No. 08-1515

IN THE
Supreme Court of the United States

GOLDEN GATE RESTAURANT ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondent.

SAN FRANCISCO CENTRAL LABOR COUNCIL, et al.,

Intervenors/Respondents.

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

BRIEF OF AMICI CURIAE THE ERISA INDUSTRY COMMITTEE AND NATIONAL BUSINESS GROUP ON HEALTH IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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The ERISA Industry Committee ("ERIC") and the National Business Group on Health ("NBGH") respectfully submit this brief *amici curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICI CURIAE

ERIC is a non-profit corporation representing America's largest private-sector employers. ERIC's members maintain, administer, and provide services to health care plans and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq*. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

NBGH, formerly known as the Washington Business Group on Health, is a non-profit organization devoted to representing large employers' perspectives on national health policy issues. NBGH is the national voice of large employers dedicated to finding solutions to the nation's most important health care issues.

Together, ERIC and NBGH have well over 300 members. Millions of active and retired workers and their families receive health care benefits through employee benefit plans sponsored by ERIC's and NBGH's members.

These *amici* participate in cases with the potential for far-reaching effects on employee benefit plan design or administration, and in which they seek to present views

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[1] The parties have consented to the filing of this brief after timely notice, and their respective letters of consent have been lodged with the Clerk. S. Ct. R. 37.2. No party authored this brief in whole or in part and no person or entity other than ERIC, NBGH, or their members contributed monetarily to its preparation or submission. *Id.* 37.6.

that will not be presented by the parties or other potential *amici*.[2] ERIC and NBGH believe that this is such a case.

The Ninth Circuit's ruling in this case—that ERISA does not preempt local laws requiring employers to make expenditures for employee health care, or equivalent payments to a local government, at a specified level or higher—opens the door to a patchwork quilt of local ordinances that will prevent employers that operate and provide health care benefits in more than one state or municipality from providing uniform nationwide health care coverage for their employees. As a result of the decision, ERIC's and NBGH's members face the prospect as employers of a patchwork quilt of varied welfare plan mandates and regulations around the country.

STATEMENT

1. Although ERISA provides incentives that strongly encourage employer-provided benefit plans, nothing in the statute requires employers to establish employee benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Moreover, when an employer elects to establish an employee benefits plan, the statute allows the plan sponsor to define the benefits provided. *See id.*; *Black & Decker*, 538 U.S. at 833; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 511 (1981).[3]

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[2] *See*, *e.g.*, *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring in part and in judgment) (citing ERIC's *amicus* brief); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999).

[3] A plan sponsor's latitude to define the content of employee benefits plans is subject only to specified federal requirements (continued…)

2. Large businesses are substantially more likely than smaller firms to offer health benefits to their employees. According to a 2007 survey by the U.S. Department of Labor, among firms employing at least one hundred workers, 93% of employers offered health care benefits. By contrast, only 59% of smaller firms (with less than one hundred employees) offered some form of health care coverage to their employees. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007, at 15 tbl.7.[4]

Large firms like the members of ERIC and NBGH typically have employees in numerous jurisdictions. Such multi-jurisdictional employers provide a substantial percentage of all of the private health care coverage offered in the United States. *See generally id.* Large firms (with more than 5,000 employees) also are considerably more likely than small firms to sponsor self-insured health plans. William Pierron & Paul Fronstin, Employer Benefit Research Institute, *Issue Brief No. 314: ERISA Pre-emption: Implications for Health Reform and Coverage*, at 11 (2008).[5] The difference is significant because ERISA specifically exempts self-insured plans from State regulation; consequently, employers that sponsor self-insured health plans can tailor their plans to

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such as ERISA's anti-backloading rules for accrual of pension plan benefits, *e.g.*, 29 U.S.C. § 1054(b)(1)(B), and the continuance-of-benefits requirements for group health plans established by COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1986), *see id.* § 1162(2).

[4] This Labor Department report is available online at http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf (last viewed July 9, 2009).

[5] This EBRI report is available online at http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf (last viewed July 9, 2009).

address their employees' needs and avoid the substantial costs and administrative burdens of complying with the patchwork requirements of State insurance laws. *See* 29 U.S.C. § 1144(b)(2)(B); Pierron & Fronstin, *supra*, at 11.[6]

3. Of course, multi-jurisdictional employers are not necessarily very large corporations with operations nationwide. Smaller regional and local enterprises frequently operate in multiple municipal, county, and State jurisdictions. A business based in San Francisco may employ workers in Oakland or San Jose. Likewise, an enterprise in St. Louis, Missouri, may employ workers at sites nearby in Illinois; one based in Kansas City may have workplaces in both Missouri and Kansas. A local restaurant chain based in Washington, D.C., might employ workers, not only in the District of Columbia, but also at workplaces in Montgomery and Prince George's Counties in Maryland, the City of Alexandria, Virginia, or Arlington and Fairfax Counties in Virginia.[7]

4. ERISA preemption is essential for multi-jurisdictional employers. Under ERISA, multi-jurisdictional employers can offer a single, coordinated package of employee health care benefits to all eligible employees, regardless of where they live, where they work currently, or where they might be transferred by the employer. Through administrative efficiencies, this permits plans to

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[6] *See also* Victoria Craig Bunce & JP Wieske, Health Insurance Mandates in the States 2008 (Council for Affordable Health Ins., Alexandria, Va.), Jan. 2008 (listing state health insurance mandates and estimating effects of compliance costs), *available online at* http://www.cahi.org/cahi_contents/resources/pdf/HealthInsuranceMandates2008.pdf (last viewed July 9, 2009).

[7] Similar "local" employers with worksites in multiple municipalities, counties, or States could be found in metropolitan areas around Boston, New York City, Philadelphia, Chicago, Dallas, Los Angeles, and elsewhere.

provide health care benefits at costs that are significantly lower than they would be under a regime requiring a multi-jurisdictional employer to meet the varying mandates of each State or locality in which one or more of its employees works.

The ability to provide uniform benefits and to administer plans uniformly across jurisdictional lines facilitates the negotiation and implementation of collective bargaining agreements that cover workers in multiple municipal and State jurisdictions.

Preemption also is important to employees who benefit from a coherent system regardless of where they work, live, or obtain their health care services. Thus, an employee who transfers or relocates to a workplace in a different jurisdiction can continue to participate in the same nationwide benefit plan and can retain the same benefits that are important to him or her, particularly if the employee or a family member suffers from a disease or condition that is currently undergoing treatment. The retention of those benefits is vital to avoiding the confusion that, in the absence of a uniform plan, would inevitably arise as a result of a transfer.

Furthermore, the ability to provide uniform benefits to all eligible employees, across jurisdictional lines, also fosters employee morale and avoids inequities by allowing workers in comparable positions to receive the same benefits regardless of their locations.

5. The San Francisco Health Care Security Ordinance ("San Francisco Ordinance") requires every covered employer in the City to certify that it has made the required "health care expenditure" either directly or indirectly on behalf of every covered employee.[8] Direct

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[8] The required health care expenditure depends on the number of covered employees, and is scheduled to be adjusted (continued…)

expenditures include amounts spent to provide health care coverage via health savings accounts, reimbursement of employee expenditures, payments to third parties, and costs incurred in the direct delivery of health care to employees. Unless the employer makes such expenditures in at least the requisite amount for every covered employee, the employer must pay the difference to the City to provide health care for the employer's employees. S.F., Cal., Admin. Code § 14.1(b)(7), Pet. App. at 110a-111a; *id.* § 14.3, Pet. App. at 115a-117a.

The San Francisco Ordinance imposes related reporting and recordkeeping requirements on employers. *Id.* § 14.3(a), Pet. App. at 116a-117a. As an initial matter, the employer must identify its "covered employees." *Id.* § 14.1(b)(2), Pet. App. 107a-109a; HCSO Regs. § 3.1, Pet. App. 130a-132a. A "covered employee" is one who performs at least ten hours of work per week within the City, including the time a transient employee spends in the City performing substantive duties—*e.g.*, deliveries—and time worked by telecommuters from homes in the City. *Id.* § 3.1(A)(3), Pet. App. at 130a; *id.* § 3.1(C)(1), Pet. App. at 131a; *id.* § 6.1(C)(1)(d), Pet. App. at 140a.[9]

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annually. *See* S.F., Cal., Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance ("HCSO Regs."), § 5.2, Pet. App. at 138a-139a.

[9] The San Francisco Ordinance effectively obligates employers with covered employees on salary (for whom hours of work might not otherwise be tracked) to develop systems to record the hourly "work performed" information the Ordinance requires. By contrast, in implementing ERISA, the Treasury Department avoided saddling employers with such an hour-counting requirement—even for pension plans subject to ERISA's 1,000-hour rule. *See Johnson v. Buckley*, 356 F.3d 1067, 1072-74 (9th Cir. 2004) (discussing the pertinent Treasury regulations and noting that one of the primary goals of ERISA is to reduce the burden of compliance with its (continued…)

Employers also are required by the Ordinance to track their health care expenditures. *Id.* § 6, Pet. App. at 139a-142a. What constitutes a qualifying expenditure under the Ordinance is governed by the implementing regulations. *See id.* § 4, Pet. App. at 135a-137a. Apart from stating that medical expenses currently deductible under the Internal Revenue Code may be counted, *id.* § 4.1(B), Pet. App. at 135a, the HCSO Regulations merely offer examples for determining what spending does (or does not) count toward the mandatory expenditure requirement, *see id.* § 4.2(A), Pet. App. at 135a-136a; *id.* § 4.3, Pet. App. at 137a. For example, the Regulations exclude administrative expenses associated with third-party provision of health care, *id.* § 4.2(C), Pet, App. at 137a, a distinction that employers find difficult to make. The Regulations also provide that qualifying expenditures include items that are usually treated as personal expenses and excluded from coverage by many ERISA health care plans (*e.g.*, non-prescription allergy medications, cold medicines, and pain relievers). *Id.* § 4.3, Pet. App. at 137a.

The Regulations require the employer to provide a detailed account of each employee's personal information and work history, *id.* § 7.2(A)(1)-(2), Pet. App. at 143a, as well as "records [of expenditures] sufficient to establish compliance with the Employer Spending Requirements of this Ordinance, including, as applicable, records of health care expenditures made, calculations of health care expenditures required under this Ordinance for each covered employee, and proof documenting that such expenditures were made at least quarterly each year," *id.* § 7.2(A)(3), Pet. App. at 143a-144a.

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provisions by plan administrators); *Swaida v. IBM Ret. Plan*, 570 F. Supp. 482, 487-88 (S.D.N.Y. 1983) (same), *aff'd per curiam*, 728 F.2d 159 (2d Cir. 1984).

SUMMARY OF ARGUMENT

1. Establishing a regulatory regime that allows employers to provide uniform benefits and plan administration for employees nationwide was a primary congressional goal when enacting ERISA. Congress achieved that goal through ERISA section 514(a), 29 U.S.C. § 1144(a), which expressly and expansively provides for federal preemption of State laws relating to employee benefits plans. Enforcement of that preemption provision is essential so that employers will not confront a patchwork of myriad state and local regulations that would prevent them from providing uniform benefits across jurisdictional lines. The erroneous holding by the court of appeals that ERISA does not preempt the San Francisco Ordinance contravenes Congress's expressed intent and undermines its important goals.

2. The Ninth Circuit's decision created a conflict among the courts of appeals because its analysis cannot genuinely be reconciled with the reasoning of the Fourth Circuit, which held that ERISA preempted an employer health care spending mandate in Maryland. Nor is the Ninth Circuit decision consistent with this Court's jurisprudence applying ERISA section 514(a). The decision of the court of appeals in this case introduces grave confusion as to the scope of ERISA preemption, which should be addressed and corrected by the Court.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Decision Undermines the Statutory Goal of Allowing Uniform Plan Design and Administration by Multi-Jurisdictional Employers

The Petition in this case presents an issue of grave national importance, especially to the nation's employers that provide jobs and benefits to workers, retirees, and

their families across the land: whether Congress's objective of creating a regime of uniform regulations for employee benefit plans can be subverted by myriad local schemes that can impose varied requirements for employer-provided health care and other employee benefits to workers.

A. In section 514(a), ERISA contains one of the most expansive preemption provisions of any federal statute. Although the Ninth Circuit opinion refers to the creation of a uniform regulatory regime as *one* of the purposes of ERISA, Pet. App. at 13a, it fails to acknowledge the strength of Congress's intent to achieve that goal and also fails to give effect to that intent.

When enacting ERISA, Congress was not content to provide the basis for implicit preemption by merely occupying the regulatory field for employer-provided retirement and welfare plan benefits. Nor did Congress merely provide that any State regulation that was inconsistent with federal requirements would be preempted. Section 514(a) expressly declares that the statute preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added).[10]

As Professor James Wooten observed, "preemption issues played a pivotal role in Congress's decision to pass ERISA." James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 2*, J. PENSION

[10] This broad preemption provision is subject to limited express exceptions. *See*, *e.g.*, 29 U.S.C. § 1144(b)(2)(A) (state laws regulating insurance, banking, or securities are not preempted).

BENEFITS, Vol. 14, No. 3, at 5 (Spring 2007).[11] Before ERISA was enacted, employee benefit plans were regulated by a patchwork of State statutes, local ordinances, and court-made rules. An employer that provided benefits to a multi-state work force encountered severe administrative difficulties and wasteful expense as it attempted to comply with rules that differed from State to State, and sometimes from city to city. Against this backdrop, a coalition reflecting both employer and labor perspectives sought not only the protection of retirement plan assets (as the Ninth Circuit emphasized in this case), but also the establishment of a uniform regulatory regime nationwide for both retirement and welfare benefit plans. *See id.* at 10.

This Court has repeatedly recognized that one of the primary purposes of ERISA was to achieve uniformity—and, conversely, to prevent multiplicity—in employee benefits regulation. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) ("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law ...."). As the Court has noted, preemption serves the congressional goal "to minimize 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. "A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain

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[11] This article by Prof. Wooten is available online at http://www.law.buffalo.edu/Faculty_And_Staff/submenu/Wooten/ERISAPreemptionPart2.pdf (last viewed July 9, 2009).

from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) ("To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."). Congress deemed preemption necessary to encourage voluntary employer sponsorship of employee benefit plans.

As noted above, the presence—or absence—of health care benefit plans may result from collective bargaining in which the provision and content of such benefits was a significant, but not exclusive, issue for negotiation between labor and management. Preemption precludes varied State and local regulation that would hinder such collective bargaining for multi-jurisdictional workforces. This Court has recognized that the federal interest in preemption is particularly important in this context. *See Alessi*, 451 U.S. at 525.

B. ERISA's legislative history underscores the importance that legislators attached to its express preemption provision. The bills passed by the House and Senate as precursors to ERISA included a preemption provision that was much narrower than the provision that ultimately became section 514(a) of ERISA. The precursor bills would have superseded State law only in areas specifically regulated by the federal statute. In conference, however, the conferees recognized that such a provision would have only limited effect, insufficient to preclude State regulation that would hinder uniform plan design and administration. Senator Javits, one of the chief architects of ERISA, explained that the narrow preemption provision "open[ed] the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." He concluded that, "on balance, the

emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain [specified] exceptions—the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29942 (Aug. 22, 1974) (remarks of Sen. Javits).[12]

The principal House sponsor of ERISA, Representative John Dent, was equally emphatic in describing the central importance of a broad preemption provision. Representative Dent stated:

> I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong. Rec. 29197 (Aug. 20, 1974) (remarks of Rep. Dent).

The conferees understood that the broad preemption provision included in ERISA would prevent State and local governments from experimenting with employment-related health care reform. In fact, one of the reasons that the conferees expanded the preemption provision was to preclude State-by-State mandates for employer-provided health care. *See* Michael S. Gordon, *The History*

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[12] Senator Williams similarly emphasized the importance of ERISA's preemption provision. *See* 120 Cong. Rec. 29933 (Aug. 22, 1974) (remarks of Sen. Williams) (stating that the conference bill eliminated the threat of inconsistent State and local regulation of benefit plans and was intended "to apply in the broadest sense" to State or local actions with the force of law).

of ERISA's Preemption Provision and Its Bearing on the Current Debate Over Health Care Reform (1992).[13] When the conferees debated ERISA, Hawaii had recently enacted a health reform measure and California was considering similar legislation. *See Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980) (holding that the Hawaiian law enacted in 1974, mandating employer-provided health care programs, was preempted by ERISA), *summarily aff'd*, 454 U.S. 801 (1981).[14] The conferees feared that inconsistent State laws regulating health care would undermine employment-based health plans, and they recognized that the narrow preemption provision included in the precursor bills was not sufficient to protect plans from this threat. *See* Gordon, *supra*, at 29-30.

C. The Ninth Circuit's analysis, upholding the employer spending mandate in the San Francisco Ordinance, would allow a "patchwork scheme of regulation," *Fort Halifax Packing*, 482 U.S. at 11, that could vary not only among the fifty States, but among thousands of county and municipal jurisdictions. The alternative to ERISA preemption in this context would be a patchwork regime that requires multi-jurisdictional employers to adapt their policies to the disparate mandates of every locality and State that regulates

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[13] This text by Mr. Gordon, minority counsel to Senator Javits during the consideration and passage of ERISA, is reproduced in *Health Care Reform: Managed Competition and Beyond*, Employee Benefits Research Institute, Issue Brief No. 135, at 28-30 (March 1993), *available online at* http://www.ebri.org/pdf/briefspdf/0393ib.pdf (last viewed July 9, 2009).

[14] In 1982, Congress enacted a unique exception to ERISA's preemption provision to allow the Hawaiian health care law as enacted in 1974. *See* Pub. L. 97-473, Sec. 302 (passed December 1982, signed Jan. 14, 1983), *codified at* 29 U.S.C. § 1144(b)(5).

employer health care expenditures and other employer-provided benefits.

Under the San Francisco Ordinance's mandate, employers must be able to prove to the City that they have met the minimum expenditure requirement on the basis of expenditures that the local rules define as qualifying health care expenditures for covered employees. Nothing guarantees that other jurisdictions—*e.g.*, Oakland or Los Angeles or Chicago or New York—would define eligible expenditures (or covered employees) in the same way. As a result, employers would constantly need to monitor amendments to State and local laws to determine whether their health care expenditures count toward the spending requirement of each jurisdiction in which they have employees (and which employees count). This problem is inevitable once State and local regulation of employee benefits is permitted, leaving multi-jurisdictional employers functionally unable to offer a uniform, nationwide array of benefits.

A similar problem arises from diverse recordkeeping requirements. Data that the San Francisco Ordinance requires may differ substantially from the data required by other jurisdictions, and employers will be forced to attempt to meet each jurisdiction's particular requirements. The problems employers face in meeting San Francisco's recordkeeping requirements would be exponentially increased for employers doing business in multiple jurisdictions. Absent preemption of such local mandates, employers would face a maze of requirements that would divert time and resources from providing care and toward compliance with the huge administrative burden that these various ordinances would create. Many employers would find that maintaining a health plan was not worth the effort, assuming it were even possible.

D. Such concerns are not speculative. Businesses have already faced the threat of conflicting spending and recordkeeping requirements under State and county

health care laws enacted not only in San Francisco, but in Maryland, New York, Massachusetts, and Vermont, which have sought to impose spending and recordkeeping requirements markedly different from those imposed by the San Francisco Ordinance. *See*, *e.g.*, *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 184 (4th Cir. 2007) (Maryland legislature enacted a statute requiring certain employers to spend 8% of total wages on "health insurance costs" and to make annual reports regarding numbers of employees, "health insurance costs," and the percentage of compensation spent on "health insurance costs"); *Retail Indus. Leaders Ass'n v. Suffolk County*, 497 F. Supp. 2d 403, 406-07 (E.D.N.Y. 2007) (county enacted legislation requiring certain employers to make expenditures equivalent to the approximate cost to the public health care system of providing health care to each employee, as determined by an administrative agency). Even the small sample of laws described in published judicial decisions makes it evident that States and municipalities could take a wide variety of approaches and impose, in the aggregate, enormous recordkeeping burdens on employers.

II. The Court Should Resolve the Confusion Created by the Conflicting Decisions of Courts of Appeals Concerning Preemption of Local Laws Mandating Employer Health-Care Spending.

A. As the eight judges of the Ninth Circuit who dissented from the denial of rehearing *en banc* correctly observed, that court's panel decision cannot be genuinely reconciled with the decision of the Fourth Circuit in *Fielder*. *See* Pet. App. at 53a-55a ("The holdings of *Fielder* and *Golden Gate* stand in clear opposition"). The Secretary of Labor, in her brief as *amicus curiae* in support of the Petitioner's request for rehearing in the Ninth Circuit, likewise recognized that the panel decision

in this case "conflicts with the Fourth Circuit's analysis of the uniformity issue in *Fielder*." *Id.* at 80a.

In *Fielder*, the challenged Maryland law required certain large employers to spend 8% of their total payroll on employee health benefits or to pay the difference between the mandated amount and their actual expenditures to the State. 475 F.3d at 183. Any funds paid to the State could be used only to fund Maryland's health programs for children. *Id.* at 185. Although the San Francisco Ordinance requires the City to earmark the funds paid by an employer to provide health care to the particular employer's employees, the two laws take the same basic approach: they require the employer to choose either to spend a specified amount to provide health care directly to its employees or to pay the same amount to the State or local government.

The Fourth Circuit held that ERISA preempted the Maryland law because it left an affected employer with no rational choice other than to provide its employees with health care and thereby required the employer to alter (or create) an ERISA plan. The employer that responds to a mandate by providing the required health care benefits to its workforce can hope to receive "improved retention and performance of present employees and the ability to attract more and better new employees." *Id.* at 193. Conversely, an employer that possesses the resources to provide mandated benefits but chooses to pay the State instead gains nothing and "might suffer from lower employee morale and increased public condemnation." *Id.* Consequently, "the only rational choice employers have is to structure their ERISA health care benefit plans so as to meet the minimum spending threshold." *Id.*

From an employer's perspective, the San Francisco Ordinance upheld by the Ninth Circuit is indistinguishable from the Maryland law because it puts the employer in the same position. When economically feasible, the employer's purported choice between paying

for its own employees' health care coverage and paying an equivalent amount to the government entity is really no choice at all. *See Suffolk County*, 497 F. Supp. 2d at 417 (evaluating a similar law enacted by a New York county and holding that "it is unreasonable to expect employers to contribute to the community or directly to the state, rather than to their own employees"). By far the most—and perhaps only—rational decision for an employer that can shoulder the administrative burden is to meet the San Francisco Ordinance's spending mandate by establishing an ERISA health care plan, thus forcing it to do what Congress in ERISA specifically sought to avoid.

B. Nor can the Ninth Circuit decision be reconciled with the precedents of this Court construing the reference in section 514(a) to State or local laws that "relate to" employee benefit plans. A law relates to an ERISA employee benefit plan for purposes of section 514(a) "if it [1] has a connection with or [2] reference to such a plan." *California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997) (internal quotation marks omitted).[15] In this case, the San Francisco Ordinance has an impermissible relation under either prong of the analysis.

As the Ninth Circuit acknowledged, the amount that the San Francisco Ordinance requires an employer to pay the City depends on whether, and to what extent, an employer is making expenditures in connection with and in reference to an ERISA welfare benefit plan.

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[15] In determining if other state laws had an impermissible "connection" with ERISA plans, the Court has looked to both (a) the objective of ERISA as a guide to the state laws that Congress understood would survive and (b) the nature of the effect of the state law on ERISA plans. *See Dillingham*, 519 U.S. at 325; *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-59 (1995).

Businesses that sponsor ERISA health care plans whose scope of coverage and qualifying costs make those employers "Full High Coverage Employers"—to use the Ninth Circuit's phrase, Pet. App. at 10a—owe the City nothing under the San Francisco Ordinance.[16] Yet employers that sponsor ERISA plans that entail less costs than the City's spending mandate, or whose plans do not cover all required employees—"Full Low Coverage Employers" and "Selective High Coverage Employers," *id.* at 10a-11a—must pay amounts to the City that are determined by the shortfall between their costs or coverage and the San Francisco Ordinance's mandate.

Consequently, the financial obligation imposed by the Ordinance on an employer in San Francisco is directly "connected with" any ERISA health care plan that the employer has chosen to sponsor. Although the Ordinance scrupulously avoids using words such as "employee benefit plan," "welfare plan," or "group health plan," its definition of "health care expenditure" (Pet. App. 110a) encompasses the costs to employers of providing and administering such ERISA plans and thus refers to such plans in determining the quantum of the payment due, if any, to the City.

C. The Ninth Circuit opinion undermines ERISA's preemption goals by emphasizing another congressional objective: to protect against misuse of benefit plan assets. *See Golden Gate Restaurant Ass'n v. City of San Francisco*, 546 F.3d 639, 649 (9th Cir. 2008) (referring to "the first underlying purpose of ERISA"), *reh'g & reh'g en*

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[16] Those employers nonetheless are required to comply with reporting and recordkeeping requirements of the San Francisco Ordinance.

banc denied, 558 F.3d 1000 (2009).[17] That purpose, however, is neither inconsistent with nor of greater importance than Congress's intent to broadly preempt patchwork State regulation of employer-provided benefit plans, including health care and other welfare benefit plans.[18]

Given employer health care mandates that already have been enacted in multiple jurisdictions, and the presence of the Ninth Circuit's decision as a putative roadmap for State, county, and local governments to follow, the conflict among the decisions of the courts of appeals promises to engender recurring controversy and litigation. That conflict is ripe for resolution by the Court at this time.

D. Finally, the *amici* note that the current Congress has begun the process of considering federal legislation aimed at expanding the availability and lowering the costs of health care in this country. Contrary to the City's assertion in its response to the Petitioner's request for a stay of the court of appeals mandate,[19] this circumstance

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[17] It appears that this portion of the text of the Ninth Circuit decision was inadvertently omitted from the Appendix to the Petition.

[18] The Ninth Circuit's decision also circumvents congressional intent regarding preemption by relying, in part, on the assertion that ERISA was not intended to preempt either State regulation of heath care providers or governmental provision of health care services to persons with low or moderate incomes. Pet. App. at 14a. In doing so, the opinion relies on a sleight-of-hand that leaps from traditional State regulation of health care services and State agencies' delivery of health care to the public (both allowed by ERISA) to State-imposed mandates that *employers* provide health care benefits (preempted by ERISA).

[19] *See* Docket No. 08A824, Joint Response to Application for Order Staying Mandate and Vacating Stay of District Court Judgment, at 25-26.

increases, rather than diminishes, the need for correction of the Ninth Circuit's erroneous decision. All the significant health care reform proposals currently under discussion are similar in at least one respect: they give credence to and depend upon the continuing participation of employers as vital sponsors of benefits providing access to health care. Enforcement of ERISA's preemption provision is essential to that goal; conversely, as the framers of ERISA recognized, a balkanized legal environment could be fatal to it.

CONCLUSION

For the foregoing reasons, the *amici* respectfully ask this Court to grant a writ of certiorari to resolve the important question presented herein.

Respectfully submitted,

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