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Golden Gate and the Ninth Circuit's Threat to ERISA's Uniformity and Jurisprudence

I. INTRODUCTION

In March 2009, the Ninth Circuit Court of Appeals held¹ that San Francisco's Health Access Program was not enacted in contravention to the Employee Retirement Income Security Act ("ERISA").² Since the Program's enabling ordinance passes all of the tests describing laws not preempted³ by ERISA,⁴ the court held that the ordinance creates a permissible means for San Francisco to tax employers and create employee health benefits for its residents.⁵ Nevertheless, while applying its tests, the Ninth Circuit overlooked one of the main purposes of ERISA: "provid[ing] a uniform regulatory regime over employee benefit plans."⁶ Distracted by its responsibility to uphold and preserve state and local autonomy,⁷ the Ninth Circuit erred in its application of ERISA's tests to the point that it violated one of ERISA's primary purposes—uniformity.

1. The Ninth Circuit was petitioned for a rehearing en banc and, in denying that rehearing, issued *Golden Gate Rest. Ass'n v. City of San Francisco*, 558 F.3d 1000 (2009).

2. *Golden Gate Rest. Ass'n*, 558 F.3d at 1004.

3. 29 U.S.C. § 1144(a) (2006) (stating that the "provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any" ERISA plan).

4. ERISA's ever-complicated and oft-challenged preemption has been the source of an abundance of litigation. For an example of at least six cases in a five-year period where the Supreme Court ruled on an ERISA preemption, see *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992).

5. *Golden Gate Rest. Ass'n*, 558 F.3d at 1001 ("No employer is required by the Ordinance either to establish a new ERISA health care plan or to modify an existing ERISA health care plan.").

6. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004).

7. Although the dissent in *Golden Gate*'s denial of rehearing contends that the majority's primary distraction was its focus "on ERISA's objective of protecting against misuse of benefit plan funds," 558 F.3d at 1009 (Smith, J., dissenting), this Note will focus on the court's "presumption against preemption." While the dissent's arguments pointing to that distraction are interesting, the fact that the San Francisco Ordinance does little to encourage the abuse of plan funds, and actually provides a means by which a greater portion of San Francisco citizens may benefit from ERISA or similar plans, makes them less than compelling.

II. BACKGROUND

A. *The Impetus for ERISA*

In the early 1960s, the once iconic American car manufacturer Studebaker met its demise.⁸ During its colossal fall, Studebaker “terminated its pension plan for more than 4,000 employees, leaving many without promised benefits and with no recourse after 20 or more years of work.”⁹ This mismanagement of pension benefits became the impetus behind a bill proposed by Republican Senator Jacob Javits in 1967, which later became ERISA.¹⁰

Congress signed ERISA into law on Labor Day in 1974.¹¹ The primary concern in pushing the enactment was “the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.”¹² ERISA addressed that primary concern through the establishment of two objectives. First, it worked to protect employee benefits by establishing “extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee’s expectation of the benefit would be defeated through poor management by the plan administrator.”¹³ Second, to assure its success, ERISA insulated itself from any state meddling by eliminating all conflicting regulation among the states—establishing uniformity among benefit plans by preempting all other state laws.¹⁴ Although the first objective is probably more important because it directly addresses Congress’s concerns about employee benefits, the second goal has become a more contentious point of law because it restricts state sovereignty in regards to state employee benefit legislation.

Nevertheless, Congress viewed the preemption, and the uniformity that it creates, as an absolute necessity for ERISA’s success.¹⁵ Congress intended the preemption “to apply in its

8. See Claire A. Peterson, *The Evolving Effect of ERISA on Managed Care Liability*, HOSP. TOPICS, Winter 2001, at 5, 5.

9. *Id.*

10. *ERISA: A Well-Intentioned Reform Gone Wrong*, FORTUNE, Sept. 12, 1988, at 146.

11. *Id.*

12. *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

13. *Id.*

14. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent) (“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.”).

15. See 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits) (“[T]he emergence

broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law.”¹⁶ Consequently, ERISA’s preemption clause is “one of the broadest preemption clauses ever enacted by Congress.”¹⁷ Unfortunately, enforcing ERISA’s preemption and its consequential uniformity is easier said than done. Indeed, “[d]eveloping a rule to identify whether ERISA *preempts* a given state law—the first step in determining whether ERISA *completely preempts* the law—has bedeviled the Supreme Court.”¹⁸

B. The Application of ERISA

Determining the extent of ERISA’s preemption has created a complicated mix of tests. According to the statutory language, ERISA is supposed to preempt “any and all State laws insofar as they . . . *relate to* any employee benefit plan.”¹⁹ However, determining the scope of the seemingly simple term “relate” has created several multi-part tests. First, the Supreme Court has broken down the analysis by ruling that a “law ‘relate[s] to’ a covered employee benefit plan for purposes of [ERISA] ‘if it [1] has a connection with or [2] reference to such plan.’”²⁰ Then, until *Golden Gate*, the Ninth Circuit used its own multi-factor test to find a “connection with” ERISA when:

- (1) . . . the state law regulates the types of benefits of ERISA employee welfare plans;

of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs.”)

16. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams).

17. *PM Group Life Ins. Co. v. W. Growers Assurance Trust*, 953 F.2d 543, 545 (9th Cir. 1992) (quoting *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990)).

18. *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1216 (9th Cir. 2000) (referencing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 334–35 (1997) (Scalia, J., concurring) (“Since ERISA was enacted in 1974, this Court has accepted certiorari in, and decided, no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA pre-emption of various sorts of state law. The rate of acceptance, moreover, has not diminished.” (footnote omitted))).

19. 29 U.S.C. § 1144(a) (2006) (emphasis added).

20. *Cal. Div. of Labor Standards Enforcement*, 519 U.S. at 324 (quoting *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992) (alterations in original) (some internal quotations omitted)).

- (2) . . . the state law requires the establishment of a separate employee benefit plan to comply with the law;
- (3) . . . the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and
- (4) . . . the state law regulates certain ERISA relationships, including relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee.²¹

Finally, the Supreme Court completes the ERISA preemption test with another two-part inquisition, determining that a law makes an impermissible “reference to’ ERISA” if it (1) “acts immediately and exclusively upon ERISA plans” or (2) “where the existence of ERISA plans is essential to the law’s operation.”²²

III. GOLDEN GATE II AND III

A. *The San Francisco Health Care Security Ordinance*

In 2006, under the current state of ERISA, the San Francisco Board of Supervisors unanimously approved, and Mayor Gavin Newsom signed into law, the San Francisco Health Care Security Ordinance (the “Ordinance”).²³ With the ultimate design of implementing an independent healthcare system,²⁴ the Ordinance has two essential parts. First, the Ordinance creates the Health Access Program (“HAP”), which delivers health care “to uninsured San Francisco residents, regardless of their employment status.”²⁵ Second, and controversially, the San Franciscan government pays for and administers such a comprehensive system by requiring

medium and large businesses [to] make minimum health care expenditures on behalf of covered employees. . . . [In addition, employers are required to] maintain “accurate records of health

21. *Operating Eng’rs Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998) (citing *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1504 (9th Cir. 1993)).

22. *Cal. Div. of Labor Standards Enforcement*, 519 U.S. at 325.

23. S.F., CAL., MUN. CODE § 14 (Municipal Code Corp. 2009), available at <http://www.municode.com/Resources/gateway.asp?pid=14131&sid=5>; *Golden Gate Rest. Ass’n v. City of San Francisco*, 535 F. Supp. 2d 968, 970 (N.D. Cal. 2007).

24. *See Golden Gate Rest. Ass’n*, 535 F. Supp. 2d at 970.

25. *Id.* at 971; *see also* S.F., CAL., MUN. CODE § 14.2 (Municipal Code Corp. 2009), available at <http://www.municode.com/Resources/gateway.asp?pid=14131&sid=5>.

care expenditures” and “proof of such expenditures,” allow “reasonable access” by City officials to such records, and annually report “such other information” that the City requires.²⁶

The Ordinance permits employers to make these expenditures through many different methods, including “direct reimbursement to employees,” “payments to third parties for . . . health care services,” and, most importantly for the sake of this Note, contributions to ERISA plans.²⁷ The city enforces these requirements against employers through “significant penalties and presumptions against employers.”²⁸

B. The Ninth Circuit's Analysis

During both the first and second opportunities that the Ninth Circuit had to review the San Francisco Ordinance, the court found that ERISA did not preempt the law.²⁹

1. The presumption against preemption

Before even beginning its analysis of the ERISA preemption tests, the court noted that a presumption against preemption would inform the whole of its analysis.³⁰ According to the Ninth Circuit, since “Congress did *not* intend ERISA to preempt areas of traditional state regulation,”³¹ and since “[s]tate and local governments have traditionally provided health care services” to persons such as those cared for under the San Francisco ordinance,³² the court would operate under the presumption that the Ordinance was beyond the reach of any preemption.³³

The court then proceeded to examine the ERISA tests, finding that the Ordinance does not “relate to” ERISA,³⁴ and is therefore

26. *Golden Gate Rest. Ass'n*, 535 F. Supp. 2d at 970–71.

27. *Id.* at 970.

28. *Id.* at 971.

29. *Golden Gate Rest. Ass'n v. City of San Francisco*, 546 F.3d 639 (9th Cir. 2008); *Golden Gate Rest. Ass'n v. City of San Francisco*, 588 F.3d 1000 (9th Cir. 2009) (denying the association's petition for rehearing en banc).

30. *Golden Gate Rest. Ass'n*, 546 F.3d at 647.

31. *Id.* (quoting *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1217 (9th Cir. 2000)).

32. *Id.* at 648.

33. *See id.* at 647.

34. *See id.*

not preempted by the Act, for two reasons. First, the court held the Ordinance does not have a prohibited “connection with” ERISA because it does not impermissibly bind employers to a specific set of rules or require them to adopt a plan different from the one that they currently maintain.³⁵ Second, the Ninth Circuit held that the Ordinance does not make any unlawful references to ERISA because it does not single out the statute itself, being able to operate independent of ERISA³⁶ by “not look[ing] beyond the dollar amount spent, [or] . . . evaluat[ing] benefits derived from those dollars.”³⁷

2. “Connection with”

When applying the “connection with” prong, the Ninth Circuit bypassed its broad factors test³⁸ in order to apply a new, narrow interpretation of Supreme Court precedent.³⁹ Noting that the Ordinance at issue does not require any employers to either adopt or change their current ERISA plans,⁴⁰ the Ninth Circuit found it to be entirely permissible.⁴¹ Moreover, according to the Ninth Circuit’s reading of the Supreme Court’s decision in *Travelers*,⁴² any influence that the Ordinance may have on employers by requiring them to decide whether to pay the difference between their current plans and their obligations under the Ordinance to either the city or their current ERISA plans is an indirect and therefore entirely permissible effect.⁴³

35. *Id.* at 655–56.

36. *Id.* at 657.

37. *Id.* at 647.

38. *See supra* text accompanying note 23.

39. *See Golden Gate Rest. Ass’n*, 546 F.3d at 655–57.

40. *Id.* at 656 (observing that employers can make up the difference between the city obligation and their ERISA payments by either increasing their ERISA plan payments or paying the city directly).

41. *Id.* at 655–56 (“Any employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the City.”); *cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (“The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status.”).

42. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

43. *Golden Gate Rest. Ass’n*, 546 F.3d at 656.

3. "Reference to"

Proceeding to the "reference to" portion of the test, the Ninth Circuit continued its narrow reading of Supreme Court precedent.⁴⁴ Looking to *Greater Washington*⁴⁵ and related cases,⁴⁶ the court noticed that the Ordinance, requiring only a minimum payment to the city from all covered employers, "can have its full force and effect even if no employer in the [c]ity has an ERISA plan."⁴⁷ Therefore, the court concluded that since "the existence of ERISA plans is [not] essential to the law's operation,"⁴⁸ it does not make an impermissible "reference to" such plans.⁴⁹

4. *Rehearing en banc*

The Ninth Circuit had the opportunity to reconsider this case when the restaurateurs filed a petition for a rehearing en banc. The petitioners, and the dissenters in the court's denial of a rehearing, felt that the *Golden Gate II* decision created a split between the Ninth and Fourth Circuits and acted contrary to Supreme Court precedent.⁵⁰ Nevertheless, in a clearly written opinion, the panel rejected the petition, as well as the idea that the Circuit's previous ruling put it at odds with any other decision.⁵¹ Unpersuaded by the petitioner's arguments, the Ninth Circuit maintained the view that the Ordinance is not contrary to any precedent because it does not obligate employers to make changes to their current ERISA plans,⁵² it does not make any reference to plan benefits, and it can operate independent of ERISA.⁵³

44. *Id.* at 657–59.

45. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 113 (1992).

46. Among those cases related to *Greater Washington* are *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) and *WSB Electric, Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996). However, for the sake of brevity and for argument's purposes, this Note shall strictly focus on *Greater Washington*.

47. *Golden Gate Rest. Ass'n*, 546 F.3d at 657.

48. *Id.* (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)).

49. *Id.* at 658.

50. *Golden Gate Rest. Ass'n v. City of San Francisco*, 558 F.3d 1000, 1002–03 (2009).

51. *Id.* at 1002 (Circuit Judge Fletcher stated curtly, "[t]he dissent makes several contentions. I disagree with them all.>").

52. *Id.* at 1002–03.

53. *See id.* at 1003.

IV. ANALYSIS

In spite of the Ninth Circuit's well-reasoned efforts, the court lost sight of one of the primary purposes of ERISA—creating nationwide uniformity among employee benefit plans.⁵⁴ The Ninth Circuit's misguided effort to respect the sovereignty of states and municipalities in their own traditional sphere caused the court to issue an errant interpretation of two Supreme Court precedents, and created a split between the Ninth and the Fourth Circuits.⁵⁵

A. The Distraction

The Supremacy Clause of the Constitution provides the basis for federal preemption, allowing federal law to preempt state law when they conflict, as well as when Congress either expressly or impliedly calls for such preemption.⁵⁶ Nevertheless, in spite of the complete supremacy of federal law, the Supreme Court generally works under the “assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless [it is] the *clear and manifest purpose* of Congress.”⁵⁷ This general respect for federalism, where “[t]he powers delegated . . . to the Federal Government, are few and defined” and “[t]hose which . . . remain in the State Governments, are numerous and indefinite,”⁵⁸ is worthy of praise. Indeed, such a system is desirable, encouraging states to innovate and experiment for the eventual benefit of the rest of the nation.⁵⁹ Consequently, all state and local laws benefit from a

54. *Id.* at 1004 (Smith, J., dissenting) (“Our decision flouts the mandate of national uniformity in the area of employer-provided healthcare that underlies the enactment of ERISA.”).

55. *Id.*

56. *See* *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 203–04 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

57. *Rice*, 331 U.S. at 230 (emphasis added); *accord* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *id.* at 532–33 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926).

58. THE FEDERALIST NO. 45, at 260 (James Madison) (Clinton Rossiter ed., 1961); *see generally* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

59. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (“One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and

presumption against ERISA's preemption if they "clearly operate[] in a field that 'has been traditionally occupied by the states,'"⁶⁰ meaning that they are generally controlled by a state's police powers.

When the Ninth Circuit was tasked with discovering whether ERISA preempted the Ordinance, while still respecting and preserving the sovereignty of the states and municipalities, it found an independent connection between the Ordinance and a traditionally state regulated area—health care services.⁶¹ As a result, the court felt that state and local powers justified the Ordinance and failed to see how or why the Ordinance is preempted by ERISA.⁶²

Nevertheless, just because a plan bears a strong connection to a traditionally state-regulated area does not mean that the plan does not deeply connect to and interfere with a ERISA plan, and is therefore preempted. For example, although states retain strict power over laws concerning divorce and probate proceedings,⁶³ the Supreme Court has found that such states laws are preempted to the extent that they apply to ERISA plans.⁶⁴ Even so, the distraction of preserving state and local sovereignty led the Ninth Circuit to make a myopic interpretation of the Supreme Court precedent in *Travelers*⁶⁵

try novel social and economic experiments without risk to the rest of the country.'" (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

60. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quoting *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985)).

61. *Golden Gate Rest. Ass'n v. City of San Francisco*, 546 F.3d 639, 648 (9th Cir. 2008) ("The field in which the Ordinance operates is the provision of health care services to persons with low or moderate incomes. State and local governments have traditionally provided health care services to such persons.").

62. *Golden Gate Rest. Ass'n v. City of San Francisco*, 583 F.3d 1000, 1004 (9th Cir. 2009) ("The purpose of ERISA is not to require national uniformity in the provision of health care. Rather, its purpose is to 'ensure [] that the administrative practices of a benefit plan will be governed by only a single set of regulations.'" (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987))).

63. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890))).

64. *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001) (holding that a state statute providing "that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce" is preempted by ERISA).

65. *Golden Gate Rest. Ass'n*, 546 F.3d at 654 (referring to *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)) ("We read *Travelers* as narrowing the Court's interpretation of the scope of § 514(a).").

and *Greater Washington*,⁶⁶ opening the door for it to approve the Ordinance in spite of the ERISA preemption.

B. The Miscues

I. Misreading Travelers

In *Travelers*, the United States Supreme Court encountered a New York statute requiring “hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan, and it subject[ed] certain health maintenance organizations (HMO’s) to surcharges that var[ied] with the number of Medicaid recipients each enroll[ed].”⁶⁷ Obviously, such a plan could affect the “choices made by insurance buyers, including ERISA plans.”⁶⁸ However, as indicated by the Supreme Court, ERISA did not preempt that statute.⁶⁹ According to the Ninth Circuit, the Supreme Court’s decision was supported by three main factors: (1) health care is generally a regulated sector that is reserved to the states,⁷⁰ (2) the statute only exerted an indirect influence on ERISA plans,⁷¹ and (3) the statute did “not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself.”⁷²

While each factor listed by the Ninth Circuit plays an essential role in determining ERISA’s preemption, the Ninth Circuit’s interpretation and application of *Travelers* is troubling. Applying its understanding of *Travelers* to *Golden Gate*, the Ninth Circuit reasoned that since employers are not bound as to how they fulfill their San Francisco obligations,⁷³ the Ordinance’s influence is only indirect and thus survives preemption.⁷⁴

66. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); see *Golden Gate Rest. Ass’n*, 546 F.3d at 657–58.

67. *Travelers*, 514 U.S. at 649.

68. *Id.* at 659.

69. *Id.* at 649.

70. See *Golden Gate Rest. Ass’n*, 546 F.3d 639, 647 (9th Cir. 2008) (citing *Travelers* 514 U.S. at 661 (“[N]othing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.”)).

71. *Id.* at 656.

72. *Id.* (quoting *Travelers*, 514 U.S. at 659).

73. *Golden Gate Rest. Ass’n*, 546 F.3d at 656 (“[The Ordinance’s] only influence is on the employer who, because of the Ordinance, may choose to make its required health care

Not only is the Ninth Circuit's reasoning dubious, but such an interpretation contrasts directly with the Fourth Circuit's conception of *Travelers'* indirect influence doctrine. Understanding that ERISA preempts all employee benefit plans "established or maintained . . . by any *employer* engaged in commerce or in any industry or activity affecting commerce,"⁷⁵ the Fourth Circuit in *Fielder*⁷⁶ explains that the target of the New York statute in *Travelers* was not employers, but insurance companies.⁷⁷ The statute itself "did not act *directly upon employers or their plans*,"⁷⁸ or "bind *plan administrators* to any particular choice."⁷⁹ Essentially, the indirect influence of the New York statute came by specifically targeting "*hospitals'* charges to insurance companies . . . only *indirectly* affect[ing] the prices ERISA plans would pay for insurance policies."⁸⁰ Conversely, any law that "*directly* regulates employers' structuring of their employee health benefit plans, [creating a] tighter causal link between the regulation and employers' ERISA plans,"⁸¹ is strictly preempted, whether the employer is bound to a specific choice or not.⁸²

Disregarding the Fourth Circuit's reasoning, the Ninth Circuit focused on the differences between the Ordinance and the law in *Fielder*,⁸³ failing to see this split developing.⁸⁴

expenditures to an ERISA plan rather than to the City.").

74. *Id.* ("[T]he influence exerted by the [San Francisco] Ordinance is even less direct than the influence in *Travelers*.").

75. 29 U.S.C. § 1003(a) (2008) (emphasis added).

76. *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007).

77. *Id.* at 195.

78. *Id.*

79. *Id.* (emphasis added) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995)).

80. *Id.*

81. *Id.*

82. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129–30 (1992) ("ERISA pre-empts any state law that . . . has a connection with covered benefit plans . . . 'even if the law is not specifically designed to affect such plans, or the effect is only indirect.'" (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990))).

83. *Golden Gate Rest. Ass'n v. City of San Francisco*, 558 F.3d 1000, 1002 (9th Cir. 2009) ("Far from imposing a de facto obligation on an employer to establish or alter an ERISA plan [such as the law in *Fielder*], the [San Francisco] Ordinance offers an employer a meaningful choice.").

84. *Golden Gate Rest. Ass'n v. City of San Francisco*, 546 F.3d 639, 659 (9th Cir. 2008) ("We see no inconsistency between the Fourth Circuit's holding in *Fielder* and our holding in this case."); *Golden Gate Rest. Ass'n*, 558 F.3d at 1002 ("The Maryland law [in *Fielder*] contrasts sharply with the San Francisco Ordinance.").

Although the Ordinance provides a benefit to the people and is based in a sector where control is generally reserved to local government—because it allows employers to pay their city obligations through ERISA plans—it exerts an unlawful influence on San Francisco employers, requiring them to decide whether they should “[m]ake a payment to the government or change [their] current ERISA plan.”⁸⁵ Such a “connection with” ERISA is expressly preempted.

2. *Misreading* Greater Washington

In addition to the Ninth Circuit’s misreading of *Travelers*, the distraction of state sovereignty caused the court to make another critical mistake in finding a “critical distinction” between the San Francisco Ordinance and the ordinance in *Greater Washington*.⁸⁶ In *Greater Washington*, an ordinance in “[t]he District of Columbia require[d] employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers’ compensation benefits.”⁸⁷ This coverage was supposed to be at the “same benefit level that the employee had at the [moment he or she] was eligible to receive workers’ compensation benefits.”⁸⁸ Because this ordinance measured its coverage by the benefits of an employee’s current benefit plan (an ERISA plan), the court held that ERISA preempted the measure.⁸⁹

According to the Ninth Circuit, the fact that the *Greater Washington* ordinance measured an employer’s obligations by reference to the benefits provided by an ERISA plan, whereas in this case, the Ordinance measures an employer’s obligations by reference to payments that he or she has already made to an ERISA plan, makes all the difference.⁹⁰ The Ninth Circuit held that this distinction allows “the Ordinance [to] have its full force and effect even if no employer in [San Francisco] has an ERISA plan,”⁹¹ and “[w]here a law is fully functional even in the absence of a single

85. *Golden Gate Rest. Ass’n*, 558 F.3d at 1007 (Smith, J., dissenting).

86. *Golden Gate Rest. Ass’n*, 546 F.3d at 658.

87. *Greater Washington*, 506 U.S. at 126–27.

88. *Id.* at 128 (quoting D.C. CODE ANN. § 36-307(a-1)(3) (1992)).

89. *Id.* at 130–31.

90. *Golden Gate Rest. Ass’n*, 546 F.3d at 658.

91. *Id.* at 657.

ERISA plan . . . , it does not make an impermissible reference to ERISA plans.”⁹²

However, such a narrow reading fails to accurately reflect the short, but broad, opinion expressed in *Greater Washington*.⁹³ Quite simply, any ordinance that “specifically refers to welfare benefit plans regulated by ERISA . . . on that basis alone is pre-empted.”⁹⁴ While the San Francisco Ordinance can function independent of ERISA, any employer with a current ERISA plan must nevertheless reference it to calculate its San Francisco obligations.⁹⁵ The existence of ERISA plans becomes, therefore, essential to the law’s operation⁹⁶ because the Ordinance imposed an obligation on employers while making an unlawful reference to ERISA.⁹⁷

C. The Implications

At this juncture, the Ninth Circuit has been so adequately distracted by the alternative objective of preserving local autonomy that it has devalued ERISA’s preemption clause. As with any important case, *Golden Gate* has attracted a certain amount of attention predicting its consequences.⁹⁸ The bulk of that attention focuses on the two primary results or implications.

First, this decision clears a path for policy-makers to establish state and municipal health plans normally preempted by ERISA and destroys an essential goal of the law.⁹⁹ Precedent has repeatedly

92. *Id.* at 659.

93. Justice Thomas’s opinion for the Court in *Greater Washington* was only six pages long in U.S. Reports.

94. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992); *id.* at 129–30 (“ERISA pre-empts any state law that . . . has a connection with covered benefit plans . . . ‘even if the law is not specifically designed to affect such plans, or the effect is only indirect.’” (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990))).

95. S.F., CAL. ADMIN. CODE §§ 14.1(b)(7), 14(3) (2009), available at <http://www.municode.com/Resources/gateway.asp?pid=14131&sid=5>.

96. *See* *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

97. *Greater Washington*, 506 U.S. at 130–31 (“[A]ny state law imposing requirements by reference to such covered programs must yield to ERISA.”).

98. *See, e.g.*, The ERISA Industry Committee, *Ninth Circuit Ruling on San Francisco Health Ordinance Threatens Employer-based Health System*, STATE NEWS SERVICE, Mar. 10, 2009, available at <http://www.eric.org/forms/documents/DocumentFormPublic/view?id=18113000000FF>.

99. *Golden Gate Rest. Ass’n v. City of San Francisco*, 558 F.3d 1000, 1010 (9th Cir. 2009) (Smith, J., dissenting) (“[O]ur decision here creates . . . a roadmap for the enactment of numerous conflicting health care laws affecting national employers, the very situation Congress

stated that uniformity across state employee benefits laws is an unquestionable purpose of ERISA.¹⁰⁰ Nevertheless, under *Golden Gate*, all national companies with branches in San Francisco—and possibly elsewhere in the near future¹⁰¹—will be required to manage both federal benefit obligations as well as local benefit obligations. Now that *Golden Gate* has shown state and local governments how to successfully circumnavigate ERISA’s preemption, there is little left to preserve uniformity among benefits plans.

Second, the means by which the Ninth Circuit in *Golden Gate* arrived at its conclusion may lead to additional erroneous interpretation of ERISA’s jurisprudence. In a common law system, “the misapplication of the principles of [a law’s] interpretation can create bad precedents.”¹⁰² Such bad precedents perpetuate as courts

strove to avoid when it enacted ERISA.”); Associated Press, *S.F.’s Universal Health Plan Upheld*, DESERET MORNING NEWS (Salt Lake City), Oct. 1, 2008, at A6 (quoting a statement attributed to San Francisco City Attorney Dennis Herrera, “This [decision] is a road map for state and local governments so they can step into the void and fill the vacuum that the federal government has left because of its inability to act in this area.”).

100. *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.”); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995) (“The basic thrust of the pre-emption clause [is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.”); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987) (stating that a principal goal of ERISA is to enable employers “to establish a uniform administrative scheme, which provides a set of . . . claims and disbursements of benefits”); *id.* at 11 (“[ERISA’s] [p]reemption [clause] ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.”); *Egelhoff v. Egelhoff*, 532 U.S. 141, 149–50 (2001) (“Requiring 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 born by the beneficiaries.” (alterations in original) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990))); *Ingersoll-Rand Co.*, 498 U.S. at 142 (“Requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction[,] . . . is fundamentally at odds with the goal of uniformity that Congress sought to implement.”); *id.* (“Section 514(a) 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. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.” (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990))).

101. Heather Knight, *Supreme Court Asked to Ax Health Care Law*, S.F. CHRON., June 9, 2009, at B2 (stating that San Francisco mayor Gavin Newsom, hoping to run for governor of California, is planning to implement his plan in the rest of the state in spite of its ongoing judicial challenges).

102. Miriam R. Albert, *Common Sense for Common Stock Options: Inconsistent Interpretation of Anti-Dilution Provisions in Options and Warrants*, 34 RUTGERS L.J. 321, 355 (2003).

base future decisions upon those bad decisions. This Note has demonstrated that much of *Golden Gate* is established upon the Ninth Circuit's erroneous interpretations of Supreme Court precedent. As it stands, *Golden Gate* "undercuts the Supreme Court's ERISA preemption case law,"¹⁰³ and creates a false foundation upon which other courts may build, to continue ERISA's destruction.

V. CONCLUSION

In *Golden Gate*, the Ninth Circuit's efforts to uphold and honor a municipality's rights to sovereignty and self-determination, in the context of deciding an ERISA preemption controversy, diverted its attention from the fundamental purposes of the Act. Central to ERISA's implementation is its preemption and the nationwide uniformity that preemption is supposed to create for employee benefit plans. This distraction led the Ninth Circuit to misinterpret two important Supreme Court decisions and thereby create a split among the circuits. In addition, the court's interpretation endangers ERISA benefit plan uniformity and lays a foundation of false precedent for the building of new ERISA law until Congress or the Supreme Court rectifies the Ninth Circuit's error. It appears that in the fight for universal healthcare, the Ninth Circuit was San Francisco's greatest ally in getting around a law that has, for so long, impeded many other local governments from implementing their own plans.

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103. *Golden Gate Rest. Ass'n*, 558 F.3d at 1010 (Smith, J., dissenting).

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