No. 21-1019

In The Supreme Court of the United States

THE ERISA INDUSTRY COMMITTEE,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN HOTEL AND LODGING ASSOCIATION, ET AL., IN SUPPORT OF PETITIONER

RICHARD J. BIRMINGHAM*
HARRY KORRELL
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150
richardbirmingham@dwt.com
Counsel for Amici Curiae

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

The American Hotel and Lodging Association ("AHLA") is the largest hotel association in the country and represents all segments of the hotel industry.[2] It represents over 27,000 members. Three out of five U.S. hotels are small businesses, totaling more than 33,000 properties nationwide.

This industry is tremendously important for local economies. For every $100 hotel guests spend on lodging, another $222 is spent at destinations, totaling approximately $278 billion per year on transportation, dining, and shopping at local businesses during stays. Every 100 occupied hotel rooms per night support nearly 250 local jobs.

This is a case of great significance for *amici* and their members who are composed of small and large hotels nationwide. These hotels support more than 8.3 million American jobs and provide healthcare for those workers under employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Seattle ordinance at issue, Seattle Municipal Code 14.28 ("SMC 14.28" or the "Seattle Ordinance"), interferes with the regulatory uniformity provided by ERISA's sweeping preemption

---

[1] We informed counsel for Respondent by email January 28, 2022, of our intent to file the brief and secured consent by email on January 31, 2022.

[2] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

provision by effectively mandating a minimum premium value and a maximum cost-sharing of premiums for ERISA health plans sponsored by hotels operating within the city of Seattle.

As small business owners, hotels need to be efficient to remain in operation especially during this period of reduced hotel occupancy due to COVID-19. An employer with hotels in three cities cannot afford the time or the money to try to comply with three different local healthcare mandates for its employees. ERISA guaranteed that hotel owners could establish their own health benefit plans with a uniform design and operation both within the same state and across state lines. The Ninth Circuit's opinion in this case negates this promise to small business owners and their employees.

Under the Ninth Circuit's analysis, each state as well as each city or municipality within each state could mandate its own healthcare benefits. This is contrary to ERISA which imposes no substantive benefit requirements on hotels who sponsor health plans, leaving the design of health benefits and the uniform administration of those health plans to the hotel owners. If every city or state imposed a different healthcare mandate, a small business owner would be forced to comply with a patchwork of regulations, designs, and administrative costs which would destroy the hotels' efficiencies of operation, making it prohibitively expensive for companies with hotels in multiple jurisdictions to operate.

The Ninth Circuit's opinion nullifies ERISA by providing a simple blueprint for an end run around ERISA's broad preemption scheme: so long as a state or city allows, as one alternative mandated benefit, a cash payment directly to the employee, preemption is defeated. If ERISA's purpose of uniformity of design and operation is defeated, the increased administrative costs associated with different benefit mandates for different states and municipalities will be borne by hotels and, typically, shared at least in part by their employees. Such mandates, if not preempted by ERISA, will prevent hotels from fairly and equitably extending health coverage and other employee benefits to workers without regard to their place of residence or employment.

These additional costs will force smaller hotels out of business. The Ninth Circuit's opinion, if left to stand, will nullify ERISA's central purposes of providing uniformity of administration and allowing the freedom to choose the design of employer-sponsored health plans and would affect business owners everywhere, both large and small.

SUMMARY OF ARGUMENT

Review should be granted by this Court because the Ninth Circuit has adopted a Direct Payment Test for ERISA preemption that directly conflicts with Supreme Court precedent, including *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312 (2016), and *Rutledge*

v. Pharmaceutical Care Management Ass'n, 141 S. Ct. 474 (2020).

Under ERISA, it is clear that a state or municipality cannot mandate that an employer adopt an employee benefit plan with a minimum value or a required structure. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983). Yet the Ninth Circuit's decision in this case permits states and municipalities to accomplish indirectly, by allowing a direct payment option, what they are prohibited from regulating directly.

Under the Ninth Circuit's Direct Payment Test, if the employee benefits mandate of a challenged law can be satisfied by a direct cash payment to an employee, then ERISA and its central requirements of employer design choice and uniform administration can be avoided. For example, the Seattle Ordinance can be satisfied by either paying an employee $459 per month in cash or establishing an ERISA health plan with a premium value of $459 per month. By requiring an employer to choose between providing a plan of a certain value or paying the stipend, the Seattle Ordinance, according to the Ninth Circuit, avoids ERISA preemption. Likewise, under the Direct Payment Test, a local ordinance could require that an employer add mental health, or some other benefit, to the employer's existing ERISA plan or alternatively pay the employee $459 per month, in cash, and thus, according to the Ninth Circuit, avoid preemption.

Compliance with the Ninth's Circuit's Direct Payment Test would require a small business owner to find

an insurance carrier that was willing to underwrite different coverage options for different cities or municipalities in the state. If a carrier was unwilling or unable to provide such coverage, the hotel would either have to self-insure the benefit or make cash payments (that are unrestricted in use) to its employees. Either way, the hotel owner is forced to deal with additional administrative costs and plan design choices that interfere with ERISA's guarantee of free choice in plan design and uniform administration.

The Ninth Circuit's Direct Payment Test allows states and cities to do an end run around ERISA, and this Court's traditional ERISA preemption analysis, with the result that hotels and their employees will be subjected to a nationwide patchwork of laws and regulations imposing varying coverage and other requirements on the ERISA plans they sponsor. The Ninth Circuit's Direct Payment Test will require modifications to ERISA plans, defeat ERISA's central purpose of a hotel owner's choice in the uniformity of administration of employee benefit plans, and result in increased administrative and employee benefit plan costs for hotel owners and their employees.

ARGUMENT

A. Review is required because the Ninth Circuit's Direct Payment Test nullifies this Court's preemption precedents.

1. ERISA preemption generally

As this Court indicated in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312 (2016), the text of ERISA's express preemption clause is the necessary starting point. 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).

This Court has found two categories of state laws preempted by ERISA. First, ERISA preempts a state law if it has a "reference to" ERISA plans. Second, ERISA preempts a state law that has an impermissible "connection with" ERISA plans. *Gobeille*, 577 U.S. at 319–20.

A state law is preempted under the "reference to" test if either (i) the law acts immediately and exclusively upon ERISA plans, or (ii) the existence of an ERISA plan is essential to the law's operation. *Id*. at 320.

A state law is preempted under the "connected to" test if (i) the law governs a central matter of plan administration; (ii) the law interferes with nationally uniform plan administration, *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); or (iii) if "acute, albeit indirect, economic effect" of the state law forces an ERISA plan to adopt a certain scheme of substantive coverage or

effectively restrict its choice . . . ," *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). Under this third provision, ERISA does not preempt state rate regulations that (unlike the Seattle Ordinance at issue here) merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage. *Id.*; *De Buono v. NYSA–ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 (1997) (concluding that ERISA did not preempt a state tax on gross receipts for patient services that simply increased the cost of providing benefits); *Cal. Div. of Labor Standards Enf't v. Dillingham*, 519 U.S. 316, 332 (1997) (holding that ERISA did not preempt a California statute that incentivized, but did not require, plans to follow certain standards for apprenticeship programs).

When presented with preemption claims in earlier cases, this Court has indicated that preemption turns on Congress' intent. *Travelers*, 514 U.S. at 655. The purpose of a state law is relevant to determine if the state law is within the scope of provisions that would survive, after examining its effect on ERISA plans. *Id.* at 656; *Dillingham*, 519 U.S. at 325. In *Travelers*, for example, the Court noted that "[b]oth the purpose and the effects of" the state law at issue "distinguish[ed] it from" laws that "function as a regulation of an ERISA plan itself." 514 U.S. at 658–59.

As a shorthand for these considerations, this Court in *Rutledge v. Pharmaceutical Care Management Ass'n*, 141 S. Ct. 474 (2020) noted: (i) where a

state law governs a central matter of plan administration or (ii) interferes with nationally uniform plan administration or (iii) forces plans to adopt any particular scheme of substantive coverage, the state law will be found to be preempted. *Id.* at 480.

ERISA does not guarantee substantive benefits. Therefore, a hotel owner is free to design its self-insured plan without interference from the state, and a hotel owner's insured plan design is only limited by state laws that regulate insurance, as ERISA does not preempt the power of the state insurance commissioner. *Greater Wash. Bd. of Trade v. Dist. of Columbia*, 948 F.2d 1317, 1325 (D.C. Cir. 1991), *aff'd*, 506 U.S. 125 (1992); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). ERISA, instead, seeks to make the benefits promised by a hotel owner more secure by mandating certain oversight systems and other standard procedures. *Travelers*, 514 U.S. at 651. Those systems and procedures are intended to be uniform. *Id*. at 656 (ERISA's preemption clause "indicates Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'" (quoting *Alessi v. Raybestos–Manhattan, Inc*., 451 U.S. 504 (1981)). Requiring ERISA administrators and hotel owners to master the relevant laws of 50 states and many more municipalities and to contend with litigation would undermine the congressional goal of minimizing the administrative and financial burdens on plan administrators—burdens ultimately borne by the employees when increased costs are inevitably passed on. *Egelhoff*, 532 U.S. at 149–50; *Ingersoll–Rand Co. v.*

McClendon, 498 U.S. 133, 142 (1990); *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

A state law cannot be saved from preemption by simply invoking the state's traditional power to regulate in the area of public health. ERISA contemplated the preemption of substantial areas of traditional state regulation. *Dillingham*, 519 U.S. at 330. ERISA preempts a state law that regulates a key facet of plan administration or plan design even if the state law exercises a traditional state power. *See Egelhoff*, 532 U.S. at 151–52.

2. The Seattle Ordinance references ERISA plans

An examination of the Seattle Ordinance reveals that it is preempted under the "reference to" test of ERISA preemption. As explained in more detail below, the Seattle Ordinance operates immediately and extensively on ERISA plans, and ERISA plans are essential to the operation of the Seattle Ordinance's payment scheme. The Seattle Ordinance is also preempted as it forces a hotel owner into a particular benefit design and, as noted above, is not saved from preemption merely because the state has historically regulated in the health industry.

The Seattle Ordinance, SMC 14.28, requires covered hotels to make, each month, payments for required "healthcare expenditures" for covered employees of $459 if an employee has no spouse, domestic partner, or dependents and up to $1,375 for an employee

with spouse, domestic partner, and dependents. *Id*. § 14.28.060.A. These are the rates in effect for 2022 and are "subject to annual adjustments based on the medical inflation rate." *Id*. § 14.28.060.A.

Covered hotels have discretion as to the form of the monthly required healthcare expenditures they choose to make for their covered employees. SMC § 14.28.060.B. Hotels may satisfy their monthly obligations through any one or more of the following options, either individually or in combination:

- *First option*: **Direct Compensation.** Additional compensation can be paid directly to the covered employee (*id*. § 14.28.060.B.1);
- *Second option*: **ERISA insured or funded benefit option.** Payments to a third party, such as to an insurance carrier or trust, or into tax favored health programs (including health savings accounts, medical savings accounts, health flexible spending arrangements, and health reimbursement arrangements) for the purpose of providing healthcare services to the employee or the spouse, domestic partner, or dependents of the covered employee (if applicable) (*id*. § 14.28.060.B.2); and
- *Third option*: **ERISA self-insured option.** Average per-capita monthly expenditures for healthcare services made to or on behalf of covered employees or (the spouse, partner, or dependents) by the employer's self-insured and/or self-funded insurance program(s). *Id*. § 14.28.060.B.3.

Under all of the options, there is a potential delay in the Seattle Ordinance's application for new hires. If the hotel's health plan imposes a waiting period, the hotel owner will not be required to satisfy the health expenditures described in SMC § 14.28.060 until the sooner of 60 days from the date of hire or the expiration of the waiting period. *Id*. § 14.28.060.C.

The Seattle Ordinance contains several exceptions. One exception provides that a hotel owner will be "deemed to have satisfied" its monthly obligations under any of the three options if "an employee voluntarily declines an employer's offer" of compliance through the second and third options—*i.e.*, an offer of coverage under the hotel's insured or self-funded ERISA health plan. SMC § 14.28.060.D. For the offer to be valid, the hotel owner "must not require the employee to pay more than a dollar amount equivalent to 20 percent of the monthly required healthcare amount described in subsection 14.28.060.A.1," through the employee's portion of an insurance premium or cost-sharing. *Id*. § 14.28.060.D.1. For example, for an employee entitled to a healthcare expenditure just for him- or herself, the employee shall not be required to pay more than an amount equaling 20 percent of the single employee healthcare expenditure rate of $459, *i.e.*, $91.80/month towards the hotel-sponsored health insurance plan.

3. The dollar amount of the healthcare expenditure required to comply with the Seattle Ordinance cannot be determined without reference to an ERISA plan

As a practical matter, under the Seattle Ordinance the required healthcare expenditure payment to the employee cannot be determined without reference to the hotel's ERISA healthcare plan. If an employee, who has no dependents, has a premium for healthcare coverage of greater than $459 per month under the hotel's medical plan, then no payment is required. However, even if no payment is made, an examination of the hotel's ERISA plan is still necessary to determine if the employer complied or a penalty is owed.

If no payment was made because the employee opted out of such coverage, an examination of the hotel's plan and the cost-sharing would be required to determine the premium and whether the cost-sharing of the employee is more than 20 percent of the premium. If the employee is a new hire, an examination of the hotel's plan is required to see if there is a waiting period of 60 days. If so, no healthcare expenditure needs to be made for the employee during that period of time.

If the value of the health premium is not sufficient, then the hotel must either increase benefits under the plan or pay the employee in cash. If a hotel must increase benefits, the Seattle Ordinance encourages the hotel to impose a 60-day waiting period and a 20 percent cost-sharing of the premium in order to offset the

costs of the additional benefit that must be provided under the Seattle Ordinance.

Because an examination of the hotel's healthcare plan is required, the "reference to" test is satisfied because a hotel's health plan is an essential element of demonstrating compliance with the ordinance.

4. The Seattle Ordinance has an impermissible "connection with" ERISA plans

The Seattle Ordinance also satisfies the impermissible "connection with" test because it interferes with the administration of the plan by imposing a maximum cost-sharing, a maximum waiting period, and a minimum value on the premium under the plan. The Seattle Ordinance effectively mandates that hotels structure their health plans with a certain dollar level of benefits and a certain maximum cost-sharing with employees. A hotel with an insured plan would have to convince an insurance carrier to file modified insurance contracts with the Washington State Insurance Commissioner just to satisfy the needs of a few hotels within the City of Seattle. If that process fails, the hotel would need to explore the redesign of its plan to self-insure or pay the employees in cash, again with a modification to the hotel's medical plan to prevent double benefits to the employee.

The Ninth Circuit's response to the arguments that the employer can merely pay the entire $459 monthly without referring to the ERISA plan is a Hobson's choice as it is a substantial cost that would more than

double a hotel's healthcare cost. For example, if the hotel is already paying $410 as a medical premium for an employee, with no dependents, the hotel would have to pay another $459 if no reference is made to the hotel's plan and only $49 if reference is made to the hotel's plan. The additional $459 per month per employee, with no dependents, is a prohibitively expensive payment and not a real choice for the hotel. Moreover, the Ninth Circuit's Direct Payment Test—the hotel owner can simply pay the full cost without referencing the hotel's health plan—simply ignores the "reference to" and the "connection with" preemption tests and permits the city to accomplish indirectly what ERISA forbids directly. ERISA prohibits the City of Seattle from requiring hotels to offer health benefits that have a minimum value, and ERISA also prohibits a city from imposing a minimum cost-sharing on premiums or requiring a maximum waiting period before benefits could commence:

> ERISA reserves to the federal government the sole power to regulate the field of employee benefit plans to eliminate any threat of conflicting state and local regulation.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99 (1983).

Thus, in *Shaw*, this Court held that a New York state law that required a provision for sick leave benefits to pregnant workers was preempted. In *Greater Washington Board of Trade*, 948 F.2d at 1324–25, the court held that a state mandate to provide health

insurance to employees that were receiving workers' compensation was preempted.

The City of Seattle cannot be permitted to accomplish indirectly that which it is forbidden to regulate directly. Because the Seattle Ordinance is tantamount to a mandated benefit design, it is prohibited by this Court's decision in *Shaw*. As this Court's shorthand preemption test indicates, the Seattle Ordinance interferes with the uniform administration of employee benefit plans and interferes with a hotel owners' free choice of plan design, and therefore, the Ordinance should be preempted. The Seattle Ordinance should also be preempted because it has a reference to ERISA plans and operates immediately on such plans, and a hotel's ERISA plan is essential to the operation of the Seattle Ordinance because the premium under the plan determines how much the employee must be paid directly in cash.

The Direct Payment Test formulated by the Ninth Circuit is contrary to this Court's precedent, and this Court should grant review and reverse the decision by the Ninth Circuit by applying the traditional "reference to" test of ERISA preemption.

B. Review is required because the Ninth Circuit's Direct Payment Test is an erroneous interpretation of the Supreme Court's opinion in *Rutledge v. Pharmaceutical Care Management Ass'n*, 141 S. Ct. 447 (2020).

In this case, the Ninth Circuit stated that a direct payment to an employee is not an ERISA plan and does not implicate an ERISA plan. The Ninth Circuit suggests that this Court's traditional preemption analysis is not applicable and that there is a new paradigm of preemption analysis when there is merely a cost paid to the employee and no payment is required to be made to the ERISA plan. Not so. This Court has held that, where a payment or cost is designed to influence employer choice with respect to the design of an ERISA plan or interferes with the uniform administration of such plan, ERISA is implicated.

When analyzing cost implications of a law on ERISA plans, this Court confirmed the appropriate test for preemption is the two-part test applied in *Gobeille* and *Egelhoff*: does the law have a "reference to" or a "connection with" an ERISA plan. *Rutledge*, 114 S. Ct. at 479. In applying these tests, this Court reaffirmed that a court must consider ERISA objectives as a guide as to the scope of state law that Congress understood would survive. *Id.* at 480. As a shorthand for these considerations, a court must ask whether a state law governs a central matter of plan administration, interferes with nationally uniform administration, or forces the plan to adopt a certain scheme of coverage. *Id.* at 480; *Gobeille*, 577 U.S. at 320.

In *Rutledge*, the Court did, however, indicate that laws that just affect costs, when such laws are not aimed at employee benefit plans and only have an indirect effect on such plans, are not preempted. Examples of laws that have been found not preempted include a tax provision that was not aimed at employee benefit plans and only indirectly increased the cost of administration of an employee benefit plan, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and in *Rutledge*, a law that required pharmacy benefit managers to reimburse pharmacies at a rate equal to or higher than the pharmacy's wholesale cost. Although *Rutledge* found indirect cost regulations permissible, this Court went on to state that if the cost binds an administrator to a particular administrative choice or forces the plan to adopt any particular substantive scheme, the cost regulation would nevertheless be preempted. 114 S. Ct. at 480–81.

The logic of *Rutledge* and *Travelers* is not, as suggested by the Ninth Circuit, that costs imposed on entities other than ERISA plans can never result in preemption. Rather, these cases hold that ERISA is not implicated by a general cost regulation that is not aimed at an employee benefit plan and only has an indirect effect on the administration of employee benefit plans. The Seattle Ordinance, however, is not an indirect cost regulation similar to that in *Rutledge* or *Travelers*. The Seattle Ordinance is a healthcare measure that can only be satisfied by payments of healthcare expenditures with reference to an ERISA plan. The

stated intent of the Seattle Ordinance is to provide high-quality healthcare coverage (healthcare coverage through a health plan with a minimum value) to employees. SMC § 14.28.025. The Seattle Ordinance is aimed at ERISA plans as the expenditures can only be satisfied by an ERISA plan or by a direct payment to the employee after the value of the ERISA plan is taken into consideration. Under the Seattle Ordinance, health plans are required to have a specified minimum value with a specified maximum premium cost-sharing of no more than 20 percent or the hotel owner is required to make a cash payment to the employee equal to the difference in value.

Rutledge did not establish or endorse the standalone Direct Payment Test as a new paradigm of ERISA preemption as formulated by the Ninth Circuit. *Rutledge* did not give approval to a new test for ERISA preemption. *Rutledge* confirmed that the test for ERISA preemption is the "reference to" or the impermissible "connection with" tests that have long been used by this Court.

The Ninth Circuit's Direct Payment Test is at variance with this Court's analysis of costs in *Rutledge*. Under *Rutledge* and *Gobeille*, the Seattle Ordinance is preempted because it is aimed at ERISA plans, forces a particular plan design, and interferes with the uniform administration of the hotel's ERISA medical plans. Applying this Court's shorthand guidance to giving effect to congressional intent, the Seattle Ordinance is preempted because it both interferes with the national uniform administration of the plan and is

designed to force a particular coverage scheme. This Court should grant review and reverse the Ninth Circuit's erroneous Direct Payment Test for ERISA preemption. This Court should find that the Seattle Ordinance is preempted under the "reference to" test for ERISA preemption and is not an indirect regulation of costs as authorized by *Rutledge* and *Travelers*.

C. Review is required because the Ninth Circuit's Direct Payment Test provides an end run around ERISA and effectively nullifies its goals of uniform administration and employer choice in providing welfare benefits.

As the Court is aware, ERISA imposes no substantive requirement to provide any particular welfare benefits. ERISA is designed to encourage hotel owners to provide welfare benefits by ensuring that such benefits could be uniform in their design and administration. Requiring ERISA administrators and hotel owners to master the relevant laws of 50 states and hundreds of municipalities and to contend with litigation over those requirements would undermine the congressional goal of "'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Egelhoff*, 532 U.S. at 149–50 (quoting *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)); *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

Adherence to the Ninth Circuit's Direct Payment Test would invite cities like Seattle to make an end run

around the statute and nullify the central purpose of ERISA—the hotel owner's control over uniform benefit design and uniform administration. As explained in more detail above, the Seattle Ordinance requires a health plan to provide an employee, without dependents, health plan coverage at a value of at least $459 per month (coverage for families is $1,375 per month), with no more than a 60-day waiting period and no more than a 20 percent cost-sharing of the premium. Suppose the City of Yakima, Washington also adopts an ordinance requiring no cost-sharing with employees or requiring a payment to the employee of $300 per month. Suppose the City of Kent, Washington also requires a health plan to provide family coverage equal in value to $1,500 per month or to pay that amount directly to the employee. Suppose the City of Portland, Oregon further requires a mental health therapy benefit of $2,500 per month or payment of that amount to the employee. Suppose the City of San Francisco, California prohibits requiring any waiting period on health coverage or requires a payment to employees of $1,000 per month. Each of these benefit requirements would be an impermissible regulation of a hotel's employee benefit plan if imposed directly. *See* discussion of *Shaw*, and *Greater Washington Board of Trade*, *supra* at pp. 14-15. The Ninth Circuit's Direct Payment Test allows a city or state to accomplish indirectly what it could not accomplish directly, by merely including a stand-alone direct pay option, that is, by allowing payment of a set amount to the employee in cash in lieu of the required benefit. As illustrated by this proposed patchwork of laws, the Ninth Circuit's opinion

would interfere with the uniform administration of benefits plan and would force a hotel to adopt certain benefit and cost-sharing provisions in its ERISA employee benefit plans, the expense of which is borne by employees. This Court should grant review in order that hotels and their employees can avoid the patchwork of laws that will proliferate if the Ninth Circuit's Direct Payment Test for ERISA preemption is allowed to stand.

CONCLUSION

Review by this Court is necessary because the Ninth Circuit's Direct Payment Test is an erroneous interpretation of this Court's precedent and if left to stand will become a blueprint for nullifying ERISA preemption. It provides a simple method for states and municipalities to do an end run around the protections afforded to hotels and their employees under ERISA. States and municipalities could impose mandated benefits and administrative schemes by simply having an alternative cost that must be paid directly to the employee in lieu of the mandated design changes. Such an alternative direct payment approach does not avoid preemption under the "reference to" and impermissible "connection with" tests adopted by this Court.

The Ninth Circuit's opinion, if not overturned, will lead to an unworkable patchwork of laws and regulations that will drive up hotel and employee costs as well as the costs of plan administration. The Ninth

Circuit's opinion interferes with the equitable treatment of employees that are working across state lines or even within different counties or cities within a single state. Review should be granted and the decision of the Ninth Circuit should be reversed, finding that the Seattle Ordinance is preempted by ERISA.

Respectfully submitted,

RICHARD J. BIRMINGHAM*
HARRY KORRELL
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150
richardbirmingham@dwt.com
Counsel for Amici Curiae

**Counsel of Record*