

**Nos. 07-17370, 07-17372**

Decision: September 30, 2008  
Panel Members: Goodwin, Reinhardt, and W. Fletcher

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GOLDEN GATE RESTAURANT ASSOCIATION,  
Plaintiff/Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO,  
Defendant/Appellant;

SAN FRANCISCO CENTRAL LABOR COUNCIL; SERVICE  
EMPLOYEES INTERNATIONAL UNION LOCAL 1021; SEIU UNITED  
HEALTHCARE WORKERS-WEST; and UNITE HERE! LOCAL 2,  
Intervenors/Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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**PETITION FOR REHEARING EN BANC**

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## **RULE 35 STATEMENT AND INTRODUCTION**

In 2006 San Francisco enacted the “Health Care Security Ordinance” – a “pay or play” law requiring covered employers to pay a minimum hourly amount toward each employee’s health care. S.F., Cal., Admin. Code Chap. 14, §§ 14.1 – 14.8 (2007) (as amended April 2, 2007). Employers who cannot show that they satisfy this obligation in full must pay the balance directly to the City. The Ordinance also imposes extensive new recordkeeping and reporting requirements on employers, subjecting them to severe penalties for failure to comply.

Plaintiff Golden Gate Restaurant Association (“GGRA”) filed this action seeking a determination that the Ordinance is preempted by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.* The District Court (Hon. Jeffrey S. White) granted GGRA’s motion for summary judgment, holding that the Ordinance “fails to withstand the expansive test of ERISA preemption” in that it has “both an impermissible connection to ERISA plans and makes unlawful reference to such benefit plans.” *Golden Gate Restaurant Assn. v. City and County of San Francisco*, 535 F. Supp. 2d 968, 980 (N.D. Cal. 2007). The City appealed. A panel of this Court subsequently ruled that the Ordinance was not preempted and ordered the matter remanded for entry of judgment in favor of the City.

The issue presented in this appeal is of exceptional importance to employers and other stakeholders across the country. Eleven entities with national constituencies, including the United States Department of Labor, filed amicus briefs urging that the District Court judgment be affirmed. On the other side, the City was joined by several intervenors; the California Attorney General, among others, filed amicus briefs urging reversal.

There is good reason for this extraordinary level of national interest. The San Francisco Ordinance stands at the leading edge of a growing national phenomenon; almost three dozen states, counties, and cities have proposed or adopted similar “pay-or-play” laws in the past three years.<sup>1</sup> San Francisco City Attorney Dennis Herrera declared that, in light of the panel’s opinion, the Ordinance would be “a road map for state and local governments.”<sup>2</sup> Mayor Gavin Newsom said that the panel’s decision was a “huge victory,” proving that “every city and state in this country can provide health insurance if they are willing to challenge the conventional wisdom.”<sup>3</sup> If the panel’s opinion stands as written,

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<sup>1</sup> Julia Contreras & Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 St. Thomas L. Rev. 105, 136 (2006) (summary of recent pay-or-play legislation).

<sup>2</sup> Jason Dearen, *Court Upholds Legality of SF Health Care Plan*, San Jose Mercury News, Sep. 30, 2008.

<sup>3</sup> Marc Lifsher, *Federal Court Upholds San Francisco Healthcare Program*, Los Angeles Times, Sep. 30, 2008.

these remarks may well prove prophetic. By substantially narrowing the scope of ERISA preemption, the opinion encourages the proliferation of inconsistent regulations by states and local governments across the country. Employers operating in multiple jurisdictions will be burdened with a multiplicity of conflicting obligations, to the ultimate detriment of plan beneficiaries. This is “exactly the burden that ERISA seeks to eliminate.” *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

The panel’s opinion directly conflicts with existing Supreme Court and Ninth Circuit precedent, including the *Egelhoff* decision, *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), *General American Life Ins. Co. v. Castonguay*, 984 F. 2d 1518 (9th Cir. 1993), and *Scott v. Gulf Oil Corp.*, 754 F. 2d 1499 (9th Cir. 1985). In effect, the panel fashioned a new and much narrower ERISA preemption standard than this or any court has previously endorsed. Further, the panel’s opinion is in direct conflict with a recent decision of the Fourth Circuit Court of Appeals, *Retail Industry Leaders Assn. v. Fielder*, 475 F. 3d 180 (4th Cir. 2007), which struck down similar pay-or-play legislation in Maryland. *Fielder* was the first appellate opinion to deal with the issue, and this is the second. The panel’s opinion creates a conflict with *Fielder* that will leave employers and employees as well as state and local governments across the

country without clear guidance on the critical issue of employee healthcare regulation.

## PETITION

### **I. ERISA Preemption Was Intended To Prevent State And Local Interference With Employee Benefit Plan Administration.**

Congress enacted ERISA in 1974 as a comprehensive legislative scheme “to promote the interests of employees and their beneficiaries in employee benefit plans.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Coupled to the scheme was ERISA Section 514, 29 U.S.C. § 1144, which preempts “all state laws insofar as they may now or hereafter relate to any employee benefit plan.” Section 514 is “one of the broadest preemption statutes ever enacted.” *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F. 2d 543, 545 (9th Cir. 1992). The goal of ERISA preemption is “to minimize the administrative and financial burden of complying with conflicting directives” and “[to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)). A state law “relates to” an employee benefit plan “if it has a connection with or reference to such a plan.” *Shaw*, 463 U.S. at 97.

## II. The District Court Correctly Held That The Ordinance Is Preempted.

The District Court correctly held that the Ordinance has both a “connection with” and a “reference to” ERISA plans.<sup>4</sup> It has a “connection with” ERISA plans because “[t]he provisions require private employers to meet a certain level of benefits, and those benefits are the type regularly provided by employer ERISA plans.” 535 F. Supp. 2d at 976. In addition, the District Court found the Ordinance imposes:

... specific recordkeeping, inspection, and other administrative burdens related to the administration of their private health-care expenditures. ... Failure by an employer to maintain accurate records, to prepare an annual report detailing employer-provided health care expenses, or to permit the audit and inspection of its records subjects an employer to substantial daily penalties. [S.F. Admin. Code §§ 14.3(b), 14.4(e)(2)].

*Id.* As recognized by the District Court, these requirements “are ongoing and directly affect the administrative scheme of providing health care benefits.” *Id.*

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<sup>4</sup> The Ordinance was enacted on July 25, 2006. Details of the Ordinance are set forth at pages 13918-24 of the panel’s opinion. GGRA filed suit on November 8, 2006. The District Court granted summary judgment for GGRA on December 26, 2007. San Francisco and the Intervenors filed emergency motions for stay pending appeal. The District Court denied the motion on December 28, 2007, but the motions panel of this Court granted an emergency stay via a published order on January 9, 2008. *Golden Gate Restaurant Ass’n v. City and County of San Francisco*, 512 F. 3d 1112 (9th Cir. 2008). The motions panel retained the case as the merits panel and set argument for April 17, 2008. On September 30, 2008, the panel issued a decision reversing the judgment and remanding for entry of summary judgment against GGRA.

The Court further held that the Ordinance has a “connection with” ERISA plans because its requirements:

... affect the structure of private employers’ already existing plans by requiring that, in order to comply with the City’s additional requirements, employers either modify the administration of their existing ERISA plans or structure their additional payments with reference to the amounts paid under the existing plans.

*Id.* It found irrelevant that employers could make payments directly to a public entitlement program, echoing a common-sense conclusion that:

“[t]he undeniable fact is that the vast majority of any employer’s healthcare spending occurs through ERISA plans. Thus, the primary subjects of the [minimum expenditure requirements] are ERISA plans, and any attempt to comply with the statute would have direct effects on the employer’s ERISA plans.”

*Id.*, quoting *Fielder*, 475 F. 3d at 196. Finally, the District Court held that the Ordinance has a “connection with” ERISA plans because it would interfere with nationally uniform plan administration, one of ERISA’s principal purposes. “The [law] would deny [the employer] the uniform nationwide administration of its healthcare plans by requiring it to keep an eye on conflicting state and local minimum spending requirements and adjust its healthcare spending accordingly.”

*Id.* at 977, quoting *Fielder*, 475 F. 3d at 197.

The District Court also held correctly that a statute unlawfully “refers to” an ERISA plan and is preempted “if it mentions or alludes to ERISA plans, *and* has

some effect on the referenced plans.” *Id.* at 979, quoting *WSB Electric, Inc. v. Curry*, 88 F. 3d 788, 793 (9th Cir. 1996). The Court found that the Ordinance does both. First, it noted that the Ordinance “specifically references the existence of ERISA plans in its expenditure requirement provisions.” *Id.* at 978. It further found that:

[L]iability under the Ordinance is determined exclusively with reference to employer-provided benefits, mostly under existing ERISA plans, which plans are essential to the operation of the Ordinance. . . . The expenditure requirements take into account directly whether and how much employers are spending on employee health coverage. . . . In order to determine compliance, the Ordinance necessarily refers to whether and how much an employer pays for employee health coverage under its existing ERISA plans, assuming such employers maintain them at all.

*Id.* Accordingly, the Court concluded that “the analysis required to determine both whether an employee is covered and the amount the employee would be entitled to under the Ordinance with specific reference to amounts already paid under private ERISA plans, would alter the administration of existing private ERISA plans.” *Id.* The District Court’s detailed findings wholly support its conclusion that the Ordinance has an unlawful connection with, and makes reference to, employers’ ERISA-governed plans.

### **III. The Panel’s Opinion Contradicts Longstanding ERISA Preemption Authority.**

#### **A. In Holding That The Ordinance Has No “Connection With” ERISA Plans, The Panel’s Opinion Conflicts With Well-Established Law Of This Circuit.**

In reversing the District Court’s judgment, the panel held that the Ordinance has no “connection with” ERISA plans because it:

[D]oes not require any employer to adopt an ERISA plan or other health plan. Nor does it require any employer to provide specific benefits through an ERISA plan or other health plan. Any employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health plan expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the City. The Ordinance thus preserves ERISA’s “uniform regulatory regime.” [Citation omitted]

Opn. at 13940. The panel concedes that the Ordinance is likely to change employers’ behavior but still insists that there is no “connection with” ERISA plans because the Ordinance does not dictate what that behavior will be. According to the panel, the Ordinance “does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or even to provide ERISA plans or employee benefits at all.”<sup>5</sup> Opn. at 13941. This is not the correct standard.

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<sup>5</sup> The Panel clearly erred on this point. An employer’s ongoing obligation to provide health care to its employees directly, through insurance, or through payment to a third party (including the City) constitutes an ERISA plan. ERISA defines “plan” to include “any plan, fund, or program . . . established or

Instead, this Court has long adhered to the standard explained in *General American Life Ins. Co. v. Castonguay*, *supra*, 984 F. 2d 1518. The *Castonguay* court held that:

The key to distinguishing between what ERISA preempts and what it does not lie, we believe, in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee. . . . Because of ERISA’s explicit language [citation omitted] and because state laws regulating these relationships (or the obligations flowing from these relationships) are particularly likely to interfere with ERISA’s scheme, these laws are presumptively preempted.

*Id.* Under this approach, the Court must ask “whether the state law reaches a relationship that is already regulated by ERISA.” *Id.* at 1522.

It doesn’t matter whether the state law regulates the relationship directly (by telling the parties what they can or cannot do) or indirectly (by imposing on the parties extra duties that flow from their conduct in this relationship). Any regulation of the relationship is basis enough for the preemption.

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maintained by an employee . . . for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital case or benefits, or benefits in the event of sickness.” ERISA § 3(1), 29 U.S.C. § 1002(1). As the panel recognized, the Ordinance is obviously preempted if it mandates creation of an ERISA plan.

*Id.* This “relationship” test has been applied in virtually every subsequent ERISA preemption case decided by this Court.<sup>6</sup> It was applied (quite correctly) by the District Court which found, as noted above, that the Ordinance requires modification of the “core relationship” between the private employers and their intended beneficiaries (i.e., employees and their families). 535 F. Supp. 2d at 977. The panel never mentioned the “relationship” test but devised its own, much narrower view of preemption.

**B. The Panel’s Opinion Contradicts Prior Circuit Precedent In Reaching The Conclusion That Employer Payments To The City Do Not Result In The Creation Of An ERISA-Governed Plan.**

The GGRA and the Department of Labor contend that employer payments to the City, which entitle covered employees to receive health care benefits through the City’s public health plan, result in an ERISA-governed “plan, fund or program.” The panel recognized that, if this argument is correct, then “the Ordinance almost certainly makes impermissible ‘reference to’ an ERISA plan.” Opn. at 13927.

The panel avoided this result by holding that the public payment option does not create an “employee welfare benefit plan” within the meaning of ERISA. Opn.

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<sup>6</sup> See, e.g., *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F. 3d 1212, 1217 (9th Cir. 2000); *Blue Cross of California v. Anesthesia Care Associates Med. Group, Inc.*, 187 F. 3d 1045, 1053 (9th Cir. 1999); *Operating Engineers Health & Welfare Trust Fund v. JWW Contracting Co.*, 135 F. 3d 671, 678 (9th Cir. 1998).

at 13927. Specifically, the panel found that employer payments to the City, the associated recordkeeping requirements, and the other administrative requirements (including tracking which workers perform qualifying work in the City, tracking their hours, and tracking the credit the employer gets for health care payments to other entities) are an insufficient administrative burden to rise to the level of an ERISA “plan.” This ruling directly conflicts with this Court’s holding in *Scott v. Gulf Oil Corp.*, *supra*, 754 F. 2d 1499. *Scott* held that an ERISA plan is established where a “reasonable person” can “ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.” *Id.* at 1504, citing *Donovan v. Dillingham*, 688 F. 2d 1367, 1373 (11th Cir. 1982) (en banc).

In *Scott*, the Court found that a much less burdensome program – a simple agreement to provide severance pay to terminated employees at a rate of two weeks’ salary per year of employment – was sufficient to establish an ERISA plan. The panel does not dispute this, instead stating that “[t]he outcome of *Scott* is almost certainly no longer good law” in light of subsequent Supreme Court decisions. *Opn.* at 13932. But *Scott* has never been overruled. This Court has in fact continued to rely on *Scott* in recent years, *see Winterrowd v. Amer. Gen. Annuity Ins. Co.*, 321 F. 3d 933, 938 (9th Cir. 2003), and the Supreme Court cited it, without disapproval, in one of the cases cited by the panel. *See Fort Halifax*

*Packing Co. v. Coyne*, 482 U.S. 1, 7 fn. 4 (1987).<sup>7</sup> The panel’s clear conflict with *Scott* is by itself sufficient to require en banc rehearing.

**C. The Panel’s Opinion Conflicts With Prior Ninth Circuit Precedent In Holding That The Ordinance Does Not Make “Reference To” ERISA Plans.**

The panel relies on *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997), for the proposition that state law cannot make unlawful “reference to” ERISA plans unless it acts “immediately and exclusively” upon them or their existence “is essential to the law’s operation.” *Opn.* at 13942. However, the Supreme Court has recognized a wider range of impermissible references, including where a law “impose[s] requirements by reference to [ERISA] covered programs.” *Dillingham Constr.*, 519 U.S. at 324, citing *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. at 130-131. In fact, even under Ninth Circuit precedent cited by the panel, “a statute ‘refers to’ an ERISA plan and is therefore preempted if it mentions or alludes to

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<sup>7</sup> As part of its conclusion that public payments would not create a plan, the panel also stated that the factors adopted in *Scott* are “necessary but are not sufficient” to establish plan formation. This contradicts Circuit precedent such as *Curtis v. Nevada Bonding Co.*, 53 F. 3d 1023, 1028 (9th Cir. 1995), which – though cited by the panel – actually reiterated that “ERISA coverage extends to an arrangement sufficiently specific to “enable a reasonable person to 'ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.’” *Id.*, citing *Scott* and *Donovan*.

ERISA plans, *and* has some effect on the referenced plans.” *WSB Electric, Inc. v. Curry, supra*, 88 F. 3d at 793.

Here, as the District Court correctly found, the Ordinance refers to ERISA plans because it measures employers’ obligations by express reference to their payments to such plans. 535 F. Supp. 2d at 978. The panel tacitly recognized this reference by constructing five “categories” of employers covered by the Ordinance (such as “Full Low Coverage” employers and “Selective High Coverage” employers). Each category is defined by the questions whether (1) an employer has one or more ERISA plans, and (2) its contributions to such plans exceed the required minimums. *See* Opn. at 13922-23. These definitions, and their obvious impact on plan administration, show that the Ordinance refers to ERISA plans.

The panel also sought to distinguish the Ordinance from the law in *Greater Washington* by characterizing it as mandating “payments” rather than “benefits.” Opn. at 13944.<sup>8</sup> However, another panel of this Circuit has already recognized that this distinction makes no difference in the context of ERISA plans: “This ‘contribution/benefit’ dichotomy, while perhaps superficially appealing, is unsupported by the law.” *Local Union 598, Plumbers & Pipefitters Industry*

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<sup>8</sup> *Greater Washington* had struck down a District of Columbia law requiring employers to provide health care insurance coverage for injured employees eligible for workers’ compensation benefits on a level equal to that provided to their active employees under ERISA plans. 506 U.S. at 130.

*Journeyman & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d, 1213, 1219 (9th Cir. 1988). “Employer contributions are the fuel for [ERISA] plans. . . . As the district court concluded, “[T]he rate of contribution rests *at the very core of ERISA’s consideration.*” *Id.* (emphasis added).

**D. The Panel's Opinion Ignores One Of The Principal Purposes Of ERISA Preemption: Providing A Uniform Regulatory Regime Over Employee Benefit Plans.**

ERISA preemption “was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government.” *Ingersoll-Rand Co. v. McClendon*, *supra*, 498 U.S. at 142. The uniformity guaranteed by ERISA was intended to benefit employees and plan beneficiaries because higher administrative costs can lead “employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.” *Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 11; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (discussing Congressional recognition that employer flexibility would encourage greater benefits nationwide). “Requiring ERISA administrators to master the relevant laws of 50 States . . . 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 149-150.

The panel in this case never addressed the impact that the Ordinance will have – or that dozens or hundreds of such ordinances and statutes will have – on national uniformity. It simply denied that the Ordinance forces employers to do anything different with respect to the administration of their ERISA plans.

#### **IV. The Panel’s Opinion Conflicts With Fourth Circuit Precedent Holding That Local Pay-or-Play Laws Are Preempted By ERISA.**

The panel tried to distinguish the Fourth Circuit’s contrary holding in *Fielder* on the grounds that the Maryland pay-or-play statute offered the employer no reasonable choice but to increase its ERISA contributions. Opn. at 13946-47. It noted that any payments made to the State by employers under the Maryland statute would have been earmarked for general entitlement programs, providing no actual benefits for employees, and that no rational employer would therefore choose to pay money to the State when it could spend the same dollars on employee benefits. The panel held that under the Ordinance, however, money paid to the City does result in a benefit for employees; a rational employer might thus choose to “pay” rather than “play.” It determined that the public payment option was reasonable because the City’s health plan “provides tangible benefits to

employees.”<sup>9</sup> But this distinction was irrelevant to the Fourth Circuit’s holding. The *Fielder* court held that, even if there were some “meaningful avenue” by which the employer could incur non-ERISA healthcare spending, the Maryland statute would still have an impermissible “connection with” ERISA plans:

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

*Fielder*, 475 F. 3d at 196-197.

The panel relied entirely on the premise that employers have a choice – that the Ordinance does not actually compel an employer to have an ERISA plan or to change its ERISA plan if it has one. Yet, as the *Fielder* court observed, “the vast majority of any employer’s healthcare spending occurs through ERISA plans.” *Id.*

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<sup>9</sup> This position conflicts with the panel’s earlier reasoning when considering whether payments to the City create an ERISA plan. It had already concluded that such payments would not create a plan because they would provide no predictable benefits. Opn. at 13936 (“neither the employer nor the covered employee has any control over the kind and level of benefits provided by the [City plan]... An employer can make no promises to its employees with regard to the [City plan] or its coverage.”) It is difficult to reconcile the panel’s conclusion that payments to the City create an illusory benefit with its later conclusion that they provide a “meaningful alternative” for employers who could otherwise guarantee benefits through ERISA plans.

at 196-197. The argument that an employer *might* comply with a pay-or-play statute through some way allegedly not governed by ERISA “does nothing to refute the fact that in most scenarios, the Act would cause an employer to alter the administration of its healthcare plans.” *Id.* Options, meaningful or not, do not change the fact that the Ordinance will likely cause *most* employers to change how they deal with ERISA healthcare plans. That the Ordinance might not necessarily cause *all* employers to change their conduct does not mean that it has any less of a “connection with” ERISA plans. As the District Court correctly determined, “the Ordinance requires the modification of the *core relationship* between the private employers and their intended beneficiaries.” 535 F. Supp. 2d at 977 (emphasis added).

## **CONCLUSION**

This case presents an issue of great national importance: what state or local governments may do, and how far they may go, in trying to fashion solutions to the nation’s healthcare problems. Unfortunately, the panel’s decision creates great confusion, contradicting and departing from long-established Supreme Court and Ninth Circuit precedent and contradicting the only other Court of Appeals decision

to address the issue. Golden Gate Restaurant Association respectfully submits that this matter requires en banc review.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman type. According to the “Word Count” feature in my Microsoft Word software, this brief contains 4099 words up to and including the signature lines that follow the brief’s conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 21, 2008.

October 21, 2008

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## CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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/s/

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## **APPENDIX**