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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

W.G. CLARK CONSTRUCTION CO., a Washington corporation,
Respondent,

v.

CARPENTERS HEALTH & SECURITY TRUST OF WESTERN
WASHINGTON; CARPENTERS RETIREMENT TRUST;
CARPENTERS-EMPLOYERS VACATION TRUST; CARPENTERS-
EMPLOYERS APPRENTICESHIP & TRAINING TRUST, Appellants,

and

PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS, a
Local Union, Appellant; PARAMOUNT SCAFFOLD, INC., a
Washington corporation, Respondent.

AMICUS CURIAE BRIEF OF THE EMPLOYEE PAINTERS' TRUST,
ET AL. IN SUPPORT OF APPELLANTS, CARPENTERS HEALTH &
SECURITY TRUST OF WESTERN WASHINGTON, ET AL.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Employee Painters' Trust, the Western Washington Glaziers Trusts, and the Western Washington Floor Covers Trusts.¹ Amici requested and were granted the ability to file a brief in this case in support of the positions taken by the Appellants in this appeal.

Amici are Taft-Hartley employee benefit trust funds governed by ERISA. Amici are regularly and often in a similar legal position at the Washington Superior Court and U.S. District Court levels as the Appellants in this case. Amici's interest in this case is in informing the Court of the importance of abrogating *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000), *cert. denied*, 532 U.S. 1002 (2001) (affirming *Puget Sound Electrical Workers Health and Welfare Trust v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994)). This Court's decision in *Trig* is contrary to public policy, controlling precedent in other jurisdictions, and against controlling case law from the Ninth Circuit. *Trig* stands on an antiquated view of ERISA preemption that has since been put to rest by the U.S. Supreme Court and further pushed to extinction by federal circuit court precedent following U.S. Supreme Court decisions narrowing

¹ The precise Amici parties are the Employee Painters' Trust; Western Glaziers Retirement Fund, District Council No. 5 Apprenticeship and Training Trust Fund, The Painters and Allied Trades Labor-Management Cooperation Initiative, Washington Construction Industry Substance Abuse Program, Western Washington Glaziers Org Fund, and Western Washington Glaziers MRP ("Western Washington Glaziers Trusts"); and Resilient Floor Covering Pension Fund, Western Washington Floor Covering Apprenticeship Fund, Labor-Management Cooperation Fund, and Allied Trades Training Center ("Western Washington Floor Coverers Trusts").

ERISA preemption. If *Trig* is overturned, Amici will stand to benefit because they will not be forced to engage in needless litigation over their rights provided under RCW 39.08 and 60.28 and will avoid falling victim to the blatant forum-shopping engaged in by parties in the same position as the Respondents in this case.

ISSUES TO BE ADDRESSED BY AMICI

1. Whether two statutes of general applicability, RCW 39.08 and 60.28, are preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1144(a), when a trust fund governed by ERISA attempts to enforce these provisions?
2. Whether an ERISA-governed trust fund’s enforcement of RCW 39.08 and 60.28 against a general contractor’s bond to secure contributions to the trust fund by an employer provides “alternate enforcement mechanisms for employees to obtain ERISA plan benefits” and is therefore preempted under ERISA?
3. Whether the *Trig* and *Merit* decisions themselves create an ERISA preemption issue because they read into RCW 39.08 and RCW 60.28 an impermissible reference to ERISA and ERISA trust funds?
4. Whether the harm suffered by ERISA trust funds under the *Trig* and *Merit* decisions and the changed ERISA preemption interpretation by all courts addressing the issue since 2001 warrant overturning *Trig* and *Merit* because the doctrine of *stare decisis* yields to an incorrect and harmful law?

STATEMENT OF THE CASE

At its core, this case asks whether Washington should join its sister jurisdictions and all but one decision of a United States Circuit Court and hold a Taft–Hartley employee benefit trust fund’s enforcement of a state law of general applicability enacted for the protection of payment to and for the benefit of laborers and wage earners is not preempted under ERISA. Adding the preceding sentence, Amici join in whole, have no objection or exception to, and adopt the Statement of the Case presented by Appellants in their Opening Brief.

ARGUMENT

State law claims under RCW 39.08 and 60.28 should not be preempted because (1) the statutes are not an alternative enforcement mechanism under the case law pertaining to alternative enforcement mechanisms under ERISA, (2) ERISA does not preempt state laws of general applicability in traditional areas of state function, and (3) the *Trig* and *Merit* decisions read into RCW 39.08 and 60.28 an impermissible reference to ERISA. Finally, *Trig* and *Merit* should be abrogated despite the doctrine of *stare decisis* because the rules established in those cases are incorrect and those rules have caused great harm to the judicial system and parties regularly before the courts of this state and federal courts within this state.

I. TRUST FUND CLAIMS UNDER RCW 39.08 AND RCW 60.28 ARE NOT PREEMPTED UNDER ERISA.

When reviewing preemption of state laws, “[t]he purpose of Congress is the ultimate touchstone.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (internal quotations omitted). A Court reviewing a state law for preemption by a Federal statute must “never assume[] lightly that Congress has derogated state regulation.” *N. Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995). This is particularly true when the state law is in a traditional area of state regulation or concern. *Id.* at 655.

At its most basic level, ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a). The “relate to” language is not as broad as it may literally be read because if it were “preemption would never run its course.” *NY State Conf. of Blue Cross & Blue Shield*, 514 U.S. at 655. More to the point, literally applying the “relate to” provision “was a project doomed to fail, since, as many a curbstone philosopher has observed, everything is related to everything else.” *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 335, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (Scalia, J., concurring).

Preemption has its limits and a state law will only be preempted under ERISA if the state law “has connection with or reference to” an employee benefit plan. *Arizona State Carpenters Pension Trust v.*

Citibank, 125 F.3d 715, 723 (9th Cir. 1997) (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d. 490 (1983)). Impermissible reference will be found where the state law acts immediately upon ERISA plans or the existence of such plans is necessary for the laws operation. *S. Cal. IBEW-NECA Trust Funds v. Standard Indus. Electric Company*, 247 F.3d 920, 925 (9th Cir. 2001). An impermissible connection with a plan is only found by examining the objectives of ERISA and the nature and the effect of state law on ERISA plans. *Id.* An impermissible connection with ERISA has been found where:

First, Congress intended ERISA to preempt state laws that mandated employee benefit structures or their administration.

...
Second, Congress intended to preempt state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, thereby functioning as a regulation of an ERISA plan itself.

...
Third, in keeping with the purpose of ERISA's preemption clause, Congress intended to preempt state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits.

Arizona Carpenters Pension Trust, 125 F.3d at 723 (internal quotations omitted) (emphasis added).

A. RCW 39.08 and 60.28 are not alternate enforcement mechanisms for employees to obtain benefits from an ERISA plan.

An alternative enforcement mechanism to ERISA will only be preempted if that enforcement mechanism may be used by an employee to obtain or compel benefits from an ERISA plan. *Arizona Carpenters Pension Trust*, 125 F.3d at 723; *Thurman v. Pfizer, Inc.*, 484 F.3d 855, 861

(6th Cir. 2007); *Georsa v. Savasta & Co., Inc.*, 329 F.3d 317, 324 (2d Cir. 2003); *Leblanc v. Cahill*, 153 F.3d, 134, 1147 (4th Cir. 1998) (stating “Congress intended to preempt *state laws providing alternate enforcement mechanisms for employee to obtain ERISA plan benefits*” (emphasis added)); *Coyne v. Delaney*, 98 F.3d 1457, 1471 (4th Cir. 1996); *Airparts Co., Inc. v. Custom Benefit Services of Austin, Inc.*, 28 F.3d 1062, 1065 (10th Cir. 1994) (providing “[l]aws that have been preempted are those that provide *an alternative cause of action for employees to collect benefits protected by ERISA*” (emphasis added)). The alternative enforcement mechanism argument does not apply to claims made by an ERISA trust fund under a generally applicable state law that permits bond claims on construction and improvements performed within the state. *Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co.*, 215 F.3d 136, 145 (1st Cir. 2000).

Respondents spend several pages of their brief referring to RCW 39.08 and 60.28 as an alternative enforcement mechanism to ERISA. Their argument is unavailing because they fail to properly analyze the alternative enforcement mechanism line of cases. Their argument pulls the alternative enforcement mechanism loose from its foundation, which requires ERISA preemption only if the alternative enforcement mechanism is used by an employee to obtain ERISA plan benefits. Without including the requirement that the alternative enforcement mechanism be for an employee to compel benefits from an ERISA plan, the rule is ripped loose from its only premise which is protection of the overriding purpose of

ERISA. “In enacting ERISA, Congress’ primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.” *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L. Ed. 2d 98 (1989). With this purpose in mind, preempting alternative enforcement mechanisms that allow employees to obtain ERISA plan benefits without following the provisions in ERISA makes great sense.

Whereas preventing an employee from compelling ERISA benefits with alternative enforcement mechanisms will protect the overarching purpose of ERISA by preventing accumulated funds from being mismanaged or given to those employees that do not meet requirements for benefits, an ERISA trust fund’s procurement of unpaid contributions for the labor supplied or work performed by laborers on a construction project does not jeopardize ERISA’s purpose or Congress’ primary concerns in enacting ERISA. In fact, if anything, RCW 39.08 and 60.28 further protects the payment of accumulated benefits to employees and prevention of mismanagement of funds.

The case law across the country is overwhelming in its holding that preemption based on an alternate enforcement mechanism is an issue when the alternative enforcement mechanism is for employees to obtain or compel ERISA plan benefits. Respondents relied upon the alternative enforcement mechanism reasoning used by the Second Circuit in *Plumbing Industry Board, Plumbers Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61 (2d Cir. 1997) to argue the alternative enforcement

mechanism argument applies not only to employees attempting to obtain benefits but also to ERISA plans collecting unpaid contributions. Respondents also cite statements in *Trig* and *Merit* that use the alternative enforcement mechanism as it concerns a plan obtaining contributions. These positions are incorrect in light of the overwhelming weight of case law across the country interpreting the alternative enforcement mechanism language.

The alternative enforcement mechanism argument in favor of preempting state laws seems to grow from the U.S. Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), but that case was (1) decided under the pre-*Travelers* ERISA preemption standards and (2) itself involved an employee using an alternative state law enforcement mechanism to compel benefits from an ERISA plan. *Id.* at 135-36. The Court in *Ingersoll-Rand* also recognized the state law action in that case was the same claim permitted in Section 510 of ERISA and also held the state law cause of action preempted for that reason. *Id.* at 142-43. The alternative enforcement mechanism argument of the Respondents and the alternative enforcement mechanism reasoning of *Merit* and *Trig* begin with *Ingersoll-Rand* as a faulty foundation for their arguments regarding a plan obtaining contributions under a surety relationship.

When an ERISA trust fund uses RCW 39.08 and RCW 60.28 to collect unpaid contributions, it is not an employee attempting to obtain or compel benefits from an ERISA plan, which was exactly what the

employee in *Ingersoll-Rand* and the numerous other alternative enforcement mechanism cases attempted to do. There is no explicit provision of ERISA that permits the actions allowed under RCW 39.08 and 60.28. ERISA does not regulate an ERISA plan's actions regarding and toward entities that are other than the core ERISA entities. A non-signatory general contractor or its surety that has agreed via contract to provide payment for laborers working on its projects is not a core ERISA entity and no ERISA provision governs an ERISA plan's dealings with such entities.² Thus, even the Supreme Court case that gave rise to the discussion of alternative enforcement mechanisms and preemption is inapposite to an ERISA plan's claims under RCW 39.08 and 60.28 because the claims under these statutes do not involve an employee attempting to obtain benefits from an ERISA plan and do not fall within a provision of ERISA allowing the same action.

An ERISA trust fund's procurement of contributions through use of RCW 39.08 and 60.28 is not an alternate enforcement mechanism to ERISA. RCW 39.08 and 60.28 do not affect the core congressional policy concerns articulated in favor of the passage of ERISA. The statutes also do not provide an alternative means for a laborer to compel ERISA plan benefits from an ERISA plan. Therefore, RCW 39.08 and 60.28 should not

² Respondents have argued that an exclusive remedy under ERISA Section 515 is provided for obtaining contributions from a signatory contractor, which means no other party may be pursued outside of Section 515, 29 U.S.C. § 1145. This is simply incorrect under *Operating Engineers Health and Welfare Trust v. JWJ Contracting Co.*, 135 F.3d 671, 676-77 (9th Cir. 1998), wherein a signatory contractor also had to pay under Arizona's little Miller act—a non-ERISA cause of action.

be preempted under ERISA and the reasoning in *Trig* and *Merit* that is contrary to this argument should be abrogated by this Court.

B. RCW 39.08 and 60.28 are not ERISA preempted because they are state laws of general applicability in an area of traditional state regulation.

If a court were to read a state law of general applicability in a traditional area of state concern as preempted, it would do grave harm to the presumption that Congress does not intend to preempt state law unless it clearly provides for such preemption. *Cal. Div. of Labor Standards Enforcement*, 519 U.S. at 334 (holding California’s regulation of apprenticeship programs, including those operated, managed, or funded under ERISA plans, was not preempted). “Nothing in ERISA suggests that it was intended to pre-empt either the area of state statutory payment bonds or their guarantee by third-party sureties.” *JWJ Contracting*, 135 F.3d at 678. Surety law and the protection of citizens through the upholding of rights and obligations in public contracts are traditional areas of state concern. *Id.*; *Carpenters Local Union No. 26*, 215 F.3d at 141.

The First Circuit’s decision in *Carpenters Local 26* is highly instructive to the issues before this Court. Like this Court in this case, the First Circuit in *Carpenters Local 26* was faced with the question of whether a state statute of general applicability, which allowed an ERISA plan to secure unpaid contributions through use of a claim on a bond posted by a general contractor who contracted with the state to complete a public works project, was preempted by ERISA. The First Circuit thoroughly considered the issues before it and reviewed those issues

against the backdrop of a prior First Circuit decision that held an ERISA plan could not make a claim under such a statute.

In *Carpenters Local 26*, union members worked for a company named Henry Construction (“Henry”). *Id.* at 138. Henry was signatory to a collective bargaining agreement with Local 26. *Id.* The collective bargaining agreement required Henry to contribute to ERISA trust funds for Henry’s covered employees. *Id.* Henry was a subcontractor and its employees performed work on a public works project in Peabody, Massachusetts. *Id.* Under Massachusetts statute, a general contractor on a public works project is required to post a bond with a surety for the benefit of laborers on the project. *Id.* at 138-39. The general contractor on the Peabody project obtained a surety bond from U.S. Fidelity & Guaranty Company. *Id.* at 139. When Henry failed to make its contributions to the ERISA trust funds designated under his collective bargaining agreement with the Carpenters Union, the trust fund’s collection arm placed a claim on the bond issued by U.S. Fidelity & Guaranty Company. *Id.*

The plaintiffs filed an action in state court to collect on the bond and the bond company removed the action to federal court. *Id.* The bond company moved for judgment on the pleadings, arguing ERISA preempted the bond claims. *Id.* The district court held it was bound by a prior First Circuit decision and granted judgment to the bond company on its preemption argument. *Id.* at 138. On appeal, the First Circuit reversed the district court and held the prior case the district court relied upon was

abrogated and the Massachusetts bond statute was not ERISA preempted. *Id.* at 145.

The First Circuit's holding was based on an analysis of the reference to or connection with standards articulated by the U.S. Supreme Court in *Travelers* and followed in *Dillingham*. *Id.* at 139-45. The First Circuit reasoned a state statute that only creates an ability to make claims against a surety should not be preempted. *Id.* at 141. A law of general applicability that is in an area of traditional state function, like surety or enforcement of contracts, will not be preempted because it does not make an impermissible reference to ERISA or have a connection with ERISA. *Id.* at 141-45. A premise of equal importance to the conclusion reached by the First Circuit was that the state law did not have an effect on "the intricate web of relationships among the principal players in the ERISA scenarios," which is to mean that it did not affect the relationship between two of the plan, administrators, fiduciaries, beneficiaries or employer. *Id.* at 141.³ Thus, the First Circuit held a state bond statute requiring posting of a bond on a public works project is not preempted when an ERISA plan makes a claim on such a bond. *Id.*

The parallels between *Carpenters Local 26* and the issues at stake in this case are straightforward. Like the statute at issue in *Carpenters*

³ There exists significant case law that views whether relationships between two core ERISA entities are affected by state law as an important factor in determining whether a law will be preempted. If a relationship between two such entities is not affected, there will not be ERISA preemption. *Arizona State Carpenters Pension Trust*, 125 F.3d at 724; *Gerosa*, 329 F.3d at 324; *Morstein v. National Insurance Services, Inc.*, 93 F.3d 715, 722 (11th Cir. 1996).

Local 26, RCW 39.08 and 60.28 are neutral on their face. In fact, the Washington statutes are more neutral than the Massachusetts statute because the Washington statutes do not mention trustees; the Massachusetts statute did mention trustees as possible claimants. When an ERISA trust fund makes a claim under the Washington statutes it is treated the same as any other commercial claimant, which was also an important factor in the First Circuit’s decision in *Carpenters Local 26*.⁴ Just as a project subcontractor had not paid contributions to the Carpenters trust funds in the First Circuit case, a project subcontractor has not paid contributions to the claimants in this case. Here, the claim is against a bond posted by a general contractor on a public works project, just as the claim in *Carpenters Local 26* was made against a bond posted by a general contractor on a public works project. The circumstances in this case and in *Carpenters Local 26* before the First Circuit are an all-too-common circumstance of claims on bonded projects in Washington.

Despite its prior decisions and the doctrine of *stare decisis*, the First Circuit recognized the great sea change that had taken place in ERISA preemption following *Travelers* and *Dillingham* and abrogated its prior to decisions to clearly hold a statute of general applicability in an area of traditional state regulation—like a bond statute for public works—

⁴ “ERISA does not purport to regulate those relationships where a plan operates just like any other commercial entity—for instance, the relationship between...the plan and its...creditors.” *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993).

that does not on its face mention ERISA or act exclusively or immediately upon it would not be preempted by ERISA. Equally important is the statute does not affect the relationship between two or more ERISA entities. Neither the Massachusetts statute nor Washington's statutes affect the relationship between and among two or more core ERISA entities. While it may be argued that allowing an ERISA plan to collect contributions from a surety somehow affects its relationship with the signatory employer, this is too tenuous and remote a connection to trigger preemption and, most importantly, pursuing a bond claim does not absolve the employer of its non-performance. *Ironworkers Local 25 Pension Fund v. McGuire Steel Erection, Inc.*, 352 F. Supp. 2d 794, 801-02 (E.D. Mich. 2004). This Court now has the opportunity to make the same decision the First Circuit made. This Court has the opportunity to set aside *Trig* and *Merit*, which no longer state the correct legal rule regarding ERISA preemption of a state bond statute of general application to public works projects.

RCW 39.08 and 60.28 are statutes of general applicability in a traditional area of state regulation. The statutes do not act immediately or exclusively upon ERISA plans and do not have an impermissible connection with ERISA or ERISA plans. For these reasons, this Court may properly abrogate its decisions in *Trig* and *Merit* and hold RCW 39.08 and 60.28 are not preempted by ERISA.

C. The *Trig* and *Merit* decisions read into RCW 39.08 and 60.28 an impermissible reference to ERISA.

Preemption of state laws under ERISA is not limited to only legislative laws, statutes, or rules. 29 U.S.C. § 1144(c)(1). State law preempted under ERISA also includes preemption of state judicial “decisions” that “relate to” employee benefit plans. 29 U.S.C. § 1144(a)-(c)(1). As stated earlier, the “relate to” clause includes any laws that make reference to ERISA or ERISA plans and act immediately and exclusively upon them. *See Dillingham*, 519 U.S. at 324-25.

On their face, the provisions of RCW 39.08 and 60.28 make no reference to ERISA, ERISA trust funds, or even to trust funds generally. The statutes are wholly devoid of any reference at all to ERISA or any aspects of ERISA, its enforcement, or administration. Despite the general nature of RCW 39.08, which requires payment of “*all* laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work,” this Court’s decisions in *Trig* and *Merit* have read into the statute a troubling caveat. That caveat states something akin to: “unless a claim is made by an ERISA Trust Fund, in which case no claim may be made.” The statute is not written with this caveat, and if the Legislature wrote the statute with this language, the statute would surely be preempted under ERISA because the statute would make a direct reference to ERISA and act exclusively and immediately upon ERISA Trust Funds.

In essence, this Court's prior decisions in *Trig* and *Merit* have read and interpreted RCW 39.08 and 60.28 in such a way that the decisions make direct reference to employee benefit plans. State judicial decisions can be preempted under ERISA in the same way that state legislative action can be preempted under ERISA. The *Trig* and *Merit* decisions have caused RCW 39.08 and 60.28 to have an impermissible direct reference and application to ERISA and ERISA plans. Therefore, the decisions may be abrogated in order to bring Washington law in line with Federal Court precedent because ERISA is a matter of federal law.⁵

II. TRIG AND MERIT SHOULD BE ABROGATED BECAUSE THEIR HOLDINGS ARE INCORRECT AND CAUSE GREAT HARM TO THE JUDICIAL SYSTEM, THE PUBLIC, TRUST FUNDS, CONTRACTORS, AND SURETIES.

The doctrine of *stare decisis* will yield if the person requesting a prior decision be abrogated can show the prior decision is incorrect and the rule is harmful. *In re Stranger Creek and Tributaries of Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Arguments in support of why *Trig* and *Merit* no longer state correct rules of law are thoroughly fleshed out in the preceding paragraphs of this brief. Amici intend in this section to focus on the harm *Trig* and *Merit* currently cause and the harm that will continue to occur if the decisions remain the law of Washington.

⁵ See *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 830-31 ("ERISA preemption is a matter of federal law").

Much has changed since the Washington Supreme Court decided *Trig* in a 5-4 decision in 2001. Much more has changed since this Court decided *Merit* in 1994. While it may be true this Court in *Trig* held *Merit* was still good law based on *stare decisis*, the intervening twelve years have been witness to court after court across the country, and in particular, within the Ninth Circuit taking positions directly contrary to *Trig* and *Merit*. Unlike the Respondents arguments in their brief seem to state, a court does not need a change in a statutory language or directly contrary authority from a higher court to abrogate one of its prior decisions. While at the time this Court decided *Trig*, its decision may have been correct based on *stare decisis*, the passage of time and recent court decisions have shown that *Trig* and *Merit* state incorrect rules of law and experience in Washington over the past twelve years has shown application of *Trig* and *Merit* are harmful to the judicial system in Washington, litigants in similar cases, ERISA plans, general contractors, and sureties.

The issue in this case is not that uncommon. ERISA trust funds have continued to file claims under RCW 39.08 and 60.28 despite the *Trig* and *Merit* decisions. ERISA trust funds continue to file claims because their claims will be adjudicated in U.S. District Courts in this state. Sureties and general contractors who obtain bonds for projects under Washington law continue to file declaratory judgment actions in state court to obtain a favorable ruling under *Trig* and *Merit*. Adherence to *Trig* and *Merit* have created a perverse environment in which parties are encouraged to rush to the courthouse, rush to judgment, leave reasoned

settlement discussion at the door, and shop for the most friendly forum for their claims.

The series of events that occur in cases such as the one now before this Court are harmful to all parties involved. The judicial system itself is harmed because of the blatant forum shopping that occurs. Parties are encouraged to forum shop, which law students learn in first semester civil procedure classes is a behavior that is discouraged. The forum shopping often leads to competing actions in which already overstressed judicial resources are stretched further to hear the same case on two fronts. This harms the citizens of this state because it further slows the judicial process for them and for other litigants before the courts.

The harm to the parties in these types of cases is equally as great as the harm to the judicial system and the public. ERISA trust funds, sureties and general contractors in circumstances such as these must obtain legal counsel and take their arguments to two courts. The procedures in the cases must be pushed forward at a lightning quick pace because both sides want the case heard and decided in their court of choice. This often leads to spending exorbitant amounts of fees in both actions that could likely be cut in half. The cost to the judicial system, the public, litigants, and parties has been great because of adherence to *Trig* and *Merit*.

The harm that occurs to the judicial system, the public, litigants, and parties in these types of cases will not cease if this Court holds *Trig* is still good law and RCW 39.08 and 60.28 are preempted by ERISA. The claims made by ERISA trust funds under these statutes will continue

because there is a favorable forum and controlling Ninth Circuit precedent that permits ERISA trust funds to make claims such as those under RCW 39.08 and 60.28. The race to the courthouse, legal wrangling, and rush to judgment will continue unabated because the U.S. District Courts will continue to apply the majority rule that such claims are not preempted and state courts in Washington will continue to hold such claims are preempted. It is an interesting and expensive quandary that will continue as long as Washington adheres to the minority view on this topic.

The only opportunity for these types of cases to cease occurring is for this Court to abrogate *Trig* and *Merit*. The opportunity to state the majority rule of law on ERISA preemption as it relates to claims under RCW 39.08 and 60.28 and put an end to the forum shopping that occurs in these cases is before this Court in this case. The harmful effects of *Trig* and *Merit* are clear and presently before the Court.

Stare decisis is not a straitjacket and cannot forever prevent a court from making a change in its precedent. The rule stated in *Trig* is incorrect and later cases from across the country have shown that claims like those under RCW 39.08 and 60.28 should not be preempted. The continued adherence to *Trig* will only continue to cause the harm to the judicial system, the public, litigants, and parties in cases such as this one. Under these circumstances, *stare decisis* should yield to a holding that places Washington in lock step with other states and with all but one federal circuit court. *Trig* and *Merit* should be overturned to prevent

further harm and to allow this Court to state the correct rule of law on ERISA preemption.

CONCLUSION

Amici respectfully request this Court abrogate its decisions in *Trig* and *Merit*. RCW 39.08 and 60.28 are state laws of general applicability that do not reference ERISA, act exclusively upon ERISA, or affect relationships between two core ERISA entities. Under precedent from courts across the country, the correct legal rule is statutes in the vein of RCW 39.08 and 60.28 are not ERISA preempted. The harm caused by *Trig* and *Merit* has been great and will not cease if *Trig* and *Merit* are not abrogated.

Dated: November 22, 2013

Respectfully submitted,

/s/ Nathan R. Ring

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From: Sean W. McDonald <SMcDonald@theurbanlawfirm.com>
Sent: Friday, November 22, 2013 4:57 PM
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Cc: Nathan R. Ring; j.maxwell@ekmanbohrer.com
Subject: Case No. 88080-8 - Amicus Brief of Employee Painters' Trust, et al.
Attachments: Case No 88080-8 - Amicus Brief of Employee Painters Trust.PDF; Case No 88080-8 - Proof of Service for Amicus Brief.pdf

On behalf of attorney Nathan Ring, please accept for filing the attached document. A proof of service is also attached.

W.G. Clark Construction Co., Respondent v. Carpenters Health & Security Trust of Western Washington, et al.,
Appellants.

Case No. 88080-8

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