Nos. 07-17370, 07-17372

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GOLDEN GATE RESTAURANT ASSOCIATION, ET. AL.,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET. AL.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. C06-6997 JSW

BRIEF FOR THE RETAIL INDUSTRY LEADERS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amici* state as follows:

The Retail Industry Leaders Association has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

The Chamber of Commerce of the United States of America has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amici file this brief with the consent of all parties.

The Retail Industry Leaders Association ("RILA") is an international alliance of employers, including retailers, product manufacturers, and service providers, that promotes consumer choice and economic freedom through government advocacy and industry leadership. Its members, which include the largest and fastest-growing retail companies in the industry, account for over $1.5 trillion in annual sales, provide millions of jobs, and operate more than 100,000 stores, manufacturing facilities, and distribution centers both domestically and globally.

The Chamber of Commerce of the United States of America (the "Chamber") is a nonprofit corporation and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

RILA and the Chamber are both committed to protecting their members' ability to establish and administer health plans on a uniform, company-wide basis,

and therefore oppose laws such as the San Francisco Health Care Security Ordinance which conflict with the federal policy embodied in the Employee Retirement Income Security Act ("ERISA"). RILA was the plaintiff in two previous cases involving similar laws that were struck down by the courts. *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Retail Indus. Leaders Ass'n v. Suffolk County*, No. 06 CV 00531 (ADS) (ETB) (E.D.N.Y. July 14, 2007). The Chamber filed *amicus* briefs in the *Fielder* case before both the district court and the court of appeals.

STATEMENT

Plaintiff, the Golden Gate Restaurant Association ("GGRA"), sued the City and County of San Francisco in federal district court, asserting that the San Francisco Health Care Security Ordinance ("the Ordinance") is preempted by ERISA. *Golden Gate Rest. Ass'n v. City of San Francisco*, No. C 06-06997 JSW, 2007 U.S. Dist. LEXIS 94112, at *5 (N.D. Cal. Dec. 26, 2007). The Ordinance, enacted by the San Francisco Board of Supervisors in 2006, requires private employers with 100 or more employees to make health care expenditures of $1.76 per hour on behalf of each covered employee, and smaller employers to spend $1.17 per hour for each covered employee. *See id.* at *3.

The Ordinance allows employers to fulfill their payment obligation by, among other things, paying third-party health care insurers to provide coverage to

employees, reimbursing employees for health care expenses, making contributions to health savings accounts, or making payments directly to the City "to be used on behalf of covered employees." *Id.* (quoting S.F. Admin. Code § 14.1(b)(7)). The Ordinance also establishes a government-operated health care plan called the Health Access Program ("HAP"). *See id.* The HAP, which would be funded in part from employer contributions and in part from the general treasury, would provide health care to uninsured San Francisco residents who pay the required premiums. *See id.* at *4. Nonresidents who work in San Francisco would not be covered, but would be able to draw from a medical reimbursement account, created by the HAP, to pay medical care costs. *See id.*

The Ordinance also requires that covered employers maintain accurate records of health care expenditures to demonstrate compliance with the law. *See id.* at *4-5. Violating these requirements could lead to an enforcement action, resulting in the loss of City permits and licenses as well as substantial penalties. *See id.* at *5.

The district court granted summary judgment to plaintiff, holding that ERISA preempts the Ordinance because "[b]y mandating employee health benefit structures and administration, [the Ordinance's] requirements interfere with preserving employer autonomy over whether and how to provide employee health coverage, and ensuring uniform national regulation of such coverage." *Id.* at *16.

Defendants applied to this Court for a stay of the district court's decision. The Court granted the stay, finding that defendants had demonstrated a likelihood of success on the merits because, among other reasons, the Ordinance (1) fell "within the traditional police powers of the State," (2) placed administrative burdens on the "employer," rather than the "plan" itself, and (3) regulated the level of "payments," rather than "benefits," that an employer is required to provide. *Golden Gate Rest. Ass'n v. City of San Francisco ("GGRA")*, 512 F.3d 1112, 1120, 1123-24 (9th Cir. 2008).

SUMMARY OF ARGUMENT

Employers, such as *amici*'s members, administer their health care plans on a company-wide basis to diversify risk and minimize costs. Congress understood the benefits of uniform plan administration and, in enacting ERISA, sought to protect employers from the additional burdens they would face from the "balkanization" of fifty state and countless municipal regulatory regimes. *Fielder*, 475 F.3d at 194. ERISA's "clearly expansive" preemption clause ensures that federal law will occupy the field of plan regulation: this benefits not only employers but also beneficiaries, who might otherwise bear the additional costs imposed by state and local requirements. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146, 149-50 (2001) (internal citation omitted). The Ordinance, by imposing minimum health care expense levels for one particular locality as well as various reporting require-

ments, imposes on employers precisely the types of local regulation that ERISA barred in order to allow uniform plan administration.

I. ERISA preempts any state or local law that "relates to" an employee benefit plan. The touchstone in any ERISA preemption case is the purpose of the federal law, which was enacted to give employers the discretion to decide whether to provide employees with health benefits and the appropriate level of benefits, and to ensure uniform plan administration. The Ordinance confounds those fundamental federal policies, by forcing employers to allocate health care costs on a city-specific, per-employee, per-hour basis, and thereby effectively precluding plan uniformity. If the Ordinance were allowed to stand, similar laws could be enacted by other cities and states, each with their own idiosyncratic judgments about the appropriate level of employer contributions to health care. As a result of this patchwork of state regulation, "A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). This result is unacceptable under ERISA.

II. The City distorts ERISA and the cases interpreting it in order to portray the Ordinance as having only an "indirect" economic effect on ERISA plans. The

City urges reversal primarily because it believes the Ordinance only requires that employers make health care "payments," rather than provide health care "benefits" to employees. This distinction is spurious. In order to provide health care "benefits" to employees, an employer must make "payments" (expenditures) either to an insurance company in the case of an insured plan, or directly to providers or employees in the case of a self-insured plan. In other words, the "benefits" received by the employee are the other side of the coin of the "payments" made by the employer.

Contrary to the City's unavailing attempts to distinguish prior cases, the proper test for ERISA preemption is simple: if the law burdens employers according to the health care benefits they give employees, then it "relates to" an employee benefit plan. The Ordinance here does just that and, consequently, is preempted. Moreover, if the Court reverses the district court's finding that the Ordinance is preempted by ERISA, it would create a square conflict with the Fourth Circuit's decision in *Fielder*, which concluded that a substantially similar Maryland law was preempted because it mandated health care and interfered with uniform plan administration. *See Fielder*, 475 F.3d at 191.

ARGUMENT

A state or local law "relates to" ERISA, and therefore is preempted, if it either "refers to" or has a "connection with" an ERISA plan. *Cal. Div. of Labor*

Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997). A law impermissibly "refers to" a plan, and must "yield" to ERISA, whenever it "impos[es] requirements by reference to [ERISA] covered programs." *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130-131 (1992). To determine whether a law has a forbidden "connection with" an ERISA plan, courts look "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 of the effect of the state law" on a plan. *Dillingham*, 519 U.S. at 325 (internal citation and quotation marks omitted). As to what constitutes an ERISA "plan," it is no more complicated than that term connotes: Any employer "plan" or "program" (29 U.S.C. § 1002(1)) for regularly funding employee health care—that is, any "scheme, program or method worked out beforehand to achieve [that] objective," AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed.), is an ERISA plan. *See Fort Halifax*, 482 U.S. at 12.[1]

Under both the Supreme Court's "reference to" and "connection with" tests, the Ordinance runs afoul of the purpose that lies at the heart of ERISA preemption and is of paramount importance to the Chamber's and RILA's members: the need

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[1] The statute provides certain exemptions not relevant here, for example, for workers' compensation plans and church plans. *See* 29 U.S.C. §§ 1003(b)(2), (3).

for uniform plan administration and the potential for disruption posed by state and local regulation.

I. The San Francisco Ordinance Is Preempted By ERISA Because It Disrupts Nationwide Plan Uniformity.

A. The Ordinance Is Preempted Because It Refers To A Plan.

As an initial matter, the Ordinance "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." *Greater Wash. Bd. Of Trade*, 506 U.S. at 130. In this case, as in *Greater Washington Board of Trade*, employers determine their legal obligations by referring to their existing benefit plans—if those plans are (in San Francisco's judgment) insufficient, payments to the City are compulsory. A plainer case of preemption will seldom occur.

"Reference to" preemption results, as well, from the central role benefit plans would play in enforcement of the Ordinance. Most employers offer health care, and all that do provide it through ERISA-regulated plans. Enforcement of the Ordinance therefore will involve the City in examining employers' health plans, and—when non-compliance is alleged—in charging that employer contributions to the plans are insufficient to discharge obligations under the Ordinance. *Cf. Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990) (when a plaintiff must "plead" an ERISA plan as part of a cause of action, the action "relate[s] to" the plan, "[b]ecause the court's inquiry must be directed to the plan"). Similarly, just as the plaintiff had to "plead" the ERISA plan as part of his claim in *Ingersoll-*

Rand, so under the Ordinance employers regularly will plead their existing ERISA plans as part of their defense. Such proceedings would raise questions concerning whether the employer had an ERISA plan, whether the employer's expenditures met the Ordinance's mandate, and whether the employer had kept adequate records to prove it made the proper per-employee expenditures. *See* S.F. Admin. Code § 9.2(A) (City may bring cause of action for "[f]ailure to make the required health care expenditures"); *id.* (employer may be penalized for failure to keep required records, and ordered to "cooperate with the [City] in reconstructing the records it should have maintained"). Under the logic of *Ingersoll-Rand,* these actions would be preempted.

B. The Ordinance Is Preempted Because It Has A Forbidden Connection With A Plan.

The parties agree that whether a state (or local) law has a "forbidden connection" with a plan turns on "'the objectives of the ERISA statute'" as well as "'the nature of the effect of the state law on ERISA plans.'" Pl.'s Br. 14; Def.'s Br. 17; *GGRA*, 512 F.3d at 1120 (quoting *Dillingham*, 519 U.S. at 325). The test, therefore, is whether the law at issue interferes with ERISA's objectives, and among ERISA's principal objectives, of course, is "to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004).

Congress knew that uniform plan administration serves multiple salutary purposes. First, it benefits the employer, or plan sponsor, by "minimiz[ing] the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 498 U.S. at 142. Second, uniformity inures to the benefit of beneficiaries, as higher administrative costs can cause "employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax*, 482 U.S. at 11. Third and finally, elimination of inconsistent state regulation improves federal oversight of the "administrative integrity" of plan operations. *Id.* at 15.

The Ordinance violates each of those objectives by mandating specific health care benefit levels and imposing various administrative requirements for San Francisco employers. Contrary to what the Ordinance presumes, employers do not ordinarily allocate health care costs on a per-employee, per-location basis. Rather, employers generally provide company-wide coverage in order to reduce costs and diversify risk. Employer payments are made to an insurer based on the overall profile of the insured group, and are not divided up to correspond to hours worked or the place of residence of each insured. Alternatively, in the event of self-insurance, payments are made when the health care claim is presented—and again are not fixed according to how many hours that employee worked or where the

employee lived. Therefore, the Ordinance's threshold requirement that employers allocate health care expenditures to specific employees in a specific location will, by itself, require employers to create a special pool for San Francisco employees that is separate from the rest of the employees covered by the company plan. For this reason alone, the law is preempted.

Moreover, the efficiencies that result from a uniform plan—efficiencies that ERISA protects—are defeated when individual localities are permitted to replace actuarially-based calculations and prices, determined by the marketplace, with government-imposed mandates. *See Fielder*, 475 F.3d at 194 (employer-contribution law interferes with plan uniformity when it forces an employer to "segregate a separate pool of expenditures" for a specific location). The need to monitor expenditures in multiple jurisdictions is squarely at odds with ERISA's purpose of establishing a uniform system of plan regulation. This difficulty would, of course, be exacerbated by similar requirements across all fifty states and countless municipalities. *See Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481, 494 n.13 (D. Md. 2006) ("Unless such legislation is deemed to be preempted, nationwide employers potentially will face not only fifty different requirements imposed by the States, but also a virtually limitless number of requirements that local subdivisions in each State may enact."), *aff'd*, 475 F.3d 180 (4th Cir. 2007). Local laws like the Ordinance will have the inevitable effect of forcing employers,

like *amici*'s members, to monitor employee expenditures on a local, rather than a company-wide, basis.

As the Supreme Court has recognized, "[r]equiring ERISA 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.'" *Egelhoff*, 532 U.S. at 149-50 (alterations in original and internal citation omitted). If the Ordinance were allowed to stand, nothing would prevent other jurisdictions from enacting their own reticulated and particularized employer-contribution laws, based on their own policy judgments about the appropriate level of employer health care, and their own set of recordkeeping and other administrative requirements. This result stands in marked contrast to the policies underlying ERISA, which "does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Rather, under ERISA, "[e]mployers or other plan sponsors are generally free . . . , for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.*; *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("private parties, not the Government, control the level of benefits" under ERISA).

The threat of conflicting state and local regulations is not merely hypothetical. In the wake of Maryland's enactment of the Fair Share Health Care Fund Act, popularly known as the "Wal-Mart law," other states and localities have considered or adopted similar employer-contribution mandates. *See Fielder*, 475 F.3d at 184. Indeed, nearly thirty states have proposed some iteration of the Maryland law, each with its own unique, locale-specific requirements. *See* J. Contreras & O. Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 ST. THOMAS L. REV. 105, 136 (2006) (collecting proposals). For example, Suffolk County, New York enacted an ordinance—which was likewise found preempted—that required covered employers to pay health care costs of at least $3.00 per hour for each covered employee. *See Retail Indus. Leaders Ass'n v. Suffolk County*, No. 06 CV 00531 (ADS) (ETB) (E.D.N.Y. July 14, 2007). If these laws were permitted to stand alongside the Ordinance, employers would need to maintain different plans, with different total spending levels and different records to track expenditures, in each locality. It would be unsustainable for employers to comply with such differing minimum payment and recordkeeping requirements in states, cities, and counties across the nation.

C. Contrary To The City's Contention, There Is No "Non-ERISA" Alternative To Compliance With The Ordinance's Payment Mandate.

The City contends that the Ordinance is saved from preemption because it provides supposed "non-ERISA" alternatives to compliance, such as health savings accounts and employer contributions to a government-created health care fund. Def.'s Br. 21-25. The City is badly mistaken. First, the options provided by the law are not in fact "non-ERISA" alternatives, and second, even if they were, any option an employer chose would, as a practical matter, affect the level of benefits provided in their ERISA plans.

The primary alternative the City offers employers to modifying their existing plans—making quarterly contributions to the state on behalf of its employees—is itself an ERISA "plan." Simply put, a "plan" or "program" for systematically funding employees' health care *is* a covered plan: Whenever an employer "assumes . . . responsibility to pay benefits on a regular basis," and "faces . . . periodic demands on its assets that create a need for financial coordination and control," the employer operates an ERISA plan. *Fort Halifax*, 482 U.S. at 12; *see also Fielder*, 475 F.3d at 190 ("a grant of a benefit that occurs periodically and requires the employer to maintain some ongoing administrative support generally constitutes a 'plan'"). In other words, periodic payments plus monitoring of payments equals a plan. *See id.* at 190-91 ("Because the definition of an ERISA 'plan' is so expan-

sive, nearly any systematic provision of healthcare benefits to employees constitutes a plan.").[2]

To be sure, the requirement of a "one-time, lump-sum payment triggered by a single event" does not satisfy the definition of an ERISA plan because it does not require administrative oversight. *Fort Halifax*, 482 U.S. at 12. But the Ordinance requires employers to make regular *quarterly* payments to the City's Health Access Program ("HAP"). *See* S.F. Admin. Code § 1.1(A). In connection with these payments, an employer must determine each employee's eligibility for the HAP, monitor the total hours that each employee works, calculate the total health care expenditures required by the HAP for that employee, and maintain records establishing that the required payments were made each quarter. *See id.* § 7.2(A)(1)-(3). That takes planning; it is done "for the purpose of providing for participants or beneficiaries . . . benefits in the event of sickness" (29 U.S.C. § 1002(1)); it is, therefore, a covered plan.

This Court's opinion staying the district court's order concluded that these contributions do not run afoul of ERISA because they are "payments" rather than

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[2] Similarly, health savings accounts are not a valid "non-ERISA" alternative. *See* Employee Benefits Sec. Admin., U.S. Dep't of Labor, Field Assistance Bulletin 2004-1 (Apr. 7, 2004) (finding that HSAs fall outside ERISA only if "the establishment of the HSAs is completely voluntary on the part of employees"); *id.* (an HSA must be administered in conjunction with a "high-deductible health plan," which if provided by an employer, is an ERISA plan).

"benefits." *GGRA*, 512 F.3d at 1123-24. That is a distinction without a difference that has no basis in ERISA jurisprudence and dissolves under the practicalities of plan administration and the Supreme Court's definition of what constitutes a plan. What to an employee is a health care "benefit" is to an employer a health care "payment," made either to a private health insurer or directly to the provider or employee. Moreover, by forcing an employer to make periodic payments under the HAP—whether one characterizes those payments as "payments" or "benefits"—and by requiring an employer to exercise "financial coordination and control" over such payments, the City has mandated that an employer create an ERISA "plan." *See Fort Halifax*, 482 U.S. at 14 n.9 ("The ongoing, predictable nature of this obligation therefore creates the need for an administrative scheme to process claims and pay out benefits, whether those benefits are received by beneficiaries in a lump sum or on a periodic basis.").[3] Indeed, this Court has previously held, and

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[3] The City asserts without citation that, if it did not provide San Francisco businesses with an offsetting credit for the amount spent in existing ERISA plans, "[n]obody could seriously contend that such a law [*i.e.*, a law requiring payments to a municipality in exchange for health insurance services for the company's employees] would be subject to ERISA challenge." Def.'s Br. 25. But such payments are mandatory contributions to a particular health care insurer (the City), which has control over the operation and administration of the HAP for the benefit of employers' covered employees. *See* S.F. Admin. Code § 1.1(A) (payments made by employers under the Ordinance are made either "to their covered employees" or "for the benefit of their covered employees"). Therefore, a law requiring employers to make mandatory health-care expendi-

[Footnote continued on next page]

the Supreme Court summarily affirmed, that "laws that create funding requirements for employee benefit plans" are laws that "relate to" a plan, and "[s]tatutes regulating contributions to ERISA plans have consistently been held preempted." *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1218 (9th Cir. 1988), *summarily aff'd*, 488 U.S. 881 (1988); *see also id.*, 846 F.2d at 1219 ("the 'contribution/benefit' dichotomy, while perhaps superficially appealing, is unsupported by the law").

The HAP is no less a "plan" because it happens to be government-sponsored. Although ERISA provides an exemption for plans established by federal and state governments, *see* 29 U.S.C. § 1002(32), that exemption is limited to a plan established or maintained by a government "*for its employees*." As this Court has observed, "[t]here is no express exemption from ERISA coverage for

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[Footnote continued from previous page]

tures to the City has all the hallmarks of an ERISA plan under *Fort Halifax*: periodic, foreseeable payments requiring administrative oversight. *See* 482 U.S. at 12. The HAP, therefore, because it requires that an employer designate the City as its health insurer, violates ERISA both because it creates a "plan" and because it invades the province of the employer to determine for itself the terms that will govern that plan. *See, e.g.*, 29 U.S.C. § 1102(a)(1) & (2); *cf. Egelhoff*, 532 U.S. at 147 (state law that dictated choice of beneficiary, which under ERISA must be identified by the employer in the plan documents, is preempted). Indeed, to require employer funding of a plan of the City's design is ultimately indistinguishable from the preempted requirement in *Agsalud* that the employer sponsor a plan of the state's design.

plans which state law requires private employers to provide their employees." *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760, 764 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981). Therefore, the HAP is an ERISA plan because it is a government plan established for the benefit of *private* employees, *see* S.F. Admin. Code § 1.1(A), and falls within the broad ambit of ERISA preemption.[4]

Moreover, as stated above, most employers covered by the Ordinance already provide health care to their employees through some form of ERISA plan. *See Fielder*, 475 F.3d at 196 ("The undeniable fact is that the vast majority of any employer's healthcare spending occurs through ERISA plans . . . and any attempt to comply with the Act would have direct effects on the employer's ERISA plans."). If the plan an employer currently has in place does not satisfy the Ordinance because the employer does not spend the required minimum on health care,

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[4] If the City were to argue in the alternative that the HAP is *not* an ERISA plan because payments to the HAP constitute a general-purpose tax that does not inure to the benefit of the employer's own employees, then the payments would be an externality that the employer would make every effort not to incur. In that case, the law would be preempted for another reason: it would be a Hobson's choice whereby employers would either be forced to pay the tax or to provide their employers with coverage. No rational employer would choose to pay the tax in lieu of expending the same amount on health care for its employees. *See Fielder*, 475 F.3d at 193 (noting that the Maryland law is preempted because "the only rational choice employers have under the [law] is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold").

the employer will need to adjust the terms of its existing plan in order to bring it into compliance. It must do that either by increasing benefits within its existing plan, or by making payments to the City under the HAP, which as explained above, is itself an ERISA plan. In either case, employers must make alterations to their ERISA plans to avoid the possibility of civil penalties and the revocation of their City permits, certificates, and licenses. *See* S.F. Admin. Code §§ 8.1(B); 9.2; *Egelhoff*, 532 U.S. at 150 (a law is "not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it").

The City's reliance on the supposed "alternatives" under the Ordinance also fails because in *every* case involving health care mandates that the Supreme Court found preempted by ERISA, the employer had an "alternative" to adopting the benefits prescribed by statute: to pay a civil penalty. For example, in *Agsalud*, 633 F.2d at 760, the State of Hawaii passed a law requiring employers to include a litany of specific benefits in their health care plans. The Hawaii law also provided, however, that an employer who failed to comply with its mandate would be liable for $1 per employee for each day of non-compliance. *See* Haw. Rev. Stat. § 393-33. This Court found the law preempted by ERISA and the Supreme Court summarily affirmed. The City does not and could not seriously assert that the case would have been decided differently had the state instead characterized its penalties as a health care "payment." If the Court adopts the City's reasoning, then all

the Supreme Court cases prohibiting state health care mandates would effectively be a dead letter, as states could always end-run the decisions by relabeling a penalty as a health care "payment." *But see 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").

II. Like Other Mandated Health Care Laws Held Preempted By This Court And The Supreme Court, The Ordinance Operates In An Area Of Core ERISA Concern; It Is Not Saved From Preemption By Cases On ERISA's Periphery That Did Not Regulate The Relationship Between Employer And Employee With Respect To Health Benefits.

The City Ordinance directly and expressly regulates employers' provision of health care to their employees, stating, "[c]overed employers shall make required health care expenditures to or on behalf of their covered employees each quarter." S.F. Admin. Code § 14.3. In defending a legislative command so squarely in conflict with ERISA's preemptive core, the City misinterprets ERISA in at least three different ways.

First, the City errs in arguing that the Ordinance is saved from preemption because it does not, in the City's view, present a Hobson's choice that is tantamount to a direct mandate. Although the City is correct that laws that economically coerce employers to adopt an ERISA plan by presenting them with a "Hobson's choice" are preempted, *see N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 664 (1995), that is not the sole

test for preemption. Rather, ERISA's express preemption clause is written broadly to preempt any state or local law that "relates to" an ERISA plan, a proscription broad enough to encompass not only direct mandated-health care laws, but also laws that regulate in other ways employers' provision of health care benefits to their employees. *See Egelhoff*, 532 U.S. at 150; *Fielder*, 475 F.3d at 195. Therefore, irrespective of whether the Ordinance presents a Hobson's choice, it is preempted for the much more straightforward reason that it expressly and significantly "relates to" plans by, among other things, "'dictat[ing] the choice[s] facing ERISA plans' with respect to matters of plan administration." *Egelhoff*, 532 U.S. at 150 (first alteration added).

Second, the City argues that the Ordinance "indirectly" affects plan administration because the law only regulates the *employer*, not the *plan* itself. Like the City's suggestion that *payments* may be regulated but not *benefits*, this distinction has no basis in Supreme Court ERISA caselaw or in the reason that Congress preempted state and local regulation of employee benefits. Congress intended "to ensure that plans *and plan sponsors* would be subject to a uniform body of benefits law[,]" and also desired to eliminate "'the potential for conflict in substantive law . . . requiring the tailoring of plans *and employer conduct* to the peculiarities of the law of each jurisdiction.'" *Travelers*, 514 U.S. at 656-57 (quoting *Ingersoll-Rand*, 498 U.S. at 142) (emphases added). Therefore, state laws that regulate an em-

ployer's relationship with a plan also "relate to" a plan under ERISA, and are pre-empted to the same extent as laws that dictate the terms and composition of the plan itself. Indeed, laws regulating employers' provision of health benefits to employees lie at the very heart of ERISA's preemptive core.

Third, the City misreads and improperly extends the scope of the so-called "trilogy" of Supreme Court ERISA cases: *Travelers*, 514 U.S. at 645, *Dillingham*, 519 U.S. at 316, and *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806 (1997). Unlike the Ordinance, which specifically targets an employer's health care expenditures, the state laws in *Travelers*, *Dillingham*, and *De Buono* exercised only a "remote," "tenuous," and "indirect" influence on ERISA plans. *Travelers*, 514 U.S. at 661; *see also Fielder*, 435 F. Supp. 2d at 495 (noting that *Travelers*, *Dillingham*, and *De Buono* "lie at the periphery of ERISA analysis, not . . . at its core"). Indeed, while it was important to the Supreme Court that the laws at issue in the "trilogy" concerned traditional areas of state regulation, the Ordinance can hardly be considered "traditional": efforts by states and localities to mandate employer expenditures for employee health care are of recent vintage and the only other similar laws that have been challenged in court—in Maryland and Suffolk County, NY—have been found preempted. Critically, unlike the Ordinance, in none of the "trilogy" cases did the state directly regulate an employer as plan sponsor, and in none of those cases did the state subject an employer to civil

enforcement proceedings and monetary penalties for failure to provide employee health care. ERISA is not responsibly applied by cherry-picking isolated phrases from those fundamentally different cases, while ignoring the Ordinance's conflict with Supreme Court cases close to point.

In *Travelers*, the Supreme Court held that ERISA did not preempt a New York law that imposed an additional surcharge on hospital bills that were paid by health insurers other than New York Blue Cross Blue Shield. Blue Cross's competitors claimed that ERISA preempted the law because it made Blue Cross more attractive to plan administrators from a cost perspective than other insurers. *See Travelers*, 514 U.S. at 658. The Supreme Court rejected this argument. First, the law did not regulate plans at all, but instead applied broadly to all hospital *patients* who paid for health coverage. *Id.* at 649-50, 661. Therefore, the economic effect of the law on plans was only indirect. *Id.* at 658. Second, the law was a "*general* health regulation," which "historically has been a matter of local concern," unlike laws that *specifically* target employers' provision of health benefits. *Id.* at 661 (emphasis added).

Similarly, in *Dillingham*, the Court found that ERISA did not preempt a California wage law that allowed employers to pay apprentices a lower wage if they participated in a state-approved apprenticeship program. The law at issue targeted apprenticeship programs, which unlike employer health care contributions, were

not necessarily ERISA plans. *See Dillingham*, 519 U.S. at 332-33. Moreover, the effect on ERISA plans was not accomplished by threatening employers with the "stick" of civil penalties for non-compliance, but through indirect means that motivated them with the "carrot" of lower costs; therefore, the "added inducement created by the wage break . . . [was not] tantamount to a compulsion" under ERISA. *Id.* at 333. Perhaps most important, the statute at issue regulated employee wages, which are not covered by ERISA and which are matters of local concern that had "long been regulated by the States." *Id.* at 330. Indeed, Congress had enacted legislation that "recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue." *Id.*[5]

Finally, in *De Buono*, New York imposed a tax on "gross receipts for patient services at hospitals, residential health care facilities, and diagnostic and treatment centers." 520 U.S. at 809-10. Similar to the law in *Travelers*, the New York statute regulated health care *providers*, not plans or plan sponsors, and therefore, any economic effect that the law had on plans was collateral. Once again, because the law targeted the entire health care industry, and therefore "clearly operate[d] in a

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[5] For the same reason, the "prevailing wage" cases relied on by the City from this Circuit are distinguishable; such wage laws have traditionally been an area of state concern, and therefore, fall outside the core ambit of ERISA preemption. *See, e.g., WSB Elec., Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996). To the extent there is any tension between those cases and a finding that the Ordinance is preempted, it is the prevailing wage cases which must yield.

field that has been traditionally occupied by the States," the law was not preempted by ERISA. *Id.* at 814 & n.10 (internal quotation marks omitted).

As the Fourth Circuit recognized in *Fielder*, ERISA preemption of the Maryland law did not depend on the indirect effect caused by regulation of entities such as hospitals that do business with ERISA plans. Rather, a law that mandates employer health payments both *creates* and *directly regulates* a plan. Put simply, "state-imposed regulation of employers' provision of employee benefits conflict with ERISA's goal of establishing uniform, nationwide regulation of employee benefit plans." *Fielder*, 475 F.3d at 191. Similarly, the Ordinance here, by forcing employers to contribute to employee health care, "implicates an area of core ERISA concern." *Egelhoff*, 532 U.S. at 147. Therefore, "unlike generally applicable laws regulating 'areas where ERISA has nothing to say,' which [the Supreme Court has] upheld notwithstanding their incidental effect on ERISA plans, [the Ordinance] governs the payment of benefits, a central matter of plan administration." *Id.* (quoting *Dillingham*, 519 U.S. at 330).

In stark contrast, this Court's stay decision made no distinction between general health care regulations that have minimal or no effect on the uniform administration of employer plans—as in *Travelers*, *Dillingham*, and *De Buono*—and laws that directly target the establishment, funding, and administration of ERISA plans; instead, it found that somehow *all* laws relating to health care are entitled to a pre-

sumption against preemption because they are subsumed within the "traditional police powers of the State." *GGRA*, 512 F.3d at 1120. By the stay panel's reasoning, the "trilogy" cases save the present Ordinance from preemption because the Ordinance merely "influences" an employer's choice of health care expenditures, an influence that, as *Travelers* supposedly "makes clear, . . . is entirely permissible." *Id.* at 1122. The panel therefore extended *Travelers*' "Hobson's choice" analogy—which applies only to cases of *indirect* regulation—to statutes that *directly* regulate an ERISA plan. But no inquiry into the degree of economic coercion is required when a state law, under pain of a civil enforcement action, either requires an employer to make health care payments or else "dictates the choices" of payments; rather, such laws categorically "relate to" a plan and hence are preempted.

The panel's analysis in the stay decision therefore misinterprets governing ERISA case law. In any event, the Court should avoid adopting an expansive reading of the "trilogy" cases when another circuit has plainly rejected such a reading, and the result would be a circuit split on the critically important issue of ERISA plan administration. *See, e.g.*, *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (agreeing with sister circuit's decision where "the creation of a circuit split would be particularly troublesome").

* * *

ERISA gives employers the freedom to select what health care benefits to provide to employees. It also guarantees that the federal government will exercise exclusive oversight over the regulation of plan funding and administration. The Ordinance conflicts with both of those federal objectives by dictating minimum benefit levels and specific regulatory requirements for employees within the City. Unless the Ordinance is found preempted, other localities will be emboldened to enact their own versions of the San Francisco law, and uniform plan administration will be wholly frustrated. The sophistical distinction between "benefits" and "payments" advanced by the City is without any foundation in the case law or the purposes of the ERISA preemption provision, and would allow wholesale circumvention of the many Supreme Court decisions making plain that states and localities may not mandate employee benefits. In short, the City's arguments do not merit creating a circuit split with the Fourth Circuit on an issue of paramount importance to nationwide employers.

CONCLUSION

The district court's order granting plaintiff's motion for summary judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 6,486 words. This word count excludes the table of contents, table of authorities, and signatures and certificates of counsel.

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I hereby certify that, on this 28th day of March, 2008, I caused two copies of the foregoing brief to be served by overnight commercial carrier on:

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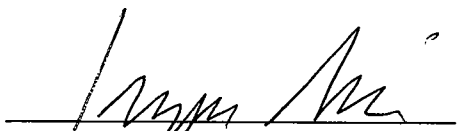

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