or-play" laws based on new models including the San Francisco Ordinance. ERISA's objectives include the avoidance of "the possibility of endless litigation over the validity of

State action that might impinge on Federal regulation."[34]

Professor Edward A. Zelinsky has closely followed the circuit conflict on "pay-or-play" laws. Questioning the Ninth Circuit's unique benefits-versus-contributions distinction, he wrote: "Under [ERISA] Section 514(a), state law is preempted when it 'relate[s]' to employee benefit plans, not when it 'relate[s] to plan's outputs' ... If [the court's] approach does not trivialize the matter of ERISA preemption, it comes close." "At some point, it will be necessary for the Supreme Court to resolve the conflict represented by Fielder and Golden Gate II."[35]

B. The Issue Presented by the Conflict is Recurring and of Great National Importance

The conflict among the circuits on ERISA preemption of "pay-or-play" laws is both recurrent and of great national importance.

As of 2006, "pay-or-play" laws had already been proposed or were under consideration by at least thirty states as well as local jurisdictions across-the-country. Julia Contreras and Orly Lobel, "Wal-Martization and the Fair Share Health Care Acts," 19 St. Thomas L. Rev. 105, 136 (2006). Many of these proposals faced immediate opposition based on their being obviously-preempted by ERISA. The Ninth Cir-

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[34] Sen. Jacob K. Javits, 120 Cong. Rec. 29942 (1974).

[35] "Golden Gate Restaurant Association: Employer Mandates and ERISA Preemption in the Ninth Circuit," Cardozo Legal Studies Research Paper No. 19, pp. 22, 31; State Tax Notes, Vol. 47, 2008; available at SSRN: http://ssrn.com/abstract=1090122:

cuit's decision has clouded this formerly-clear issue, making future proposals far more likely to succeed.

The circuit conflict created by the Ninth Circuit cuts to the core of ERISA. At stake are two of ERISA's fundamental principles, both of national significance.

First, the circuit split over "pay-or-play" laws disrupts the national interest in encouraging the voluntary formation of employee benefit plans protected and governed by a single body of federal law.[36] Congress' goal was to "ensure that plans and *plan sponsors* would be subject to a uniform body of benefits law."[37] Employers' flexibility to adopt, modify, or terminate welfare benefit plans at any time[38] "is not an accident;" it was intended to encourage employers to set higher benefit levels at the outset (since they may be reduced if economic conditions sour) by streamlining administration and decreasing plan costs.[39] Congress carefully balanced this autonomy with employee-protection provisions that expressly prohibit interference with existing benefits, and require employers to follow a plan's written procedures prior to amendment.[40] These statutory protections ensure "that employers do not 'circumvent the provision of promised benefits.'"[41]

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[36] ERISA section 2(a), 29 U.S.C. § 1001(a).

[37] *Travelers,* 514 U.S. at 645 (emphasis added).

[38] *Curtiss-Wright Corp,* 514 U.S. at 78.

[39] *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. at 510, 515 (1997).

[40] *Id.* at 515-516; ERISA sections 510 and 402(b)(3), 29 U.S.C. §§ 1140 and 1102(b)(3).

[41] *Inter-Modal,* 520 U.S. at 515 (citation omitted).

Second, the circuit conflict disrupts the national goal of "*minimiz[ing]* the need for interstate employers to administer their plans differently in each State." *Shaw*, 463 U.S. at 105 (emphasis added). Congress designed ERISA so that interstate employers could operate plans in a uniform, cost-efficient fashion, and be able "'to predict the legality of proposed actions without the necessity of reference to varying state laws.'"[42] The "basic thrust" of ERISA preemption 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, 657-658 (1995). As this Court observed in *Egelhoff*, 532 U.S. at 149-150, "[r]equiring administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries."

The circuit conflict raised by *Golden Gate II* will cause widespread confusion and spur further litigation. It also politicizes the critical issue of uniformity in plan design, benefits and administration, allowing individual judges to impose their own social perspectives in an area where Congress has insisted upon allowing national uniformity. The decision reopens the door for the very multiplicity of federal, state and local regulation—coupled with multi-tiered, excessive administration costs—that brought about ERISA's enactment. Unless resolved, the conflict also will impede the prospect of successful national healthcare-reform.

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[42] *Pilot Life,* 481 U.S. at 56 (citation omitted).

This circuit conflict on a significant and recurring ERISA preemption issue of national consequence is alone sufficient ground for this Court's review.

II. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS HOLDING THAT ERISA PREEMPTS STATE LAWS MANDATING EMPLOYER CONTRIBUTIONS OR PLAN BENEFITS.

Still another reason supports the granting of a writ of certiorari. By creating a novel-but-unwarranted distinction between "mandated-contributions" and "mandated-benefits," the decision does violence to the Act's text and architecture, and directly conflicts with this Court's ERISA preemption decisions.

A. The Decision Renders Meaningless this Court's ERISA Preemption Standards in *Shaw v. Delta Air Lines* and Directly Conflicts With Other Supreme Court Preemption Decisions

The Ninth Circuit's decision effectively strips this Court's ERISA preemption standards in *Shaw*, *supra*, of any meaning. The decision also directly contradicts later decisions of this Court holding that ERISA preempts state laws mandating employer contributions or plan benefits.

ERISA's preemption clause—called the "crowning achievement of [the] legislation," 120 Cong. Rec. 29197 (Aug. 20, 1974), remarks of Rep. Dent—most clearly reflected Congress' effort to eliminate the threat of inconsistent or local regulation of employee benefit plans and establish in its stead a comprehensive and pervasive federal scheme. *Shaw*, 463 U.S. at 99.

ERISA's preemption clause states that the Act supersedes any and all state laws that "relate to" any employee benefit plan, with a state defined as including its political subdivisions. ERISA sections 514(a), (c)(2), 29 U.S.C. §§ 1144(a), (c)(2).

In *Shaw*, 463 U.S. at 96, this Court held that ERISA preempts a New York law that mandated pregnancy benefits because dictating such substantive terms would "relate to" an employee benefit plan within the meaning of 29 U.S.C. § 1144(a). The words "relate to" mean have "a connection with" or "reference to" ERISA plans. *Id.* at 97.

In *Travelers*, this Court explained that "[t]o determine whether a state law has the forbidden connection, we look both to 'the *objectives of the ERISA statute* as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature and effect of the state law on ERISA plans." 514 U.S. at 656 (emphasis added) (citation omitted). Accordingly, ERISA preempts laws that touch on central areas of ERISA by "prohibit[ing]" what is "permitted" by federal law, "mandating employee benefit structures or their administration," or by "preclud[ing] uniform administrative practice." *Id.* at 656-657. In assessing the burden a law places on uniform administrative practices, this Court takes a far-ranging look consistent with ERISA's purposes. Under examination are the impact of the particular law on plan sponsors, plans and administrators, as well as the potential for increased burdens if similar laws were enacted by other states. *Egelhoff*, 532 U.S. at 151.

In formulating preemption standards, this Court has explained that ERISA's goal was to encourage employers to establish plans voluntarily and eco-

nomically through a single, federal regulatory system that allows uniform administrative practices across-the-nation. *Fort Halifax*, 482 U.S. at 12. In striking a balance between competing federal and state interests, ERISA makes plan regulation "'exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987)(citation omitted).

This Court has held that ERISA preempts state or local laws mandating employer contributions for group health-insurance, with a noncompliance penalty, *Agsalud*, *supra*; laws requiring plans to provide pregnancy benefits, *Shaw*, *supra*; and laws requiring employers to provide inactive employees, on workers' compensation, with the same health-benefits as active employees, *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129-130 (1992).

The Ninth Circuit's contradiction of this Court's ERISA preemption holdings in *Golden Gate II* is direct and profound. ERISA preempts the San Francisco Ordinance because it creates the same national problems for plan sponsors, plans and ultimately the beneficiaries repeatedly highlighted by this Court's decisions, but doing so to a far-greater degree.

The Ordinance plainly violates the "connection with" prong of ERISA preemption. It compels employers to provide health-benefits to employees, a violation of ERISA's rule that employee benefit plans are to be completely voluntary. The Ordinance also compels employers to choose between maintaining uniformity in health-benefits through a required change in benefits in their existing ERISA plans, or giving up on uniformity through a required provision of different benefits to their San Francisco employees.

Further, an employer must adjust its administrative practices to reflect the Ordinance's unique administrative requirements including rules for coverage of part-time employees working as few as ten-hours-per-week, and for restricting a plan's ability to require employee contributions as part of a health-insurance program. Because employers may not count on "structuring administrative practices according to a set of uniform guidelines," they may "decide to reduce benefits or simply not to pay them at all" in some jurisdictions. *Fort Halifax*, 482 U.S. at 12.

The Ordinance also violates the "connection with" prong because the "City-payment-option" itself requires the creation of an ERISA plan, a point emphasized by the Secretary of Labor's *amicus* brief. App. at 85-86a. ERISA section 3(1) broadly defines an employee welfare benefit plan as including "*any plan, fund, or program*," "established or maintained by an employer," "for the purpose of providing for its participants ... through the *purchase of insurance or otherwise*, medical, surgical, or hospital care or benefits ...." 29 U.S.C. § 1002(1) (emphasis added). The test for ERISA plan coverage is a low-threshold one, designed to sweep as many plans as possible within ERISA's regulation. The test is simply whether the statutory requirements for a "plan, fund, or program" are met, not whether the employer designs the plan or performs all of the work. For example, the employer's day-to-day role in a standard, ERISA-covered group health-plan typically consists of paying premiums and handling a small amount of paperwork.[43] There is no employer-managed trust fund. An insurance

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[43] *See, e.g., Credit Managers Ass'n v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617 (9th Cir. 1987).

company, third-party administrator or PPO performs virtually all of the plan-design, administrative-and-fiduciary tasks, and payment functions. *See, e.g., Brundage-Peterson v. Compcare Health Services Ins. Co.*, 877 F.2d 509, 511 (7th Cir. 1989) ("The contingent feature of a true welfare benefit plan ... is unaffected by the delegation of the administrative duties of the plan to an insurance company—a delegation contemplated by the statute").

Under the "City-payment-option," an employer's ongoing contributions and regulatory compliance establish for its employees an ERISA health "plan, fund, or program" financed "through the purchase of insurance or otherwise." For ERISA's purposes, an employer's HAP-contributions are indistinguishable from its premium payments to an insurance company or a PPO for health-coverage, payments which result in an ERISA plan.[44] In each instance, the employees receive their benefits from a third-party professional administrator and the program is substantially administered by that party.

In concluding the "City-payment-option" was outside of ERISA, the Ninth Circuit contradicted the statute's plain text and Congress's goals. It made the unprecedented holding that for an ERISA plan to exist, not only must there be trust fund assets for ERISA to protect from employer mismanagement, but the employer itself must draft the plan's documents and perform the administrative and fiduciary duties. App. at 20a, 24-26a. This is a classical example of a theory which proves too much. Under this highly-restrictive coverage standard, very few if any

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[44] *See, e.g., Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994).

insured health-plans, third-party-administered plans, or HMO or PPO plans would be governed by ERISA's rules and protections, and few ERISA plans would have professional plan administration.

The Ordinance also violates the "reference to" prong of ERISA preemption. An employer must determine its legal obligations by referring to its existing ERISA plans. This is precisely the situation which triggered preemption in *Washington Board of Trade*, *supra*. The District of Columbia ordinance made an impermissible "reference to" ERISA plans because it required equal health-benefits and therefore required a comparison to ERISA plans.

Similarly, ERISA preempts the Ordinance's healthcare contributions-mandate under *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). ERISA preempts a claim if, in evaluating it, "the court's inquiry must be directed to the plan." *Id.* at 144. In any City-enforcement action, a court's inquiry must focus on the employer's ERISA plan to see whether it provides contributions equal to Ordinance levels.

B. The Decision's New ERISA Preemption Standard Improperly Allows Local Laws to Regulate Not Just Employer Contributions, But Employee Benefit Plans Themselves

The Ninth Circuit's decision invents an artificial, destructive ERISA preemption standard, one that undermines the Act's primary goals. If local governments may mandate employer contributions and complex administrative schemes, they may regulate ERISA plans themselves by first requiring their establishment and then dictating what benefits the plan provides, what categories of employees and part-

time workers are covered, and how the plan is administered. In addition, plan sponsors must constantly watch for diverse contribution-mandates and administrative regulations across-the-land.

The Ninth Circuit reached this anomalous result through an incorrect ERISA preemption analysis. The court started by observing that laws in areas historically regulated by the states enjoy "a presumption against preemption," citing *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997), *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., NA., Inc.*, 519 U.S. 316, 330 (1997), and *Travelers*, *supra*.[45] App. at 13a. In each case, however, the state law was "remote from the areas with which ERISA is expressly concerned" and operated in "'areas where ERISA has nothing to say.'"[46] As applicable here, these cases reflect that ERISA preempts laws, even in areas of traditional local interests, if they have any one of the three features of the "pay-or-play" laws: forbid what ERISA permits, mandate plan structure or administration, or preclude uniform administrative-practices.[47]

The Ninth Circuit then inappropriately applied this presumption-against-preemption to the "pay-or-play" laws. As two other courts correctly concluded in *Fielder*, *supra*, and *Suffolk County*, *supra*, "pay-or-play" mandates aim directly at a quintessential rela-

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[45] *De Buono* simply held that ERISA does not preempt a gross-receipts-tax on healthcare-providers, while *Dillingham* rejected preemption of a prevailing-wage-law. *Travelers* rejected preemption of a surcharge-on-hospital-bills because it did not interfere with nationally-uniform plan administration.

[46] *Egelhoff*, 532 U.S. at 147-148.

[47] *E.g.*, *Travelers*, 514 U.S. at 656-658.

tionship ERISA was meant to govern exclusively: a plan sponsor's arrangements to pay for employees' "medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1),

When reviewing mandates for employer contributions or for plan benefits, this Court has uniformly held them to be ERISA-preempted. *See, e.g., Agsalud, supra* (health insurance); *Shaw, supra* (pregnancy benefits); *Washington Board of Trade, supra* (health-benefits); *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1983) (same), *summarily aff'd*, 463 U.S. 1220 (1983). The Ninth Circuit has flatly refused to follow this controlling authority.

The Ninth Circuit based *Golden Gate II* not on the structure, language or purposes of ERISA, much less on this Court's carefully-developed preemption standards. Instead, the court premised its ERISA preemption standard on a spur-of-the-moment, unsupported theory, the type of judicial resolution described by this Court as "bring[ing] on stage, in classic fashion, a *deus ex machina* to extract from ... seemingly insoluble difficulties ... a happy ending."[48] Saving San Francisco's "pay-or-play" law, the Ninth Circuit held that preemption extends only to "mandated-benefits," not "mandated-contributions," and that the latter do not "interfere" with uniformity in plan administration, at least from the perspective of a purely local employer. App. at 35a, 36a-40a. This contributions-benefits distinction is not found anywhere in ERISA or in any prior court decision.

Most significantly, the Ninth Circuit's quixotic distinction between contributions-mandates and benefits-mandates clashes head-on with ERISA's

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[48] *Nevada v. Hicks*, 533 U.S. 353, 416 (2001).

plain text and the Act's principal objectives. It also defies common sense.

Nothing in ERISA's language or in any prior case supports the Ninth Circuit's view that Congress made an inexplicable decision that laws mandating employer contributions for employee benefits were exempt from preemption. 29 U.S.C. § 1144(a) preempts "*any and all*" laws that relate to employee benefit plans, not just some laws.

Employer contributions are not a tangential or peripheral matter, outside of ERISA's concerns. Employer contributions are an indispensable element of employer-financed ERISA plans, no less than gold bullion is to a gold coin. The Ninth Circuit's new contributions-benefits distinction is fanciful-but-illogical. It has a Cheshire-cat, *Alice-in-Wonderland* quality. There may a contribution without a benefit, but never a benefit without a contribution.

For ERISA preemption purposes, there is no material difference between laws mandating employee benefits and laws mandating contributions to pay for benefits. ERISA preempts a contributions-mandate because it overturns, in the same manner as a benefits-mandate, the Act's primary objectives of a voluntary system of cost-effective employee benefit plans[49] under which local laws do not "interfere with nationally uniform plan administration."[50]

Unless reversed, *Golden Gate II* will turn 29 U.S.C. § 1144(a) and this Court's preemption standards into a triviality, a mere semantics-game. A local government may avoid preemption simply by categoriz-

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[49] ERISA section 2(a), 29 U.S.C. § 1001(a)

[50] *Egelhoff,* 532 U.S. at 148.

ing a benefits-mandate as a contributions-mandate, with a government "healthcare-payment" penalty for noncompliance. For example, under the Ninth Circuit's preemption standard, a state may avoid the fate of the statute in *Shaw*, *supra*, by enacting a "contributions-mandate" for pregnancy benefits, coupled with a noncompliance-penalty relabeled a "healthcare-payment." As this Court explained in *Alessi*, 451 U.S. at 525, "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision."

The Ninth Circuit's errors are two-fold. The decision allows "pay-or-play" laws to escape the conflicts preemption applicable to other federal statutes under the Supremacy Clause. At the same time, it makes ERISA's express preemption clause less forceful than conflicts preemption. This Court has already squarely rejected such a result in *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) ("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 objectives"); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 397 (2002) (THOMAS, J., dissenting) ("'formalist tricks cannot be sufficient to bypass'" ERISA preemption) (citation omitted).

Unless reversed, the Ninth Circuit's decision will overturn the voluntary nature of ERISA health-plans, remove them from exclusive federal governance, and preclude economical, nationally-uniform plan design, benefits and administration. These are among ERISA's core goals. The decision thus splits the central axis of this Court's ERISA preemption decisions.

C. The Decision Improperly Expands the Type of Government-Mandated Benefit Plans That Are Outside of ERISA's Safeguards

The Ninth Circuit's decision also warrants review because it improperly expands the types of government-mandated benefit plans that are outside of ERISA's safeguards. The decision will engender new confusion and litigation on a significant federal-state issue this Court has sought to resolve several times: under what circumstances do government-mandated benefits cause the creation of an ERISA-covered plan?

This Court has rejected the argument that "ERISA only pre-empts state regulation of pre-existing benefit plans established by the employer, and not state-mandated benefit plans." *Fort Halifax*, 482 U.S. at 16-17. Unless ERISA applied, such mandated-benefit laws would "afford employers a readily available means of evading ERISA's regulatory scope." *Id.* at 16.

For over two decades, this Court has consistently held that government-mandated payments of a type generally regulated by ERISA—such as severance-benefits—escape preemption *only* if the requirement does not create a continuing need to calculate and process the payments on an ongoing basis. *Fort Halifax*, *supra*, held that ERISA does not preempt a state's severance mandate applicable only to plant closures. The payment, a "one-time, lump-sum payment triggered by a single event," required "no administrative scheme whatsoever," while the statute "create[d] no impediment to an employer's adoption of a uniform benefit administration scheme." 482 U.S. at 12, 14.

Similarly, *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989), held that a statute requiring an employer's payment of vacation pay to terminated employees did not create an ERISA plan because the payments, made out of the employer's own assets, were "typically fixed, due at known times, [did] not depend on contingencies outside the employee's control," and did not present risks different from the risk of non-payment of wages. In contrast, the Court explained, in ERISA-covered medical-care plans the benefits "accumulate over a period of time and are payable only upon a contingency outside of the control of the employee." 490 U.S. at 116.

San Francisco's "City-payment-option" involves the creation of an ERISA plan and triggers ERISA preemption because it does far more than require a mere payroll-practice such as cutting a check. All of the Ordinance's options impose ongoing employer payment requirements coupled with a phalanx of administrative chores. As noted in the Secretary of Labor's *amicus* brief, these are precisely the type of administrative requirements that bring a state mandated-benefit plan within ERISA. App. at 87a.

III. THE QUESTION PRESENTED BY THIS PETITION IS ONE OF EXCEPTIONAL NATIONAL IMPORTANCE THAT SHOULD BE ADDRESSED BY THIS COURT.

This Court should review the Ninth Circuit's decision not only because it creates a significant circuit conflict and directly contradicts this Court's ERISA preemption decisions, but also because it raises an issue of exceptional national importance at a time of intensified efforts at federal healthcare-reform. At stake is whether the federal government, or state-and-local powers, will regulate the nation's employee benefit plan system. Unless reversed, the decision will have far-ranging repercussions on this issue and ERISA's most basic objectives.

With the force of a broad-ax, *Golden Gate II* severs ERISA's preemption provision from the Act's principal goals. These include a voluntary employee benefit plan system nationwide whose uniformity and cost-efficiencies are protected by federal law. Simultaneously, the decision uproots well-settled understandings of what constitutes an ERISA plan.

The Ninth Circuit's decision surrenders to the states and countless local municipalities a largely free-rein over the sphere of employee benefit plans. If left standing, the decision will mark the return to a costly, inefficient era when plans were subject to control by fifty different sets of state-law rules and subsets of local regulations. It will resurrect the same obstacles to plan growth and development—the "multiplicity of regulation" and "'conflicting directives'"[51]—that Congress sought to end through ERISA.

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[51] *Travelers,* 514 U.S. at 656-657 (citation omitted).

The employee benefit plan landscape will become far more hostile than before ERISA. While plans and plan sponsors will remain subject to comprehensive ERISA regulation, federal rules will be overlaid with mandates for establishing health-plans and administering them pursuant to conflicting, overlapping and ever-changing state and local regulations. In short time, excessive administration-compliance costs will deplete the employer funds available for benefits, to the detriment of employers and employees alike.

The practical implications of *Golden Gate II* are staggering. As of 2006, healthcare spending totaled approximately 16% of the gross domestic product.[52] Employer-related group health-insurance covers an estimated 177 million individuals.[53] More than nine-out-of-ten employers offer PPO-options and nearly four-out-of-ten offer HMO-options.[54] Unless the decision is reversed, all of these insured group plans, plans with PPO or HMO-options, and self-funded plans with third-party administrators may be subject to "pay-or-play" laws. At the same time, *Golden Gate II*'s highly-restrictive standard for ERISA plan coverage will place the great bulk of these economical off-the-shelf plans outside of ERISA's protections. Further, employers will be able to avoid ERISA's fiduciary duty rules and its civil and criminal enforcement provisions merely by hiring a third-party to perform the bundle of plan-design and administrative-and-fiduciary tasks inherent in any plan. It is difficult to conceive of any law or any

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[52] STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, 96 (128th ed.).

[53] *Id.* at 105.

[54] *Id.* at 24.

decision causing greater damage to the nation's employee benefit plan system.

The nation's vast size makes the problems caused by *Golden Gate II* intolerable. In addition to 50 states, there are over 3,000 counties and more than 35,000 cities and towns.[55] The Ninth Circuit's decision will expose sponsors of multistate plans to a prohibitively-expensive situation: a patchwork-quilt of mandates and regulations coast-to-coast. A single local jurisdiction's power to regulate employee benefit plans becomes the power to overwhelm and destroy the national system of plans if wielded by a series of jurisdictions. This is the same insurmountable burden posed by the earlier influx of state-by-state experiments with employer mandates—dating back to the Hawaii Prepaid Health Care Act—that gave rise to ERISA's broader-than-originally-proposed preemption clause.

If *Golden Gate II* is allowed to stand, sponsors will not be able to establish employee benefit plans voluntarily, much less on an efficient company-wide or nation-wide basis. Instead, they must set up plans and allocate health-expenditures on a haphazard, inefficient person-by-person, location-by-location basis. Sponsors must constantly monitor for new laws in all jurisdictions. There will be a bewildering mismatch of employer contribution rules, either by percentage-of-gross-payroll or a dollar-amount-per-hour-worked. The varying contribution levels themselves may move upwards at uneven rates. Different jurisdictions may require coverage of different categories of employees and part-time workers, and impose different employee contribution requirements or deductibles and

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[55] *Id.* at 259.

co-payments. Compliance with varying employer-contribution formulas and data-compilation and administrative rules will overload the largest human resources departments and the most expensive software-systems.

The Ninth Circuit's decision—coupled with the circuit conflict over ERISA preemption—will also create enormous confusion and difficulty in the design and administration of thousands of employee benefit plans nationwide. Plan sponsors need to know whether they may create plans without fear that a nationally-uniform set of benefits and administrative practices will be overturned in one jurisdiction or another by an unduly-restrictive application of ERISA preemption. It will be impossible for sponsors to predict or even identify the "'uniform body'" of federal benefits law, which is a "basic thrust" of ERISA.[56] Sponsors will not even know which diverging sets of federal and state or local laws to apply in establishing and administering their plans.

This cliff-edge departure from the national uniformity of law required by ERISA, the chaos in plan administration, and the steeply-increased transaction costs will require sponsors to reduce benefits or compensation overall or to eliminate some plans altogether, *Fort Halifax*, 482 U.S. at 13, contrary to the "public interest in encouraging the formation of employee benefit plans," *Pilot Life*, 481 U.S. at 54. None of this promotes the "national public interest" in a voluntary system of employee benefit plans. None of this protects the cost-efficiencies which lie at ERISA's core. None of this furthers ERISA's goals.

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[56] *Travelers*, 514 U.S. at 656-657.

Moreover, the rationale of the Ninth Circuit's decision—that ERISA only preempts mandated-benefits, not mandated-contributions – extends beyond health-benefits. It includes welfare benefits of every stripe. Additionally, states, cities and counties face responsibilities for older residents, many of whom are low-income and may lack significant pensions. If local governments may mandate ongoing employer contributions and administrative schemes for health-benefits, presumably they may also mandate similar ones for pension benefits. Through these devices, local governments may effectively require multistate employers to follow each jurisdiction's unique dictates for establishing and administering ERISA plans providing pension and welfare benefits. All of this is at direct odds with the structure, logic and purpose of ERISA and three decades of Supreme Court precedent.

Swift intervention by this Court is critical to restore the carefully-crafted balance between state and federal law struck by Congress in ERISA and to reestablish the preeminence of ERISA's statutory scheme. Given the "centrality of pension and welfare plans in the national economy," *Boggs v. Boggs*, 520 U.S. at 839, it is vital that this Court decide the significant, far-reaching ERISA preemption issue presented by this case, and resolve the existing circuit conflict.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

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