NO. 90113-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and WASHINGTON RESTAURANT ASSOCIATION,
Petitioners/Plaintiffs,

v.

CITY OF SEATAC,
Respondent/Defendant,

v.

SEATAC COMMITTEE FOR GOOD JOBS,
Respondent/Intervenor.

APPENDIX TO ANSWER OF SEATAC COMMITTEE FOR GOOD JOBS TO PLAINTIFFS' MOTION FOR (1) ACCELERATED REVIEW AND (2) CONSOLIDATION WITH CASE NO. 89723-9

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DATED this 16th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2014, I caused the foregoing Appendix to SeaTac Committee for Good Jobs' Answer to Plaintiffs' Motion for (1) Accelerated Review and (2) Consolidation with Case No. 89723-9-I to be sent for filing via overnight mail to the Clerk of the Supreme Court, and a true and correct copy of the same to be delivered via overnight mail to:

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Appendix

NO. _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and WASHINGTON RESTAURANT ASSOCIATION,
Respondents/Plaintiffs,

v.

CITY OF SEATAC,
Respondents/Defendants,

and

SEATAC COMMITTEE FOR GOOD JOBS,
Petitioner/Intervenor.

PETITIONER SEATAC COMMITTEE FOR GOOD JOBS' EMERGENCY MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Petitioner SeaTac Committee for Good Jobs ("the Committee") is a coalition of individuals, businesses, neighborhood associations, immigrant groups, civil rights organizations, people of faith, and labor organizations in and around SeaTac, united for good jobs and a fair economy, who are working together to support a proposed ballot initiative to the People of SeaTac, entitled "Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers," City of SeaTac Proposition One ("the Good Jobs Initiative").

B. DECISION BEING APPEALED

The Committee is appealing King County Superior Court's August 26, 2013, Order Granting Plaintiffs' Motion and Application for Writs of Review, Mandate and Prohibition and Issuing Writs of Review, Mandate, and Prohibition ("the Order"), a copy of which is attached hereto. A-6-16.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Did the superior court commit probable error by issuing its Order where King County had already determined that the Initiative had sufficient signatures and therefore issued a Notice of Sufficiency?

2. Did the superior court commit probable error by issuing its Order where, even if the Court acted correctly in striking all signatures of

[1] All "A-__" references refer to documents in the Appendix submitted with Petitioner's Emergency Motion for Discretionary Review.

voters who signed the Petition more than once, sufficient other valid signatures (wrongly stricken by the Petition Review Board) existed to warrant upholding a determination of sufficiency?

3. Did the superior court commit probable error by issuing its Order where the procedures and decisions of the Petition Review Board and Judge Darvas depriving SeaTac voters of federal Constitutional rights?

4. If yes, should this Court accept discretionary review on an expedited basis, issue an order vacating the Order Granting Plaintiffs' Motion and Application for Writs of Review, Mandate and Prohibition and Issuing Writs of Review, Mandate, and Prohibition and thereby permit the Good Jobs Initiative to be submitted to the voters of SeaTac at the next general election?

D. STATEMENT OF THE CASE

This underlying action is an effort by BF Foods, LLC, Filo Foods, LLC, Alaska Airlines, INC., and the Washington Restaurant Association ("the Plaintiffs") to prevent City of SeaTac Proposition One ("the Good Jobs Initiative"), a City of SeaTac initiative entitled "Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers," from being submitted to the voters.

The SeaTac Municipal Code ("SMC") provides an initiative process for SeaTac voters. A-44-54. SMC 1.10.110 requires that a petition in support of a ballot initiative be supported by at least fifteen (15) percent of registered voters within the City as of the day of the last preceding general election. A-49. It is not disputed that with respect to the Good Jobs Initiative, this means that the proposed initiative needed to have been supported by 1,536 valid signatures in order to justify a certificate of sufficiency being issued. A-392-98.

The SeaTac Committee for Good Jobs collected 2,506 signatures in support of the Good Jobs Initiative. A-129-229. The City sent these signatures to King County Division of Elections ("King County Elections") for review, as required under SMC 1.10.140. A-249-50. King County Elections reviewed the signatures for validity, and on June 20, 2013, issued a finding of sufficiency for the signatures reviewed. A-320. The City Clerk's office issued its own certificate of sufficiency in response, on June 28. A-319.

The City Council, following the provisions of SMC 1.10.220, set the issue of sending the Initiative to the November ballot on the City Council agenda for July 23, 2013. A-362-66. Plaintiffs requested a hearing before the City's Petition Review Board, on the basis, inter alia, that the City had counted invalid signatures in support of the initiative. A-336-52.

After a review of the arguments and discussion with the City Attorney, the Board found that signatures in three of the five categories should not count towards the total signatures for a finding of sufficiency.[2] Even with these three categories of signatures stricken, the Board determined that the petition was supported by 1,579 valid signatures, and issued a final certificate of sufficiency. A-522.

The Initiative was placed on the City Council agenda for consideration on July 23, 2013, at which time the Council voted to place the Initiative on the November ballot. A-364-66. Plaintiffs then filed a motion and application for writs of review, mandate, and prohibition, forbidding the Good Jobs Initiative from being placed on the ballot on the grounds, inter alia, that the Petition Review Board had improperly counted as 61 valid signatures the signatures of SeaTac voters who mistakenly signed the petition more than once, in alleged contravention of RCW 35A.01.040(7) and SMC 1.10.140(C). A-17-32. This motion and application was subsequently granted. A-6-16.

This emergency discretionary appeal followed. Because the Order deprives the Committee of its ability to place before the voters of SeaTac an initiative that could have a significant impact on the lives of those

[2] The Board decided to strike 1) signers that did not include a date of signing on the petition; 2) signers that did not include an address on the petition; and 3) signers on petition pages that did not have a full text ordinance attached. A-392-98; A-414-15.

voters, Petitioners seek an expedited emergency determination of their right to discretionary review. *See* RAP 17.4.

E. ARGUMENT

1. Standard for Discretionary Review.

Petitioner seeks discretionary review of the trial court's order granting a motion and application for writs of review, mandate, and prohibition, forbidding the Good Jobs Initiative from being placed on the ballot. Discretionary review should be granted on the grounds that:

> The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

RAP 2.3(b)(2).

The trial court's ruling dramatically, negatively, and without any reasonable justification denied the Committee its right to have the Good Jobs Initiative placed before the voters of the City of SeaTac. In so ruling, the trial court committed probable error.

2. The Superior Court Committed Probable Error When It Granted Plaintiffs' Motion And Application For Writs Of Review, Mandate And Prohibition, Because the Initiative Qualified For The Ballot When The King County Auditor Found That It Had Sufficient Signatures And Issued Its Notice Of Sufficiency.

The Good Jobs Initiative qualified for the ballot when the King County Auditor found that it had sufficient signatures and granted its notice of sufficiency on June 20, 2013. Under state law, it is the King

County Auditor—and only the King County Auditor—that is given the "duty to determine the sufficiency of the petition." Not surprisingly, only a court of law can reject voter signatures, which are presumed valid under state law, RCW 35A.01.040 (5), once validated by the County Auditor. Because the determination by the King County Auditor has never been challenged, the Good Jobs Initiative should not be barred from the November 2013 City of SeaTac ballot.

The underlying facts of this case are not in dispute. On June 10, 2013, the proponents of the Good Jobs Initiative submitted the petition, which was thereafter sent to King County to determine its sufficiency. King County issued the Good Jobs Initiative a Certificate of Sufficiency on June 20, 2013. King County's certificate states that the Good Jobs Initiative "has been examined and the signatures thereon carefully compared with the registration records of the King County Elections Department," and as a result of such examination, found the signatures to be sufficient under the provisions of RCW 35A.01.040.

To qualify for the ballot, only 1,536 signatures were necessary. A-395, ¶3. King County found there to be 1,780 valid signatures. A-395, ¶6. This included 61 original signatures from voters who signed twice. A-395, ¶ 12. **In other words, King County found that the initiative had more than enough signatures to qualify for the ballot even if it had rejected**

both the original and duplicate signatures of voters. Even with both instances stricken, there would have been 1,719 valid signatures, well more than the necessary number.

King County found the Good Jobs Initiative valid using the same methodology that it has used throughout the county for ten years. Consistent with its practice, when the County came upon a duplicate signature, it followed the Supreme Court's decision in *Sudduth v. Chapman*, 88 Wn.2d 247 (1977), and counted the first signature but not the duplicate. When an address was missing, the King County Auditor's office looked it up.

The Washington state legislature has enacted tight regulations for determining the sufficiency of petition signatures, identifying a clear decision-maker and specific time-lines. RCW 35A.01.040[3] provides that

> (4) To be sufficient a petition must contain valid signatures of qualified registered voters or property owners, as the case may be, in the number required by the applicable statute or ordinance. **Within three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters, or to the county assessor for petitions signed by property owners for determination of sufficiency. The officer or officers whose duty it is to determine the sufficiency of the petition shall proceed to make such a determination with reasonable promptness** and shall file with the officer receiving the petition for filing a certificate stating the date

[3]*See also*, RCW 35.21.005(4).

> upon which such determination was begun, which date shall be referred to as the terminal date.
> ...
> (5) **Petitions containing the required number of signatures shall be accepted as prima facie valid until their invalidity has been proved.**
> ...
> (10) **The officer or officers responsible for determining the sufficiency of the petition shall do so in writing and transmit the written certificate to the officer with whom the petition was originally filed.** (emphasis added).

The Court of Appeals in *Eyman v. McGee,* 173 Wn.App. 684, 686 (2013) interpreted RCW 35A.01.040(4) to mean that "A city clerk has a mandatory duty under the statutes governing the filing of initiative petitions to transmit such petitions to the county auditor for determination of sufficiency."). In *King County Water Dist. No. 90 v. City of Renton*, 88 Wn. App. 214, 225 (1997), the Court noted that the "sufficiency" statute, RCW 35A.01.040, has been amended.... As amended, it appears that the county auditor and assessor are the officers whose duty it is to determine the sufficiency of a petition." The Court of Appeals noted that prior to 1997 the local government may have shared this right. *Id.*

The Revised Code of Washington (RCW) clearly delegates the authority to determine sufficiency exclusively to the County Auditor, and leaves no room for municipal officials to adopt subsequent proceedings to allow their elected officials to review and/or overturn King County's decision. Any such municipal efforts are preempted by conflicting state

law under Article XI, section 11 of the Washington Constitution. *See Lawson v. City of Pasco*, 168 Wn.2d 675, 682 (2010); *Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County Comm'n.*, 92 Wn.2d 844 (1979).

To date—about one week before the deadline for referring the Good Jobs Initiative to the ballot—no party has brought an action against King County to challenge its certificate of sufficiency or, specifically, its finding that the Good Jobs Initiative is sufficient under RCW 35A.01.040. Based on these facts, this Court should reverse the superior court and require King County and the City of SeaTac to place the Good Jobs Initiative on the ballot.

3. The Superior Court Committed Probable Error When It Granted Plaintiffs' Motion And Application For Writs Of Review, Mandate And Prohibition Because Even If The Superior Court Was Correct in Striking the Signatures of People Who Signed the Petition More than Once, Sufficient Other Valid Signatures (Wrongly Stricken By the Petition Review Board) Existed To Warrant the Good Jobs Initiative Being Placed on the Ballot.

a. The superior court failed to address Petitioner's contention that a large number of signatures were improperly excluded by the Petition Review Board, and Petitioner requests that the superior court reverse that exclusion, an act that would have resulted in a determination that a sufficient number of valid signatures existed.

In the pleadings before the superior court, the Committee contended that even if the court concluded that signatures of persons who signed more than once were properly excluded, a sufficient number of other valid signatures existed, signatures that were improperly stricken from consideration by the Petition Review Board. A-404-8.

The superior court failed to even **address** this argument in its Order. A-6-16. In fact, the superior court should have addressed the Committee's argument that two categories of signatures were *improperly* stricken by the Board, in contravention of both RCW and SMC provisions concerning local ballot initiatives. Had the superior court done so, it would have concluded, as we urge the Court of Appeals now to conclude based on the argument below, that enough valid signatures were improperly stricken by the Petition Review Board that *even if* the superior court's ruling on the duplicate signer question was correct, a sufficient number of signatures to justify the Good Jobs Initiative being placed on the ballot still existed.

b. <u>One hundred and forty-five signatures were improperly excluded by the Petition Review Board based on Plaintiffs' assertions regarding the date of the signatures</u>.

RCW 35A.01.040(8) states that "[s]ignatures followed by a date of signing which is *more than six months* prior to the date of filing of the petition shall be stricken." (Emphasis added). This language is the same as

in SMC 1.10.140(D). Yet the Petition Review Board struck as an entire category all signatures from "signers that did not include a date of signing on the petition." A-396-97, ¶¶15-17.

The Plaintiffs have not alleged that the signatures were *gathered* six months prior to the date of filing the petition, but rather broadly assert that the lack of a date means such signatures should be excluded entirely.[4] Yet the Plaintiffs have no valid justification for such an argument. The language of the Code and of the SMC clearly indicates when signatures should be stricken, and makes no provision whatsoever for striking signatures that simply omit a date. As it was not possible for any of these signatures to exist "more than six months prior to the date of filing of the petition," these signatures should not have been stricken (especially in light of the presumption of validity of signatures unless proven otherwise).

This category's signatures are included at A-429-505. As demonstrated, seven signatures *did* contain at leat partial dates, despite the characterization made by the Plaintiffs to the Board.[5] The remaining 138

[4]No one has disputed the timeframe in which the petition sheet was created, based on the email communications between the City Attorney's office and the Committee's attorney that occurred in April of 2013. A-413-14, ¶2; A-419-28. The Petition was filed with the Clerk, including the final version of the signature page, on April 26 and May 1, 2013. A-413-14, ¶2.

[5] Contrary to Plaintiffs' assertions, the Committee never stipulated to or before the Petition Review Board that any of the individual signatures contained in the categories of signatures challenged by Plaintiffs properly belonged in those categories. A-415-16, ¶9. Thus, the Committee is in no way estopped or barred from arguing to this Court that

signatures in this category, while lacking a date, occurred on pages where it could clearly be inferred from the dates surrounding the signature that the date was within the six-month window. Because 145 signatures is vastly greater than the 18-signature deficiency that would exist were all 61 "duplicate signer" signatures deemed invalid by this Court, this category alone is enough to maintain a determination of sufficiency.

c. An additional 14 signatures were improperly excluded by the Board based on the Plaintiffs' challenge regarding flaws in the address.

RCW 35A.01.040(d) requires "[n]umbered lines for signatures with space provided beside each signature for the name and address of the signer and the date of signing." There is no language in the RCW or the Code that calls for striking signatures based on flaws in address completion. The RCW language for sufficiency of signatures notes what "shall be stricken" in clear terms. *See, e.g.*, RCW 35A.01.040(7) and (8). SMC provides the same. *See, e.g.,* SMC 1.10.140(C), (D), and (E). If the intent of the statutory language was to strike the signature of any voter who did not *fully* fill out the address line, then that would be indicated in the language of the Statute and the Code.

Furthermore, as the King County Department of Elections can clearly look up names to confirm that the signer is in fact a resident of

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these seven signatures were improperly disregarded by the Board even if the Board's legal analysis regarding this "category" of signatures was correct.

SeaTac, there is no prejudicial error possible in counting a signer that does not contain a completed address next to the voter's signature.[6]

The signatures that fall into this category are included at A-506-515. Six of these signatures had partial information in the address line. Eight more did not but should not have been stricken, because they were verified as valid voters and residents of the City of SeaTac. These are 14 additional signatures that should have also counted towards the determination of sufficiency. Combined only with the seven signatures that were erroneously stricken by the Board for allegedly lacking a date on the signature line, when in fact they had such a date (discussed above), and putting aside entirely the issue of the 135 signatures that concededly lacked any written date, this still generates a total of 21 signatures that were invalidly stricken by the Board. Were this Court to deem those 21 signatures valid, then the Good Jobs Initiative is still supported by 1,539 valid signatures (the 1,518 that are left after the 61 signatures from "duplicate signers" are stricken, plus these 21)—three more signatures than are necessary for the certificate of sufficiency that was issued by the Petition Review Board to be properly upheld.

d. The fact that the Committee did not attempt to appeal these rulings of the Petition Review Board does not

[6]In fact, Plaintiffs concede that King County *did* exclude signers who were not residents of SeaTac, regardless of the information included on the petition signature sheet. A-19.

> mean that the superior court did not commit plain error in not reversing those rulings and counting the improperly stricken signatures as valid.

Where a party prevails in a preliminary action, it is not obliged to cross-appeal to argue for affirmance on any grounds supported by the record. *See State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610, 615 (2000). In *Bobic*, the Court rejected the notion that the State failed to properly preserve an issue below "because it did not cross-appeal from the trial court's finding" because "[t]he State prevailed on the suppression motion" and "[a]s a respondent, the State was not obliged to cross-appeal because it sought no further affirmative relief from the Court of Appeals." *Id.*, citing *In re Arbitration of Doyle,* 93 Wn. App. 120, 123, 966 P.2d 1279 (1998) (notice of cross appeal is essential if the respondent seeks affirmative relief as distinguished from urging additional grounds for affirmance); 3 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Rules Practice* 48 (5th ed.1998).

To the contrary, the respondent in the *Bobic* litigation, the State, was "entitled to argue any grounds supported by the record to sustain the trial court's order." *Bobic*, 140 Wn.2d at 258, citing *Davis v. Niagara Mach. Co.,* 90 Wn.2d 342, 348, 581 P.2d 1344 (1978); *Ertman v. City of Olympia,* 95 Wn.2d 105, 621 P.2d 724 (1980); *Tropiano v. City of Tacoma,* 105 Wn.2d 873, 876, 718 P.2d 801 (1986).

"[N]otice of cross-review is essential if the respondent 'seeks affirmative relief as distinguished from *the urging of additional grounds for affirmance*.'" *State v. Sims*, 171 Wn.2d 436, 442-43, 256 P.3d 285, 289 (2011) (emphasis added), citing *Robinson v. Khan,* 89 Wn. App. 418, 420, 948 P.2d 1347 (1998). Affirmative relief "normally mean[s] a change in the final result at trial." 2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.4 author's cmt. 3, at 174 (6th ed. 2004). While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court. *Sims*, 171 Wn.2d at 442-43, citing *Doyle,* 93 Wn. App. at 127 (holding that, when a respondent "requests a partial reversal of the trial court's decision, he seeks affirmative relief").

In contrast, where (as here) no affirmative relief, as defined above, is sought, then no cross-appeal is necessary in order for arguments regarding a lower tribunal's error to legitimately be presented. *See, e.g., State v. McInally,* 125 Wn. App. 854, 863, 106 P.3d 794 (2005) (State was "entitled to argue any grounds to affirm the court's decision that are supported by the record, and is not required to cross-appeal.").

Here, because the Committee was not aggrieved by the Petition Review Board's issuance of a final certificate of sufficiency, it did not affirmatively seek a writ of review of that act in this (or any other) legal

action. As in *Bobic*, the Committee did not cross-appeal from the Petition Review Board's finding because the Committee prevailed on the determination of sufficiency and "was not obliged to cross-appeal because it sought no further affirmative relief" from the Court. The Committee was entitled to argue any grounds supported by the Record to affirm the Petition Review Board's decision, and was not required to cross-appeal.

4. The Superior Court Committed Probable Error When It Granted Plaintiffs' Motion And Application For Writs Of Review, Mandate And Prohibition Because The Procedures and Decisions of the Petition Review Board and Judge Darvas Deprived SeaTac voters of Federal Constitutional Rights.

Washington State's grant of the initiative process to its citizens elevated it to a fundamental right under the Federal Constitution, protected under the Equal Protection and Due Process clauses. "[W]hen a state chooses to give its citizens the right to enact laws by initiative, 'it subjects itself to the requirements of the Equal Protection Clause.'" *Angle v. Miller*, 673 F.3d 1122, 1128 (9th Cir. 2012) (quoting *Idaho Coal. United for Bears v. Cenarrusa*, 343 F.3d 1073, 1077 n.7 (9th Cir. 2003)).

This federal protection arises from the fundamental right to vote, where "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 815

(1969). "The ballot initiative, like the election of public officials, is a 'basic instrument of democratic government,' and is therefore subject to equal protection guarantees. Those guarantees furthermore apply to ballot access restrictions just as they do to elections themselves." *Idaho Coalition*, 342 F.3d at 1076 (9th Cir. 2003) (quoting *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 123 S. Ct. 1389, 1395 (2003) (internal citation omitted); citing *Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). "Nominating petitions . . . for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause." *Id.* at 1077.

The "rigorousness" of the "inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . When those rights are subjected to severe restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Where the restriction is so severe that it eliminates a person's vote entirely, it must pass strict scrutiny. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 899-900 (9th Cir. Cal. 2003). Thus, the government must demonstrate that the infringement on this

fundamental right is narrowly tailored to serve a compelling state interest. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006). The government bears the burden of proof under strict scrutiny. *See e.g., Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012).

Striking the names of those individuals who signed the petition more than once not only directly disenfranchises 61 voters, it indirectly disenfranchises all the voters who signed to qualify the Good Jobs Initiative for the ballot. Thus, the actions and decisions of the City and Judge Darvas violate these Federal Constitutional guarantees.

a. Rejecting original signatures of SeaTac voters simply because they mistakenly signed the initiative more than once violates the Equal Protection clause of the U.S. Constitution.

Rejection of all signatures of an individual who signed an initiative twice is not in the least narrowly tailored and thus violates the equal protection rights of SeaTac voters. The government's interest in preserving the integrity of the initiative process is undisputedly important. *See John Doe No. 1 v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2819 (2010). But, this action is not narrowly tailored to meet the professed goal. As the *Sudduth* court recognized, when a voter accidentally signs an initiative twice, eliminating the voter's *original* signature along with the duplicates does nothing to enhance the integrity of the initiative process. *See Sudduth*, 88 Wn.2d at 251.

Indeed, even if the Court were to examine SeaTac's rejection of every duplicate signature under a less onerous standard, it would fail Constitutional standards. No matter how small the burden on the access to the ballot, it "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

b. Changing the requirements for signatures without notice violates the SeaTac voters' rights to due process provided by the federal Constitution.

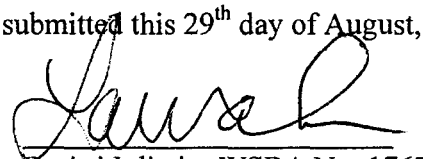
"[A]n election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). After-the-fact and surprise disenfranchisement are particularly indicative of a due process violation. *Id.* at 1227. In this case, King County has long counted one signature of a voter who has signed a petition multiple times. A-387-8. Consequently, voters had no notice that inadvertently signing twice would lead to their disenfranchisement. The Washington Supreme Court's 1977 pronouncement that rejecting every duplicate signature is unconstitutional makes it even more likely that voters expect their signatures to count even if they inadvertently signed more than once. *See Sudduth*, 88 Wn.2d at 251. SeaTac's unanticipated deviation from these initiative procedures

resulted in total disenfranchisement of enough petitioners to prevent certification of the initiative for the ballot. This easily satisfies the "significant disenfranchisement" element the Ninth Circuit expressed in *Bennett.* Rejecting the original signatures now without any notice thus violates the SeaTac voters' substantive due process guarantees afforded by the federal Constitution.

F. CONCLUSION

For the foregoing reasons, this court should accept review under RAP 2.3(b)(2) on an emergency basis under RAP 17.4, reverse the trial court's decision granting Plaintiffs' Motion and Application for Writs of Review, Mandate and Prohibition, and permit the Good Jobs Initiative to be placed on the November, 2013, ballot.

Respectfully submitted this 29th day of August, 2013.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2013, I caused Petitioner's Emergency Motion for Discretionary Review and Appendix thereto to be delivered via legal messenger to State of Washington Court of Appeals District I, and true and correct copies of the same to be delivered via email, and placed in the US First Class mail, per agreement of counsel, to:

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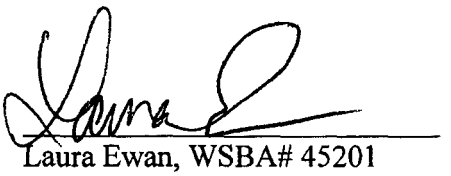

Laura Ewan, WSBA# 45201

The Honorable Andrea Darvas
Hearing Date: December 13, 2013
Hearing Time: 2:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

FILO FOODS, LLC; BF FOODS, LLC; ALASKA AIRLINES, INC.; and THE WASHINGTON RESTAURANT ASSOCIATION, Plaintiffs, v. THE CITY OF SEATAC; KRISTINA GREGG, CITY OF SEATAC CITY CLERK, in her official capacity; and the PORT OF SEATTLE Defendants. SEATAC COMMITTEE FOR GOOD JOBS, Intervenors.	No. 13-2-23352-6 KNT PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT ON STATE LAW CLAIMS

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs seek a judgment that the Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers, new Chapter 7.45 of the SeaTac Municipal Code (the "Ordinance"), is invalid. The Ordinance is invalid for each of the following reasons:

1. It exceeds the proper scope of the legislative power of the City of SeaTac under State law. The Ordinance purports to legislate and regulate various aspects of employment and business operations (including wages, leave policies, hiring policies, tip pooling, successor employer obligations, etc.) for companies and employees at the Seattle-Tacoma International Airport ("Sea-Tac Airport"). The Ordinance also creates both a municipal and private enforcement mechanism for these new rules, also to apply at the airport. However, under RCW 14.08.330, the City of SeaTac does not have the authority to regulate businesses operating at the airport. The Port of Seattle, itself a municipal corporation, has jurisdiction over the airport, and no other municipality, such as the City of SeaTac, has authority to impose or enforce such regulations. Because the legislative intent behind the Ordinance—regulating certain employment and business activity at the airport—cannot be accomplished without violating state law, the Ordinance is completely invalid.

2. It violates the "single-subject" rule applicable to municipal legislation. Here, the Ordinance addresses multiple subjects. The title itself identifies five separate subjects of the legislation. These and the other subjects addressed by the Ordinance are not sufficiently related to one another to constitute a single subject and, in fact, are commonly addressed by separate legislation. An ordinance that violates the single-subject rule is invalid in its entirety.

3. It violates the "subject-in-title" rule applicable to municipal legislation. The subject-in-title rule requires that the title of legislation fairly describe its contents. Here, the Ordinance violates the subject-in-title rule because it contains numerous provisions that are not identified in the title. Many of these omitted provisions are key to Ordinance; their omission

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from the title renders them unenforceable and makes it impossible to effectuate the primary purpose of the Ordinance as drafted. As a result, the entire Ordinance is invalid.

4. It exceeds the scope of local initiative power by purporting to expand the state common law standing requirements. The Ordinance permits a person (broadly defined under the Ordinance to include third-party individuals or organizations) to bring an action in court to enforce the statute regardless of whether that person has suffered an injury. This is contrary to long-established state common law, and this provision of the Ordinance is thus invalid.

II. STATEMENT OF FACTS

A. The Plaintiffs

Plaintiffs Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc. and the Washington Restaurant Association are all affected by the Ordinance:

1. Filo Foods LLC ("Filo") and BF Foods LLC ("BF Foods") are Washington limited liability companies located in the City of SeaTac. Filo and BF Foods are small food and beverage concessionaires operating out of Sea-Tac Airport, employing ten or more nonmanagerial, nonsupervisory employees. Filo and BF Foods would be directly affected by the Ordinance because the Ordinance will increase their labor costs dramatically and impose other restrictions on the operation of their businesses at the airport, as detailed in the Declaration of LeeAnn Subelbia.

2. Alaska Airlines, Inc. ("Alaska") is an Alaska corporation with its headquarters in the City of SeaTac. Alaska provides passenger air transportation and related services, by itself and through contractors, at Sea-Tac Airport. Alaska would be directly affected by the Ordinance in several ways, as detailed in the Declaration of Jeff Butler. Among the consequences of the Ordinance, Alaska will face significantly increased costs for various services provided to passengers through its contractors. In addition, the Ordinance will increase airlines' direct labor costs and impose restrictions on their operations when they perform services such as passenger check-in, baggage check, wheelchair escort, baggage

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handling, and other support services for other airlines. Any air carriers, including Alaska, who participate in this customary practice would be directly affected by the Ordinance, because the Ordinance purports to regulate wages, leave accrual, and other aspects of employment when their employees are so engaged.

3. The Washington Restaurant Association is a trade association representing and advocating the interests of the restaurant industry in Washington. A number of its members will be adversely affected by the Ordinance, including the way it would affect Filo and BF Foods, as detailed in the Declaration of Bruce Beckett.

B. The Ordinance

On June 5, 2013, Petitioner SeaTac Committee for Good Jobs (the "Committee") filed an initiative petition and proposed ordinance entitled "Ordinance Setting Minimum Standards for Hospitality and Transportation Industry Employer" with the City of SeaTac City Clerk's office. After extensive litigation in this Court regarding the invalidity of many of the signatures submitted in support of the measure, the Ordinance was placed on the ballot for the November 5, 2013 election.

The Ordinance amends the SeaTac Municipal Code ("SMC") to impose requirements and restrictions on certain private employers in the hospitality and transportation industries. The primary purpose of the Ordinance is to regulate various aspects of the employer-employee relationship for companies doing business at Sea-Tac Airport, as indicated by the language of the Ordinance (in particular the definition of "transportation employer"), the statements in support of the measure in the Voters' Pamphlet (which constitutes the legislative history of the initiative), and the statements of the advocates for the measure. *See* Declaration of Rebecca Meissner, Exs. A-B.

III. STATEMENT OF ISSUES

Is the Ordinance invalid because it exceeds the City's legislative authority? Yes.

IV. EVIDENCE RELIED UPON

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This motion relies on the pleadings and other papers on file in this matter and the declarations filed herewith.

V. AUTHORITY AND ARGUMENT

A. Declaratory Judgment Is the Proper Mechanism for Ruling on the Validity of an Ordinance Adopted by Initiative.

The Uniform Declaratory Judgments Act, RCW 7.24.010 et seq., is designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." RCW 7.24.120. "A declaratory judgment is used to determine questions of construction or validity of a statute or ordinance." *City of Fed. Way v. King Cnty.*, 62 Wn. App. 530, 534-35, 815 P.2d 790 (1991); *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45, *review denied*, __ P.3d __ (Wash. Nov. 6, 2013); *Seattle-King Cnty. Council of Camp Fire v. State Dep't of Revenue*, 105 Wn.2d 55, 711 P.2d 300 (1985); *Ayers v. City of Tacoma*, 6 Wn.2d 545, 108 P.2d 359 (1940).

Courts routinely rule on the validity of legislation proposed or adopted by initiative in declaratory judgment proceedings. *See, e.g.*, *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 433-34, 260 P.3d 245 (2011) (reversing denial of declaratory judgment for company challenging local initiative as exceeding initiative power), *review denied*, 173 Wn.2d 1029 (2012); *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 608, 612, 949 P.2d 1260 (1997) (affirming declaratory judgment invalidating local initiative because, among other things, initiative would have conflicted with state law); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747-49, 620 P.2d 82 (1980) ("*Seattle Bldg.*") (affirming declaratory judgment for private trade association challenging local initiative as exceeding initiative power); *Ford v. Logan*, 79 Wn.2d 147, 155-57, 483 P.2d 1247 (1971) (affirming declaration invalidating local initiative because it conflicted with the state constitution).

The jurisdiction of a court may be invoked under the Uniform Declaratory Judgments Act when there is a justiciable controversy. *Wallin*, 174 Wn. App. at 777. A justiciable controversy requires:

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> "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Id. at 777-78 (alteration in original) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001)).

Here, Plaintiffs' claims satisfy the requirements for a justiciable controversy. As indicated above and in the declarations cited, all Plaintiffs would be directly affected by the Ordinance and they, therefore, have an interest in having the Ordinance declared invalid. Plaintiffs' interest is substantial and genuine. If enforced, the Ordinance will force companies such as Filo and BF Foods to lay off employees, reduce the quality and quantity of products they offer customers, and potentially shut down as a result of increased labor costs (costs they cannot pass on to their customers because of the "street pricing" requirements imposed by the Port of Seattle, which owns and operates the airport). Airlines, such as Alaska Airlines, will face significantly increased costs for providing essential passenger services.

Employers who do not comply with the newly enacted Ordinance are subject to enforcement actions brought by employees, the City, competitors, and even third-party individuals or organizations such as the Intervenor and the labor unions who support it. 7.45.100(A). This risk of enforcement is sufficient to support a motion for declaratory judgment; an actual enforcement action is not necessary. *See Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 208, 848 P.2d 1258 (1993) (allowing declaratory judgment action concerning future enforcement of newly enacted statute); *Peterson v. Hagan*, 56 Wn.2d 48, 66, 351 P.2d 127 (1960) ("[A] declaratory judgment action will lie to determine the validity of rights under a statute, even though no steps have been taken to enforce it . . . .") (internal quotation marks omitted).

In addition, the question of whether the City of SeaTac has the authority to legislate and impose regulations on employers at the airport is one of significant public importance, and this

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too justifies the court's resolving the dispute now, before the Ordinance takes effect. *Am. Traffic*, 163 Wn. App. at 433. Where a controversy is of significant public importance, the requirements for justiciability are applied more liberally. *Wallin*, 174 Wn. App. at 777; *see also Am. Traffic*, 163 Wn. App. at 433; *State v. Watson*, 155 Wn.2d 574, 578-79, 122 P.3d 903 (2005).

B. Municipal Legislation by Initiative Is Subject to Constitutional and Statutory Limitations.

The Washington constitution protects the right of the people to propose ***statewide*** legislation by initiative, and in result courts presume such statewide laws to be valid, just like laws adopted by the legislature. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000) ("*Amal. Transit*") ("In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute.") (citing *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995)). But the constitutional right to legislate by initiative does not include the power to propose local, municipal legislation. That right, where it exists, is solely a creature of statute. *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010); *Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 643-44, 875 P.2d 673 (1994). The State legislature has authorized, but not required, noncharter code cities like the City of SeaTac to enact legislation allowing initiatives. RCW 35A.11.090. The power of the people to legislate by initiative, at the local level, is substantially limited. *Our Water-Our Choice!*, 170 Wn.2d at 7-8; *see also Coppernol v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005) (noting that judicial review of initiatives, even pre-election, is appropriate because of the "more limited powers of initiatives under city or county charters, or enabling legislation"). Courts routinely invalidate local initiatives if "'the proposed law is beyond the scope of the initiative power.'" *Our Water-Our Choice!*, 170 Wn.2d at 8 (quoting *Seattle Bldg.*, 94 Wn.2d at 746); *see also Am. Traffic*, 163 Wn. App. at 433-34; *Taxpayers for King Cnty.*, 133 Wn.2d at 608, 612 (1997).

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Section 1.10.040 of the SeaTac Municipal Code enables the voters of the City of SeaTac to legislate by initiative. This authority is expressly "subject to the limitations of State law, the general law, and this chapter." SMC 1.10.040. For the several reasons discussed below, the Ordinance is beyond the scope of the initiative power provided under SMC 1.10.040 and state law and is, therefore, invalid, and this Court should not hesitate to so rule. *Amal. Transit*, 142 Wn.2d at 204.

C. The Ordinance Is Invalid Because the City of SeaTac Has No Power to Legislate or Regulate at the Airport.

As detailed below, the Ordinance is invalid for numerous reasons, under both state and federal law: violations of state single-subject and subject-in-title rules, conflict with state common law, preemption by federal labor law, and violation of the U.S. Constitution. But there is another, fundamental problem with the Ordinance and resolution of this relatively straightforward issue in Plaintiffs' favor makes the other analyses unnecessary: The measure purports to legislate employment and business practices at Sea-Tac Airport, but the City has no authority to do so. The Port has exclusive jurisdiction and control over Sea-Tac Airport. RCW 14.08.330. Because the Ordinance purports to legislate beyond the City's legislative power, in conflict with state law, it is invalid.

A proposed law is beyond the scope of local initiative power, and thus invalid, if it attempts to achieve something that is not otherwise within the city's authority or power. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996) (holding that in order to be valid, proposed initiative "must be within the authority of the jurisdiction passing the measure") (citing *Seattle Bldg.*, 94 Wn.2d at 747).

In *Philadelphia II*, initiative sponsors sought to establish a "direct democracy" by means of a federal, nationwide initiative process. The Washington Supreme Court held that the initiative, whose purpose was to create a federal initiative process, was beyond the scope of the state's initiative power because it attempted to exercise authority that went beyond the jurisdiction of the state. 128 Wn.2d 707

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Likewise, in *Seattle Building*, the Washington Supreme Court held that an initiative by Seattle voters to limit further construction on Interstate 90, was invalid because it was beyond the scope of the City's legislative power. Because Interstate 90's title was vested in the State, the State had full jurisdiction, responsibility, and control over it, and the extent to which the City of Seattle could participate in the decision-making process with regard to construction in the Interstate 90 corridor was governed by state law. The Court held that the "obvious intent" of the initiative was to forbid further construction and that the City did not have the authority under state law to do so. The initiative, therefore, exceeded the scope of local initiative power was invalid. 94 Wn.2d at 749.

The Ordinance here is invalid because its primary purpose is to impose and enforce various regulations at Sea-Tac Airport where, under state law, the City does not have jurisdiction. That this is the purpose of the Ordinance is plain from Ordinance's definition of "transportation employer":

> 1) A person, excluding a certificated air carrier performing services for itself who: a) operates or provides within the City any of the following: any ***curbside passenger check-in services***; ***baggage check services***; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services; ***aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and cleaning; aviation ground support equipment washing and cleaning; aircraft water or lavatory services; aircraft fueling***; ground transportation management; or any janitorial and custodial services, facility maintenance services, security services, or customer service performed in any facility where any of the services listed in this paragraph are also performed . . . .

7.45.010(M) (emphasis added). It is also plain from the legislative history. The voter's pamphlet says this in support of the measure: "corporations doing business ***at the airport*** . . . continue to use the recession as an excuse to cut wages, hours, and benefits. . . . Proposition 1 requires ***airport-related employers*** to do the right thing . . . ." (emphasis added).[1]

[1] "Statement For" submitted by Yes! For SeaTac; *see also* "Get the Facts" by Yes! For SeaTac (detailing the application of the Ordinance specifically to employees and employers at the airport). Meissner Decl., Exs. A-B.

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The City of SeaTac, however, does not have the authority to impose regulations at the airport because it does not have jurisdiction there. Pursuant to the Revised Airport Act, RCW 14.08.330, an airport, such as the Sea-Tac Airport, is under the "exclusive jurisdiction and control of the municipality or municipalities controlling and operating it," and here the controlling municipality is the Port of Seattle. The Revised Airport Act goes further and expressly states that no other municipality (such as the City of SeaTac) has the power to regulate at the airports: "No other municipality in which the airport or air navigation facility is located shall have any police jurisdiction of the same or any authority to charge or exact any license fees or occupation taxes for the operations." *Id.* The Supreme Court has confirmed that the effect of the Revised Airport Act is to preclude other municipalities "from interfering with respect to the operation of the Seattle-Tacoma airport." *King Cnty. v. Port of Seattle*, 37 Wn.2d 338, 348, 223 P.2d 834 (1950) ("*Port of Seattle*").

In *Port of Seattle*, the Washington Supreme Court construed RCW 14.08.330 to prohibit other jurisdictions from regulating service providers at Sea-Tac Airport. There, King County, a municipal corporation, wanted to prevent Yellow Cab from picking up passengers at Sea-Tac Airport unless they also carried licenses issued pursuant to a King County resolution that required "for hire" licenses for all taxicab that contracted for hire within the limits of King County, but outside the city of Seattle. King County's primary argument was that, because the Airport was located within the County's jurisdiction, it had authority to regulate taxicabs operating there. Relying on the express language of RCW 14.08.330, the Washington Supreme Court concluded that the Port had exclusive jurisdiction over Sea-Tac Airport and the functions carried out there by vendors like the cab company. It observed that Sea-Tac Airport "is owned and operated by the Port of Seattle, a municipal corporation, which has been given the express statutory authority to acquire, maintain and operate airports either within or without the boundaries of the county in which the port district is situated." *Port of Seattle*, 37 Wn.2d at

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340-41. Thus, King County had no legal authority to require taxicabs operating at Sea-Tac Airport to also carry King County licenses.

The Ordinance at issue here purports to regulate certain employment terms and other business activity at the airport and purports to give the City of SeaTac authority to enforce these new rules at the airport. Because the City has no authority to legislate, regulate, or enforce rules at the airport, *see* RCW 14.08.330; *Port of Seattle*, 37 Wn.2d at 348, and because doing so is one of the primary legislative goals of the Ordinance, the Court must invalidate the measure.[2] *Seattle Bldg.*, 94 Wn.2d at 749; *Philadelphia II*, 128 Wn.2d at 719.

D. The Ordinance Violates the Single-Subject and Subject-In-Title Rules.

Municipal legislation adopted by initiative in SeaTac must comply with the single-subject and subject-in-title rules applicable to other legislation. RCW 35A.12.130; SMC 1.10.080 (a proposed ordinance may "not contain more than one subject and that subject is clearly expressed in the title"). These provisions mirror the requirements of article II, section 19 of the Washington Constitution governing legislation at the state level: "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Const. art. II, § 19.

The single-subject rule applies to initiatives, *Wash. Fed'n*, 127 Wn.2d at 553-54; RCW 35A.12.130; SMC 1.10.080, and prohibits an initiative from having more than one subject,

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[2] Section 7.45.110, titled "Exceptions," cannot save the Ordinance. That section acknowledges that application of the measure as drafted might conflict with state law and contemplates that "consent" of some other entity might solve this problem. It thus directs the City Manager, in that event, to "formally and publicly request" that consent be given. This provision, however, is invalid because it is administrative, not legislative, in nature. Measures that are administrative, rather than legislative, in nature cannot be enacted through the initiative process. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973); *Our Water-Our Choice!*, 170 Wn.2d at 8 ("[A]dministrative matters, particularly local administrative matters, are not subject to initiative or referendum."). An action is legislative if it declares or prescribes a new law, policy, or plan. *Ruano*, 81 Wn2d at 823. An action is administrative if it merely carries out or executes law or policy. *Id.* Section 7.45.110 does not create a new law or policy; it merely provides for the execution of the Ordinance. *See Durocher v. King Cnty.*, 80 Wn.2d 139, 154, 492 P.2d 547 (1972) (granting an unclassified use permit is a continuation of the zoning code and an administrative, not legislative act). It is not a proper subject for an initiative. It is, therefore, invalid. *Our Water-Our Choice!*, 170 Wn.2d at 15.

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Wash. Fed'n, 127 Wn.2d at 553-54; *Amal. Transit*, 142 Wn.2d at 207. The subject-in-title rule requires that the title of an initiative give "notice to voters which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 639, 71 P.3d 644 (2003). Violation of either rule may invalidate an ordinance in its entirety. *See Patrice v. Murphy*, 136 Wn.2d 845, 852, 966 P.2d 1271 (1998); *Wash. Toll Bridge Auth. v. State*, 49 Wn.2d 520, 524-25, 304 P.2d 676 (1956).

1. The Ordinance Violates the Single-Subject Rule.

The purpose of the single-subject rule is to "prevent logrolling or pushing legislation through by attaching it to other legislation," and legislation that violates the rule in invalid in its entirety. *Amal. Transit*, 142 Wn.2d at 207, 216. When an initiative embodies multiple subjects, "it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided." *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001) (citing *Power, Inc. v. Huntley*, 39 Wn.2d 191, 200, 235 P.2d 173 (1951)).

The risk of logrolling is "more significant" with initiatives than it is with the legislative process. *Wash. Fed'n*, 127 Wn. at 567 (Talmadge, J., concurring in majority's single-subject analysis).[3] As Justice Rosellini observed in *Fritz v. Gorton*,

> [l]ogrolling is an even greater danger to the democratic exercise of power in the initiative process. What is to prevent an individual or a group from including mildly objectionable legislation—that is, legislation which might benefit a small group and is mildly disfavored by the electorate as a whole—in an initiative measure which includes other legislation which has great popular appeal? In the legislature the committee process assures that such a provision will be detected; the amendment process provides the remedy. The legislature can delete parts of a proposal it disfavors; [with an initiative] the electorate is faced with a

[3] Justice Talmadge concurred in the opinion with respect to the art. II, sec. 19 analysis and dissented only with respect to the scope of remand. Both the majority and the concurring opinions in *Washington Federation* relied heavily on Justice Rosellini's opinion in *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911(1974), a case in which six justices agreed that art. II, sec. 19 applied to initiatives, for his explanation of the importance of the single-subject rule. *See Wash. Fed'n*, 127 Wn.2d at 551-52 (discussing opinions in *Fritz*).

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> Hobson's choice: reject what likes or adopt what it dislikes. Only [the single-subject rule] preserves the integrity of the initiative process.

83 Wn.2d at 333.

The Ordinance here is perfect example of the logrolling prohibited by the single-subject rule. The Ordinance comprises at least six new laws, each of which can stand on its own and each of which should have been the subject of a separate vote. It does the all of following:

1. Sets a new minimum wage of $15 per hour and provides for increases tied to inflation (this section of the chapter also requires publication each year of adjusted rates, requires payroll adjustments, and prohibits counting tips or commissions as part of the minimum wage required by the Ordinance), 7.45.050;

2. Creates a right to paid leave for sick and safe time (this section also identifies when such leave must be granted, sets the accrual rate for leave, prohibits employers from requiring certification of the need for leave, prohibits retaliation for use of leave, and requires cashout of unused time), 7.45.020;

3. Restricts employers' ability to hire new employees by requiring employers to offer additional hours of work to existing part-time employees before hiring additional part-time employees or subcontractors, 7.45.030;

4. Requires that any service charge to customers or tips received by employees be retained by or paid to the employees performing the services related to the charge or tips (this section not only prohibits tip-pooling/sharing, it also prohibits tips from being paid to supervisors, requires "equitable" allocation of tips or service charges, and details what that means for banquets, room service, and porterage), 7.45.040;

5. Restricts an employer's ability to choose its workforce by requiring a "successor" employer (a new employer offering substantially similar services in a facility) to offer employment to the employees of a "predecessor" employer before hiring additional employees or transferring employees from a different location; to retain such employees for a period of at least 90 days; and to use seniority to determine which of such employees to hire if there are not sufficient positions for all of them, 7.45.060(B)–(D);

6. Requires an employer to provide employees and the City Manager with a specific notice at least 60 days in advance of the termination of an employer's contract, 7.45.060(A);

7. Imposes a new "Work Environment Reporting Requirement" that mandates that employers retain records "documenting hours worked, paid sick and safe time taken by Covered Workers, and wages and benefits provided to each such

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employee" for two years (this section also requires that the records be made available to the City Manager and creates a presumption that an employer has violated the chapter if "adequate" records are not maintained), 7.45.070;

8. Prohibits individual employees from agreeing to waive the requirements of the Ordinance and permits labor unions and employers to agree to waive application of the Ordinance in collective bargaining agreements, 7.45.080;

9. Prohibits employers from interfering with employees' right to exercise their rights under the Ordinance, from taking adverse action or discriminating against employees who exercise their rights, and from modifying wages or other benefits in response to the Ordinance or its pendency, 7.45.090;

10. Creates a broad right to enforce the Ordinance by permitting any person—broadly defined in the Ordinance to include third-party entities and organizations such as labor unions—to bring an action against an employer for violations of the Ordinance, regardless of whether the third-party enforcer suffered actual injury as a result and providing remedies, including attorney's fees, 7.45.100(A);

11. Requires the City of SeaTac to adopt auditing procedures to monitor and audit employers to ensure compliance with the Ordinance and authorizing City investigations and "legal or other action" to remedy violations, 7.45.100(B); and

12. Requires the City Manager of SeaTac to formally and publicly request the consent of another legal entity if necessary for the Ordinance to become effective, if state or federal law otherwise precludes the Ordinance from applying, 7.45.110.

No complex legal analysis is necessary to determine that this Ordinance includes ***at least*** six different new substantive laws (plus subparts to facilitate implementation, enforcement, etc.): (1) a new minimum wage, (2) a new right to sick leave, (3) a new restriction on hiring part-time employees, (4) a new prohibition of tip pooling, (5) a new 60-day notice requirement in the event an employer terminates or loses a contract, and (6) a new obligation for a company taking over a facility or location to retain existing employees at that facility or location. ***There is no way for the Court to know if any of these new laws would have been adopted if voted on separately, and the measure violates the single-subject rule and is therefore invalid.*** *See Kiga*, 144 Wn.2d at 825.[4]

[4] Plaintiffs recognize that it can be argued that some of the dozen or more issues addressed by the Ordinance and listed above, such as the record-keeping and anti-retaliation provisions, are "incidental" to or "necessary to the implementation" of some of the new substantive rights and

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This common sense conclusion that the Ordinance contains more than one subject is confirmed by the application of the analysis employed by the Washington Supreme Court. The starting point in that analysis is the legislation's title and determining whether it is "general" or "restrictive." *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 655, 278 P.3d 632 (2012) (citing *Amal. Transit*, 142 Wn.2d at 207). A title is restrictive if a "'particular part or branch of a subject is carved out and selected as the subject of the legislation.'" *Amal. Transit*, 142 Wn.2d at 210 (quoting *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997)); *Broadaway*, 133 Wn.2d at 127 (title is restrictive if it "is of specific rather than generic import"). A general title "is broad, comprehensive, and generic." *Kiga*, 144 Wn.2d at 825; *Amal. Transit*, 142 Wn.2d at 207-08.

Whether a title is restrictive or general matters because measures with restrictive titles are more readily struck down. *Amal. Transit*, 142 Wn.2d at 211; *Broadaway*, 133 Wn.2d at 127. All that a challenger needs to show is that such a measure contains more than one subject. If it does, the legislation is invalid, even if some level of rational unity may arguably exist between the subjects. *Amal. Transit*, 142 Wn.2d at 215, n.8 ("[W]here a restrictive title is used, the rational unity analysis does not apply."). If a measure has a general title, courts ask whether the subjects of the measure share a rational unity both with the title ***and*** with each other. *Id.* at 216-17.

The ballot title of the Ordinance here is restrictive:[5]

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restrictions. *See Amal. Transit*, 142 Wn.2d at 207 (no violation of single-subject rule if a single subject contains "incidental subjects or subdivisions"), 217 (holding that the initiative nonetheless violated single-subject rule because "neither subject [addressed by the measure] is necessary to implement the other."); *Kiga*, 144 Wn.2d at 827-28 (same). But it is not seriously debatable that the Ordinance here addresses at least six substantive topics, creates numerous new stand-alone rights, and imposes new and separate obligations and restrictions on employers. Because this Court cannot possibly know if any of the several subjects addressed in the initiative "would have garnered popular support standing alone, [it] must declare the entire initiative void." *Id.* at 828.

[5] The relevant title for analysis of an initiative under the "single-subject" rule is the ballot title. *Amal. Transit*, 144 Wn.2d at 826 ("Where an initiative to the people is concerned, as is the case here, the relevant title for the [single-subject] inquiry is the ballot title, because not all initiatives have legislative titles; because it is the ballot title with which the voters are faced in

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> Proposition No. 1 concerns labor standards for certain employers.
>
> This Ordinance requires certain hospitality and transportation employers to pay specified employees a $15.00 hourly minimum wage, adjusted annually for inflation, and pay sick and safe time of 1 hour per 40 hours worked. Tips shall be retained by workers who performed the services. Employers must offer additional hours to existing part-time employees before hiring from the outside. SeaTac must establish auditing procedures to monitor and ensure compliance. Other labor standards are established.
>
> Should this Ordinance be enacted into law?

Meissner Decl., Ex. A.

This title indicates that the measure only applies to certain employers in two specified industries, and then it lists five specific subjects addressed in the Ordinance. This title is not a generic statement of a broad subject of legislation or even "[a] few well-chosen words, suggestive of the general topic." *See Kiga*, 144 Wn.2d at 825; *Amal. Transit*, 142 Wn.2d at 207-09. It is, instead, a title that identifies the two categories of employer regulations and then describes five of the (many) specific substantive provisions contained in the Ordinance. It is therefore a restrictive title for purposes of the single-subject analysis. *Amal. Transit*, 142 Wn.2d at 207-09; *see also Blanco v. Sun Ranches, Inc.*, 38 Wn.2d 894, 901-02, 234 P.2d 499 (1951) (title "a restrictive one, in the sense that it is expressly limited in scope to the protection of employees in factories where machinery is used"); *Swedish Hosp. of Seattle v. Dep't of Labor & Indus.*, 26 Wn.2d 819, 831-32, 176 P.2d 429 (1947) (finding title was restrictive where it specifically stated it applied to "charitable institutions"). Indeed, in litigation over the title of the Ordinance at issue, the City itself argued that it drafted the ballot title to be specific and to "avoid ***generalities*** . . . ." City of SeaTac's Response to Petitioner's Appeal of Ballot Title, p. 5:9-12 (emphasis added). *SeaTac Committee for Good Jobs v. City of SeaTac*, No. 13-2-28409-0 KNT, Dkt. No. 17.

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the voting booth; and because it is the ballot title which can be appealed before an election and which thereafter appears on petitions and the ballot."). The ballot title consists of a statement of the subject of the measure, a concise description of the measure, and the question of whether or not the measure should be enacted into law. RCW 29A.36.071; *Wash. Ass'n*, 174 Wn.2d at 668 (noting that courts "treat the whole ballot title as the initiative's 'title'").

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As explained in detail above, the Ordinance addresses, at a minimum, six separate subjects, creating new and unrelated rights, obligations, and restrictions. Because the ballot title is restrictive, that is all Plaintiffs must show to invalidate the Ordinance. *Amal. Transit*, 142 Wn.2d at 215.

In addition, even if the Ordinance's title were "general"—which it is not—the Ordinance still violates the "single-subject" rule. Where a general title is used, there must be "rational unity between the general subject and the incidental subjects." *Id.* at 209; *see Kiga*, 144 Wn.2d at 826 ("Only where rational unity exists can we be certain voters were not required to vote for an unrelated subject of which the voters disapproved in order to pass a law pertaining to a subject of which the voters were committed.").

The first step in the rational unity analysis is to determine whether there is a rational unity between the general subject of the Ordinance and its component parts. *Amal. Transit*, 142 Wn.2d at 209. The next step is to determine whether the component parts bear some rational relationship to one another. *Kiga*, 144 Wn.2d at 826; *Amal. Transit*, 142 Wn.2d at 216. Even where challenged provisions of a law may share a general subject, the law violates the single-subject rule if the various provisions of a law do not share a rational unity among one another. "[T]he existence of rational unity or not is determined by whether the matters within the body of the initiative are germane to the general title ***and*** whether they are germane to one another." *Kiga*, 144 Wn.2d at 826 (emphasis added); *Amal. Transit*, 142 Wn.2d at 209-10.

In *Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978), for example, the Washington Supreme Court reviewed an act "'[r]elating to the taking or withholding of property,'" which created criminal sanctions for dognapping and allowed recovery of attorney fees in a civil replevin action. *Id.* at 471 (quoting Laws of 1972, 1st Ex. Sess., ch. 114). The Court found that although the two provisions may have been germane to the topic of taking or withholding property, there was no rational unity between criminal sanctions for dognapping and attorney fees in a civil action and declared the law invalid. *Id.* at 470, 472.

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No single factor is determinative of rational unity, and courts ask several questions. Courts examine whether the several parts of a measure are "incidental" to a single topic; whether they "facilitate the accomplishment" of a single stated purpose; and whether, if an act has more than one purpose, one part "is necessary to implement the other." *Amal. Transit*, 142 Wn.2d at 209, 217. If a measure addresses more than one subject and each is not necessary to implement the other, the subjects lack rational unity and the measure violates the single-subject rule. *See, e.g., id.*; *Kiga*, 144 Wn.2d at 826. Here, each of the (at least) six major subjects of the measure (minimum wage, sick leave, restrictions on hiring part-time employees, prohibition of tip pooling, contract termination notice requirements, and the obligation to retain a predecessor's employees) could stand alone as separate legislation, and none is necessary to implement any of the others.

Another consideration is whether the subjects have historically been treated together or in separate legislation. *Wash. Ass'n*, 174 Wn.2d at 657 (noting that long recognition of the relationship between liquor regulation and public welfare in legislation supports finding of rational unity) (citing with approval *Wash. Fed'n*, 127 Wn.2d at 575 (Talmadge, J., concurring in part dissenting in part) (courts should consider whether legislature has historically treated issues together)); *id.* at 659 (noting that spirits and wine "have been governed . . . by the same act for decades"). Where subjects are traditionally addressed in separate legislation—or have historically been introduced as separate legislation and failed to pass independently—the subjects lack rational unity. *Power, Inc.*, 39 Wn.2d at 198-99. A bill that attempts to combine such subjects into a single piece of legislation violates the single-subject rule. *Id.*

Here, the numerous subjects combined in the Ordinance are typically addressed in separate legislation. For example, the "living wage" ordinance enacted in Bellingham—the only municipal living wage ordinance in the state of Washington other than the SeaTac Ordinance—deals solely with the subject of wages. Bellingham Mun. Code Ch. 14.18. And in 1998, when voters approved the Washington State Minimum Wage Initiative (Initiative 688,

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codified as RCW 49.46.020), establishing a state-wide minimum wage that would afterward be tied to inflation, the initiative dealt solely with the subject of a minimum wage increase—nothing else. Similarly, the City of Seattle Paid Sick Time and Paid Safe Time ordinance, Seattle Mun. Code Chapter 14.16, deals only with the subject of paid leave for sick and safe time.

The worker retention portion of the SeaTac Ordinance (requiring an employer who takes over a contract to keep the old employer's workers for 90 days) has been proposed at both the state and municipal level and failed to pass. In 2011, the Washington Legislature considered a bill (SHB 1832) that addressed the worker retention issue addressed by the SeaTac Ordinance but included none of the other wage, sick leave, tip pooling, or other issues.[6] The bill was not enacted. Also in 2011, the Port of Seattle Commissioners considered, but did not adopt, a regulation that would have imposed a worker retention rule similar to that in section 7.45.050 of the Ordinance.[7] Like the failed SHB 1832, it did not contain the wage, leave, or other provisions included in the SeaTac Ordinance.[8]

In contrast to these laws and failed proposals, the measure before the voters proposing the Ordinance here lumped together at least a half-dozen topics historically addressed separately (a minimum wage bill, a sick and safe leave bill, a tip-pooling bill, a contract termination notice requirement bill, a worker retention bill, and a bill restricting the hiring of part-time workers, among others) into a single proposed Ordinance. This is precisely the kind of logrolling the single-subject rule prohibits. *See Wash. Ass'n*, 174 Wn.2d at 657 (considering whether issues were historically treated together in legislation); *Kiga*, 144 Wn.2d at 827-28

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[6] H.R. 1832, 62nd Leg. Reg. Sess. (Wash. 2011). This bill was sponsored by Rep. Upthegrove, a representative for the district encompassing the City of SeaTac.

[7] Port of Seattle Comm'n, (Draft) *Proposed Directive on Worker Retention for the Concessions Program at Seattle-Tacoma Int'l Airport* (2011), discussed in *Approved Minutes: Comm'n Regular Meeting July 26, 2011*. *See* Meissner Decl., Exs. C-D.

[8] These proposed laws themselves failed in part because they addressed multiple subjects, as they tried to lump together, *inter alia*, "worker retention" with (illegal)"labor harmony" requirements.

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(measure violated single-subject rule because it "required the voters who supported one subject of the initiative to vote for an unrelated subject they might or might not have supported").

The title of a measure itself also informs whether there is rational unity among its parts. "If the title of the enactment is a 'laundry list' of the contents of the legislation, this is suggestive of the possibility that the . . . proponents of a popular enactment could not articulate a single unifying principle for the contents of the measure." *Wash. Fed'n*, 127 Wn.2d at 576 (Talmadge, J., concurring in single-subject analysis). Here, as noted above, the title identifies two industries and five separate subjects of the legislation.

All of the factors considered by courts in evaluating whether a law passes muster under the single-subject rule point to the same conclusion here: The Ordinance is invalid.

2. The Ordinance Also Violates the Subject-In-Title Rule.

In order to comply with the subject-in-title rule, the title of an initiative must give "notice to voters which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." *Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 639. The purpose of this provision is to ensure legislators and the public are on notice as to what the contents of the bill are. *Id.* "This requirement has particular importance in the context of initiatives since voters will often make their decision based on the title of the act alone, without ever reading the body of it." *Id.* "Where an act contains provisions not fairly encompassed with the title, such provisions are void." *Amal. Transit*, 142 Wn.2d at 228; *Broadaway*, 133 Wn.2d at 128; *Swedish Hosp.*, 26 Wn.2d at 831-32.

When an act includes valid and invalid portions, the entire act is unconstitutional if elimination of the invalid part renders the remainder of the act incapable of accomplishing the legislative purpose of the act. *Swedish Hosp.*, 26 Wn.2d at 832-33; *Broadaway*, 133 Wn.2d at 128. The Ordinance here violates the subject-in-title rule by omitting a number of key provisions; these provisions are instrumental in accomplishing the legislative purpose of the Ordinance; and their omission renders the Ordinance unconstitutional as a whole.

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As discussed above, the Ordinance's title only discusses five of the numerous provisions contained within the body of the measure (a new minimum wage, paid leave for sick and safe time, tip retention, limits on hiring part-time workers, and City auditing procedures). The title does not discuss, or otherwise allude to, several other new substantive obligations imposed on employers:

- The title does not state that the Ordinance imposes a new 60-day notice obligations on employers who lose or terminate a contract. 7.45.060(A).
- The title does not refer to the employee retention obligations imposed on employers. There is no mention of the Ordinance's requirement that "successor employers" offer employment to qualified "retention employees" of "predecessor employers" or that "retention employees" may not be discharged without just cause for 90 days. 7.45.060(B)-(D).
- The title does not state that the Ordinance requires employers to provide covered employees with additional compensation in the form of a lump sum payment at the end of each calendar year equivalent to the compensation due for any accrued but unused compensated sick and safe leave time. 7.45.020.
- The title does not disclose the fact that the Ordinance creates a new "Work Environment Reporting Requirement" that not only obligates the creation and maintenance of records of hours worked, paid leave taken, and wages and benefits paid but also creates an presumption of violation if an employer does not keep "adequate records." 7.45.070.

These onerous new burdens on employers are neither disclosed nor even alluded to in the title, and sections .020, .060, and .070 are therefore invalid. *Amal. Transit*, 142 Wn.2d at 228; *Broadaway*, 133 Wn.2d at 128; *Swedish Hosp.*, 26 Wn.2d at 832.

In addition, there is no mention in the title of the private right of action or the third-party enforcement provisions (7.45.100), no mention of the anti-retaliation provision (7.45.090), and no mention of the waiver provision (7.45.080). Given the unusual nature of these particular provisions in this Ordinance, they should have been disclosed, even if enforcement or ancillary implementation issues do not always need to be included in a title to be valid. Here, even with respect to topics that would arguably be covered by a broad title without being specifically enumerated, the Ordinance changes the law in ways that were not

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adequately disclosed and are thus invalid. *See Amal. Transit,* 142 Wn.2d at 226-27 (initiative invalid because, even though title disclosed that voter approval would be required for any tax increase, the title did not disclose that "tax" had a broader meaning in the initiative than the common understanding of that term).

So, while a court might find that voters are on notice that a new law will have some enforcement mechanism, even if such is not spelled out in the title, *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 25-26, 200 P.2d 467 (1948), nothing in the title of the Ordinance here gives notice of the radical change in the standing to sue requirements wrought by this measure. It has long been the common law in Washington that to bring an action in court, one must have suffered (or be very likely to soon suffer) an injury. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 886, 194 P.3d 977 (2008); *Branson v. Port of Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004). But under 7.45.100 and the broad definition of "person" under 7.45.010, any individual or entity (including labor unions, self-designated advocacy organizations, former employees, and even business competitors) may "bring an action against the employer in King County Superior Court to enforce the provisions of this Chapter" regardless of whether he, she, or it suffered any injury.[9] Such a significant departure from the traditional, common law requirements for standing to sue must have been disclosed in the title to be valid. *Amal. Transit*, 142 Wn.2d at 226-27.

There is also no reference in the title to the provision prohibiting retaliation against workers for exercising their rights under the Ordinance, 7.45.090. Even if a protection like this need not always be identified in a title, the last sentence of this section purports to try to apply the restrictions in the Ordinance ***retroactively***: "No Covered Worker's compensation or benefits may be reduced in response to this Chapter ***or the pendency thereof***." *Id.* (emphasis added). The Ordinance thus purports to make illegal actions taken prior to the effective date of the Ordinance. Such retroactive application of a law is unusual and is disfavored in

[9] The fact that a person may bring a court action not against "his or her" employer but against "the" employer, 7.45.100, confirms this reading.

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Washington, *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002); *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997), and such an unusual provision must have been disclosed in the title to be valid. *Amal. Transit*, 142 Wn.2d at 227.

Likewise, there is no mention anywhere in the title of the waiver provision of the Ordinance. Under 7.45.080, individual employees are prohibited from waiving any of the provisions. But unions, on the other hand, are empowered to waive "[a]ll of the provision of this Chapter, or any part hereof" in a collective bargaining agreement. This waiver provision, coupled with the radical change to the standing to sue requirements in 7.45.100, gives labor unions extraordinary power to threaten employers with expensive litigation (using the expanded standing to sue) and to coerce employers to recognize a union and reach a collective bargaining agreement so as to obtain a waiver of the onerous new obligations imposed by the Ordinance. None of this is disclosed or even alluded to in the title. Changes in the law not fairly encompassed within the title of a ballot initiative are invalid. *Amal. Transit*, 142 Wn.2d at 227.

Finally, while the title of the Ordinance obviously discloses that it will impose a new minimum wage, the title does not disclose that it uses the term "minimum wage" differently from the common understanding of that term in Washington law. Under the Ordinance, "commissions shall not be credited as being any part of or be offset against the wage rates required by this Chapter." 7.45.050. This is different from the definition of "minimum wage" under Washington law, which includes commissions in the calculation of the minimum wage. WAC 296-126-021. Because the Ordinance uses the term "minimum wage" differently from its "commonly understood, traditional meaning," that peculiar usage must have been disclosed in the title for that provision to be valid. *Amal. Transit*, 142 Wn.2d at 226-27 (initiative violated subject-in-title rule because it used the term "tax" more broadly than its common understanding, and this was not disclosed in the title that referred to taxes).

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Because the title appears to voters to list the all the significant substantive topics of the ordinance, a voter would not have cause to inquire further into the body of the act to determine the true scope and purpose of the law. Nothing in the title warned voters of the waiver provision or the significant departures from definition of "minimum wage" in Washington law, from the normal requirements for standing to sue, and from the rules regarding prospective application of laws. Therefore, these provisions of the Ordinance are invalid.

3. The Violations of the Subject-In-Title Rule Invalidate the Entire Ordinance.

As noted, provisions not identified in the title of an initiative are invalid. *Broadaway*, 133 Wn.2d at 127. If the elimination of invalid provisions would frustrate the legislative purpose of the measure, then entire Ordinance is unconstitutional. *Amal. Transit*, 142 Wn.2d at 228 (citing *Swedish Hosp.*, 26 Wn.2d at 830). Obviously, establishing a higher minimum wage for employees at Sea-Tac Airport was one of the legislative purposes of the Ordinance. As just explained, that provision is invalid because it does not disclose the peculiar use of the term "minimum wage." In addition, upon examination of the Ordinance, it is apparent that another primary purpose and effect of the measure, as written and passed, is to change the balance of power between unions and the companies operating at the airport that they attempt to organize and bargain with. Eliminating the waiver and expanded standing to sue provisions from the Ordinance would significantly reduce the intended effect of the ordinance on union-management relations. Because absent these undisclosed (and thus invalid) provisions, the Ordinance does not accomplish some the primary purposes for which it was drafted and enacted, the entire measure is invalid. *Id.*

E. The Enforcement Provision Is Invalid Because it Conflicts with State Law.

As noted above, the enforcement provision, 7.45.100, is invalid because its unusual operation is not disclosed in the title of the Ordinance. That section is also invalid (disclosure in the title or not) because its elimination of the traditional standing requirements to sue is contrary to state law. Section 7.45.100, when read with the broad definition of "person" in

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7.45.010, allows any individual or entity, including third-party organizations, to bring an action against "the employer" to enforce the Ordinance, regardless of whether the "person" bringing the claim is actually an employee, the collective bargaining representative of the employee, or has otherwise suffered an injury. This section conflicts with the state law requirements for standing to sue.

In Washington courts, before an individual can enforce a statute or otherwise bring a claim in court, he or she must establish standing to bring the claim by demonstrating that (1) he or she has suffered or will suffer an injury in fact; and (2) his or her interest is arguably within the zone of interests protected by a particular statute. *Lane*, 164 Wn.2d at 886; *Branson*, 152 Wn.2d at 876. A party asserting general enforcement of a statute, therefore, does not have standing to sue.

By allowing any "person" (broadly defined) to assert a claim for general enforcement of this municipal Ordinance, the Ordinance purports to eliminate the traditional state law standing requirements imposed by courts in Washington. This exceeds the City's power of initiative and legislation and is thus invalid. *Our Water-Our Choice!*, 170 Wn.2d at 15; *Philadelphia II*, 128 Wn.2d at 720.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter an order for declaratory judgment that the Ordinance is invalid.

DATED this 15th day of November, 2013.

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of on the following:

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The Honorable Andrea Darvus
Hearing Date: December 13, 2013
Hearing Time: 2:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

FILO FOODS, LLC; BF FOODS, LLC; ALASKA AIRLINES, INC.; and THE WASHINGTON RESTAURANT ASSOCIATION, Plaintiffs, v. THE CITY OF SEATAC; KRISTINA GREGG, CITY OF SEATAC CITY CLERK, in her official capacity; and the PORT OF SEATTLE Defendants. SEATAC COMMITTEE FOR GOOD JOBS, Intervenors.	No. 13-2-23352-6 KNT PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT ON FEDERAL LAW CLAIMS

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs seek a judgment that Chapter 7.45 of the SeaTac Municipal Code (the "Ordinance") is unconstitutional. The Ordinance violates the supremacy clause of the United States Constitution because it purports to regulate areas of law that are preempted by federal law.

Federal law is supreme, notwithstanding any contrary state law. U.S. Const. art. VI, cl. 2. "Congress' power to preempt state law is derived from the Supremacy Clause of article 6 of the federal constitution." *Beaman v. Yakima Valley Disposal*, 116 Wn.2d 697, 702, 807 P.2d 849 (1991). A state or local law is preempted if it attempts to regulate conduct regulated by federal law. Federal law may preempt state law in any of three ways: (1) Congress may explicitly define extent to which it intends to preempt state law; (2) Congress may indicate an intent to occupy an entire field of regulation, in which case the states must leave all regulatory activity in that area to federal government; and (3) Congress may preempt state law to the extent that it actually conflicts with federal law. *See Mich. Canners and Freezers Ass'n, Inc. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 469 (1984).

The Ordinance intrudes on subjects that are heavily regulated by federal law: labor relations and domestic air transport. With regard to labor relations, Congress occupied the entire field of regulation when it enacted both the National Labor Relations Act ("NLRA") and, for railroads and airlines the Railway Labor Act ("RLA"). *Beaman*, 116 Wn.2d at 702 ("Congressional power to legislate in the area of labor relations is long established.") (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). Similarly, the Airline Deregulation Act of 1978, governing domestic air transport, includes an express preemption clause. The Ordinance also violates the dormant Commerce Clause of the U.S. Constitution.

II. STATEMENT OF FACTS

On June 5, 2013, the SeaTac Committee for Good Jobs (the "Committee") filed an initiative petition and proposed ordinance entitled "Ordinance Setting Minimum Standards For

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Hospitality and Transportation Industry Employer" (the "Ordinance") with the City of SeaTac City Clerk's office. The primary purpose of the Ordinance is to regulate various aspects of the employer-employee relationship for companies doing business at the Sea-Tac Airport. *See*, Ordinance 7.45.010(M)(1); Voters' Pamphlet (Ex. A, Meissner Decl). Plaintiffs Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc. and members of the Washington Restaurant Association will be affected by the Ordinance if it is implemented.[1]

III. STATEMENT OF ISSUES

1. Is the Ordinance pre-empted by the National Labor Relations Act, the Railway Labor Act, and/or the Airline Deregulation Act?

2. Does the Ordinance violate the dormant commerce clause?

IV. EVIDENCE RELIED UPON

This motion relies on the papers on file in this matter and the declarations filed herewith.

V. AUTHORITY AND ARGUMENT

A. Standard For Declaratory Relief

Court routinely rule on the validity of legislation proposed or adopted by initiative in declaratory judgment proceedings. *See, e.g., Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 433-34, 260 P.3d 245, 248 (2011); and cases cited in Plaintiffs' Motion on State Law Claims.

B. The Ordinance Is Preempted By Federal Labor Law

The NLRA "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Commonwealth Edison Co. v. Int'l Bhd. of Elec. Workers*, 961 F. Supp. 1169, 1178 (N.D. Ill. 1997). The NLRA declares the policy of the United States to eliminate or mitigate obstructions to the free flow of commerce caused by industrial strife, unrest, and unequal bargaining power, "by encouraging the practice and

[1] *See* Declarations of Jeff Butler, Dean DuVall, LeeAnne Subelbia, and Bruce Beckett.

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procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. The NLRA authorizes the National Labor Relations Board ("NLRB") to adjudicate disputes concerning unfair labor practices and to prevent any person from engaging in an unfair labor practice affecting commerce. 29 U.S.C. § 153

The US Supreme Court has articulated two types of preemption that are implicitly mandated by the NLRA. *Chamber of Commerce of United States v. Brown*, 554 U.S. 60, 65 (2008). "*Garmon* preemption" (*San Diego Bldg. Traders Council v. Garmon*, 359 U.S. 236 (1959)) prevents states or municipalities from interfering with the NLRB's jurisdiction by prohibiting state or municipal regulation of activities that the NLRA even arguably protects and prohibits. *Brown*, 554 U.S. at 65. "*Machinists* preemption" (*Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976)) prevents states, municipalities, and even the NLRB itself, from regulating "conduct that Congress intended [to] be unregulated because left to be controlled by the free play of economic forces." *Brown*, 554 U.S. at 65 (quotations omitted).[2]

The RLA was enacted "to promote peaceful and efficient resolution" of labor disputes in the railroad and airline industries. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 72 (2009). To achieve this goal, the RLA "provid[es] a comprehensive framework for resolving labor disputes" arising thereunder. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994). The nationwide scope of railroad and airline operations and collective

[2] "Whether the NLRA preempts [a law] is a pure legal question. . . ." *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1124 (7th Cir. 2008). Most, if not all, of the business covered by the Ordinance would be covered by the NRLA. Despite the Ordinance's attempt to exclude certificated air carriers from its coverage (§ 7.45.010(M)(1)), the RLA also applies because vendors under contract to provide services to Alaska are covered by the RLA. *See*, Declaration of Dean DuVall, ¶ 3; *John Menzies, PLC, d/b/a Ogden Ground Services, Inc.*, 339 NLRB 869 (2003); *John Menzies, PLC, d/b/a Ogden Ground Services, Inc.*, 340 NLRB 1167 (2003); *Delta Air Lines Global Services*, 28 NMB No. 75 (2001); *Bags, Inc.*, 40 NMB 165 (2013). Contractors provide Alaska with baggage handling, wheelchair escorts, curbside check-in, fueling, and aircraft cleaning; these contractors are covered by the ordinance and do not currently pay the wage required by the Ordinance. DuVall, ¶ 3; Butler Decl., ¶¶ 6, 9.A.

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bargaining make state regulation of their labor relations particularly inappropriate. Congress recognized this in the context of amending the RLA to authorize union-shop agreements, notwithstanding state right to work laws, which by contrast the NLRA permits (29 U.S.C. § 164(b)):

> Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States; the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements, extend across State lines, and in the exercise of their seniority rights employees are frequently required to move from one State to another.

California v. Taylor, 353 U.S. 553, 567 n.15 (1957) (quoting H.R. Rep. No. 2811, 81st Cong., 2d Sess. 5).

Thus, although their genesis was in the NLRA, courts apply *Garmon*[3] and *Machinists*[4] preemption in the RLA context. Even prior to *Machinists*, the Supreme Court applied a similar analysis in *Taylor*. 353 U.S. at 554-55. The Court observed that it had recognized on "numerous occasions" that the RLA "protects and promotes collective bargaining" and thus the "terms of the collective-bargaining agreement that [the employees] have negotiated ... would take precedence over conflicting provisions of state civil service laws." *Id.* at 559, 561, 567; *see also United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 689 (1982) ("To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system."); *accord Bhd. of Locomotive Eng'rs v. Indus. Comm'n of Utah*, 604 F.

[3] *E.g., Bhd. of R.R. Trainmen v. Jacksonville Terminal,* 394 U.S. 369, 381 (1969); *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 321-22 (3d Cir. 2004).

[4] *E.g., Dunn v. Air Line Pilots Ass'n, Int'l*, 836 F. Supp. 1574, 1578-80 (S.D. Fla. 1993); *Delgado v. Aerovias de Mexico*, 1994 U.S. Dist. LEXIS 20567, at *28-29 (S.D. Fla. 1994).

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Supp. 1417, 1423 (D. Utah 1985). The Supreme Court's conclusion that the RLA overrides state law applies here, where the Ordinance purports to regulate privately-owned RLA carriers.

"Unlike the States, Congress has the authority to create tailored exceptions to otherwise applicable federal policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies." *Brown*, 554 U.S. at 76. Contrary to federal policy, upholding the Ordinance opens the door to a patchwork of inconsistent laws that could be adopted by hundreds of municipalities.

i. The Ordinance Is Not A Minimum Labor Standard

States and other local governments can pass minimum labor standards without running afoul of federal labor law. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 n.16 (1987). The Ordinance, however, is not a minimum standard.

"Minimum" as used by the U.S. Supreme Court implies a low threshold. *See Fort Halifax*, 482 U.S. at 21 (describing minimum labor standards as forming a backdrop for negotiations, indicating a low-threshold which serves as a floor). The Ordinance here is much more than a "mere backdrop to negotiations" because it establishes terms of employment that would be very difficult for any union to bargain for. Specifically, the Ordinance creates a $15-an-hour minimum wage (7.45.050); this represents a 63% increase over Washington state's current hourly minimum of $9.19 and Washington's minimum wage is already the highest in the country.[5] The Ordinance also calls for annual increases tied to inflation, paid sick leave, and tip distribution. 7.45.020; 7.45.040; 7.45.050. The Ordinance requires employers to offer more work to part-time employees before hiring additional part-timers and guarantee employment for existing employees for at least 90-days if a business is sold. 7.45.030; 7.45.060. Any entity—

[5] Minimum wage ranges from a low of $5.15 per hour (in WY and GA) to a high of $9.19 per hour, indexed annually for inflation (WA). See, Minimum Wage Laws in the States - January 1, 2013 (available at www.dol.gov/whd/minwage/america.htm). Five states do not have any state minimum wage and federal minimum wage is $7.25 per hour. These figures refute any characterization of the $15 per hour imposed by the Ordinance as a "minimum" standard.

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such as a labor union—may bring a claim under the Ordinance, regardless of whether or not the party is aggrieved, and recovery includes damages, reinstatement, injunctive relief, and attorney's fees and expenses. 7.45.100. These provisions are not "minimal" labor standards. *Shannon*, 549 F.3d at 1135; *Brown*, 554 U.S. at 62-64, 71-72, 81-82 (statute's "formidable enforcement scheme," providing recovery of treble damages, attorney's fees, and costs, was preempted by NLRA because it "put considerable pressure on an employer either to forgo his free speech right to communicate his views to his employees, or else to refuse the receipt of any state funds").

Moreover, in order to be considered a minimum standard, the regulation must be one of general application. *Barnes v. Stone Container Corp.*, 942 F.2d 689, 692 (9th Cir. 1991); *Shannon*, 549 F.3d at 1130; *Metropolitan Life Ins. Co.*, 471 U.S. at 753. The Ordinance is impermissibly narrow. Unlike a minimum wage law, which would be generally applicable to all employees, the Ordinance here targets a defined group of employers and employees only in in the hospitality and transportation industries that service SeaTac airport.[6]

The Ordinance applies only to employers of a certain size who provide specific services: hotels with 100 or more guest rooms that employ 30 or more workers; retail and foodservice providers that employ 10 or more nonmanagerial, nonsupervisory employees; rental car services with more than 100 cars; shuttle fleets of more than ten vans; and parking lots with more than 100 parking spaces. 7.45.010. Other "transportation employers" are covered only if they provide specified services (i.e. curbside passenger check-in services, baggage check services, wheelchair escort services, etc.). *Id.* Even then, a transportation employer is not covered by the Ordinance unless it employs 25 or more nonmanagerial, nonsupervisory employees. *Id.*

Whether the Ordinance sets standards for a hospitality employee also depends on where the employer is located. 7.45.010(G) (applies only to restaurant or retail operations located

[6] Because the Ordinance does not apply to all employees in SeaTac, it creates further imbalance by leaving uncovered employees subject to only the lower state minimum wage.

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within a hotel, public facility, corporate cafeteria, conference facility, or meeting facility). A waiter in a restaurant located in a hotel lobby is covered, but a waiter in a restaurant located across the street from, or even in the same parking lot as, a hotel is not. A company that provides catering services to airlines is exempted while companies that provide fuel, clean interiors and load bags are covered. 7.45.010(G). Even two employees working adjacent to each other, one for a vendor to an airline and the other for the airline, performing identical work, are treated differently under the Ordinance because of the airline exemption. 7.45.010(M)(1).

Finally, "[a] 'minimum' by definition cannot be undercut." *Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners*, 812 F. 2d 1220, 1226 (9th Cir. 1987). For example, Washington's Minimum Wage Act does not allow employees to negotiate for an agreement that provides ***less than*** the minimum wage. RCW § 49.46.110. The Ordinance, however, allows an employer to waive the entire Ordinance, including minimum wage, through a collective bargaining agreement. 7.45.080. When a waiver provision allows an employer to undercut the law, it is not a minimum labor standard and is subject to preemption. *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537, 1545-46 (N.D. Cal. 1991) (prevailing wage ordinance was not a minimum labor standard where waiver provision allowed employer to undercut the prevailing wage; ordinance held preempted); *Metropolitan Life Ins. Co.*, 471 U.S. at 755 ("It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. 'Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.'") (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985)).[7]

[7] ***Narrowly tailored opt-out provisions*** for union represented employees are permissible. *See, Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489-90 (9th Cir. 1996) (opt-out provision allowed represented mine workers to work a maximum of 12-hours per day instead of the 8-hours set by law). The Ordinance's waiver provision is not narrowly tailored and allows an employer to avoid the Ordinance ***in its entirety***.

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ii. The Ordinance Is Preempted Because It Impermissibly Interferes With The Collective Bargaining Process

The narrow scope and onerous terms of the Ordinance interfere with bargaining. *Metropolitan Life*, 471 U.S. at 775 (minimum labor standard should "neither encourage nor discourage the collective-bargaining process"). "[S]tate legislation, which interferes with the economic forces that labor or management can employ in reaching agreements, is pre-empted by the NLRA because of its interference with the bargaining process." *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995); *see also Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 153 (1976). A local regulation, such as the Ordinance, interferes with the bargaining process when it imposes onerous, substantive requirements on a particular group of employees. *Id.* The more stringent a local labor substantive standard, the more likely it is that the law interferes with the bargaining process. *Shannon*, 549 F.3d at 1136. "Viewed in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract." *Bragdon*, 64 F.3d at 501.

In *Bragdon*, the Chamber of Commerce sued a California county and its officials, challenging an ordinance that required employers to pay prevailing wages to employees on private construction projects costing over $500,000. The Ninth Circuit held that the ordinance was preempted because the ordinance was "very different from a minimum wage law, applicable to all employees, guaranteeing a minimum hourly rate." *Bragdon*, 64 F.3d at 502. Rather, the ordinance at issue was "much more invasive." *Id.* As the Ninth Circuit reasoned:

> This is also not the type of regulation of general application that assures that certain coverage provisions be included in all health insurance contracts, such as in *Metropolitan Life*; nor is it the type of regulation seeking to alleviate a particular hardship such as plant closings that affect the employees and the community.... The district court noted that unlike the law upheld in *Metropolitan Life*, ***the Ordinance is more properly characterized as an example of an interest group deal in public-interest clothing.***

Id. at 503 (internal quotation omitted) (emphasis added).

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Similarly, in *Shannon*, the Seventh Circuit held preempted an Illinois law that applied only to one occupation in one industry in one county. 549 F.3d at 1121, 1131. Unlike minimum labor standards of general application which are not subject to preemption, the law's "narrow scope of application" served as a "disincentive to collective bargaining." *Id.* at 1132.

The Ordinance interferes with the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application that typically have been held not preempted. The ordinance at issue in *Bragdon* ***was preempted*** because it dictated the division of the total package of wages and benefits paid to employees. 64 F.3d at 502. An employer could credit the amount of benefits paid to an employee, but the extent of that credit was limited and the employer still could not pay less than the prevailing wage. *Id.* The Ordinance is even more intrusive on the bargaining relationship than the law in *Bragdon* because it does not allow an employer ***any credit*** for benefits (i.e. health care, vacation, etc.). In order to remain both competitive and compliant with the Ordinance, an employer who currently provides such benefits will either need to (a) stop providing such benefits and, in doing so, violate the Ordinance (7.45.090(B)) or (b) enter into a collective bargaining agreement and try to bargain an allocation of those benefits against wage rates. Shaping the terms and conditions of bargaining in this manner is inconsistent with the NLRA. Indeed, Plaintiffs can find no court decisions upholding against a preemption challenge an ordinance seeking to regulate so many aspects of the employment relationship as this Ordinance does.

The Ordinance encourages unions to focus on lobbying the government for more local ordinances in order to target individual businesses instead of negotiating with them. *Shannon*, 549 F.3d at 1132-33. The Ninth Circuit warned of this result in *Bragdon*:

> A precedent allowing this interference with the free play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies. ... This substitutes the

> free-play of political forces for the free-play of economic forces that was intended by the NLRA.

64 F.3d at 504.

Here, the union responsible for the Ordinance acknowledged using the political process to circumvent the collective bargaining process: "...[W]here workers ***couldn't use traditional organizing*** to essentially solve that problem, and now turn to the ballot to ***essentially impose what in some other era was impose by the strike.***" Josh Eidelson, *Defying Koch cash and D.C. gridlock, airport town will vote on a $15 minimum wage*, Salon, October 23, 2013 (attached as exhibit E to Meissner Decl.).[8] A strike is a recognized economic weapon intended to be left unregulated outside of the NLRA and RLA. *Amalgamated Ass'n of Street, Electric Ry. And Motor Coach Emps. v. Missouri*, 374 U.S. 74, 82 (1963) ("Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 688 (1982) ("Congress determined that the most effective means of preventing [disruptions to interstate railroad service] is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees."). The union's attempt to substitute the effect of bargaining and a strike with the Ordinance is improper. *Bragdon*, 64 F.3d at 804. The Ordinance is a blatant attempt by labor unions to use the political process to dictate, rather than bargain for, employment terms at SeaTac airport.[9]

iii. The Ordinance Is Preempted Because It Interferes With An Employer's Right To Select Its Workforce And Improperly Regulates Issues Of Successorship

"It is a basic principle of federal labor law that a new employer has the right to not hire any of the employees of its predecessor." *United Steelworkers v. St. Gabriel's Hosp.*, 871 F. Supp. 335, 342 (D. Minn. 1994); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 261-

[8] Substantial contributions to "Yes! For SeaTac" were made by labor unions. Ex. J, Meissner Decl.

[9] The Ordinance targets employees who, if they chose to, could join or form a labor union—specifically "nonmanagerial, nonsupervisory employees." Ordinance, section 7.45.010(E), (N). 29 U.S.C. § 152(3), (11); 29 U.S.C. § 151, Fifth; *NLRB v. Bell Aerospace Co. Division*, 416 U.S. 267, 289 (1974) (managerial and supervisory employees not covered by NLRA or RLA).

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262 (1974) (concluding that employer had the right not to hire any of its predecessor's employees); *Adler v. I&M Rail Link*, 13 F. Supp. 2d 912 (N.D. Iowa 1998). Section 7.45.060 of the Ordinance (the "worker retention provision") interferes "with the normal exercise of the right of the employer to select its employees or to discharge them." *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). When a "successor employer" succeeds a "predecessor employer" in the provision of *substantially similar services*[10] within the City, the Ordinance requires the successor employer to hire the predecessor's employees.

Issues of successorship and worker retention are left unregulated by the NLRA. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 280, n.5 (1972) ("The [NLRB] has never held that the [NLRA] itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all the employees of the predecessor though it is possible that such an obligation might be assumed by the employer."). As the Supreme Court recognized in *Burns*:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. ... Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

406 U.S. at 287-288.

The federal law recognizes a balance between the rights of employers and employees, but the Ordinance here tramples on the rights of both. Under federal labor law a new employer

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[10] The Ordinance does not define "substantially similar services." This vagueness is fatal to its enforcement and renders it unconstitutional. *Chalmers v. Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985) (regulation is unconstitutionally vague if "ordinary people [cannot] understand what conduct is being prohibited."); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (vague laws are forbidden where that result in "arbitrary and discriminatory enforcement" and delegate "basic policy matters to ... judges, and juries for resolution on an ad hoc and subjective basis.").

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is not required to hire a predecessor's employees and whether it is deemed a successor depends on the new employer's hiring decisions. If a substantial continuity exists between the prior and subsequent businesses—for example, where the employer ***voluntarily chooses*** to hire all of its predecessor's employees—the employer may have an obligation to bargain with the predecessor employees' representative. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The Ordinance, however, forces employers to hire the employees of its predecessor (in complete disregard of the employer's federal right to hire who it sees fit). When the predecessor's employees are represented by a union, the Ordinance imposes a potential bargaining obligation on the employer where one might not otherwise exist. *Commonwealth Edison Co. v. Int'l Bhd. Of Elec. Workers*, 961 F. Supp. 1169, 1177 (N.D. Ill. 1997) (state law requiring successorship preempted under Machinists doctrine); *St. Gabriel's Hosp.*, 871 F. Supp. at 342 ("Minnesota's successor statute is preempted under the Machinists doctrine. The Supreme Court has been careful to safeguard the rightful prerogative of owners independently to rearrange their businesses.").

iv. The Ordinance Grants Additional Economic Weapons To Unions While Depriving Employers Of Others

Regulations that interfere with a union's or employer's use of economic weapons are preempted. *Machinists*, 427 U.S. at 150-51; *Garner v. Teamsters*, 346 U.S. 485, 500 (1953) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

The Ordinance targets specific employers and mandates that they provide the benefits dictated by the Ordinance or else be subject to lawsuits and penalties. The Ordinance has a broad enforcement provision and permits "any person claiming violation" to file an action regardless of whether the plaintiff has suffered an injury. 7.45.100. This allows labor unions to sue and/or use the threat of lawsuits to affect the union representation process or collective bargaining. The ***only*** way an employer can avoid the Ordinance is to enter into a collective

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bargaining agreement that expressly waives application of the Ordinance. 7.45.080. These two provisions—waiver and enforcement—put a heavy thumb on the scale in favor of unionization and provide unions with a powerful economic weapon. Unions can file—or threaten to file—lawsuits against employers for violating the Ordinance (the proverbial stick) while simultaneously pressuring employers to voluntarily recognize them and avoid the Ordinance altogether (the carrot).

That the Ordinance gives additional weapons to labor unions to use in attempting to pressure employers to recognize and negotiate CBAs with them is even more obvious when it comes to those employers that are subject to the RLA. The National Mediation Board ("NMB"), which is responsible for conducting union elections under the RLA, has "consistently held that [union] representation must be on a system-wide basis" and "must include ***all*** of the employees working in the classification deemed eligible, ***regardless*** of work locations." *Aircraft Service Int'l Group*, 40 NMB 43, 48-49 (2012) (emphasis added). *See also Pennsylvania R.R. Co.*, 1 NMB 23, 24 (1937) (RLA "does not authorize the [NMB] to certify representatives for small groups of employees arbitrarily selected" and representatives "may be designated and authorized only for the whole of a craft or class employed by a carrier"); *Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 795 (2d Cir. 1980) ("The Board's long-standing practice, in keeping with its statutory mandate, is to certify only unions that represent the majority of a system-wide class of employees."). In other words, the NMB would not hold an election for a bargaining unit that consisted of an employer's fuelers only at Seatac; the unit would have to encompass all of the company's fuelers throughout the country. A union interested in representing employees at Seatac, but which did not have enough support to obtain nationwide certification, would have to seek voluntary recognition by the employer at Seatac only, as permitted under the RLA. *See, e.g., Summit*, 628 F.2d at 795.

Absent the Ordinance, there is little (if any) incentive for an RLA employer to consider voluntarily recognizing a union at Seatac. The Ordinance creates such an incentive by imposing

huge new burdens on employers with only one way out: negotiation of a collective bargaining agreement that waives those provisions. Again, this is an intentional consequence of the Ordinance according to one of its major backers, to redress the problems presented by the *congressionally mandated* rules for organizing in the airline industry. Josh Eidelson, supra. ("Rolf cited vicissitudes of labor law that would make unionization particularly daunting for airport service workers (some are covered by a federal law that could require a majority of a company's employees in the entire country in order to win collective bargaining), as well as what he called a multi-decade scheme by airlines to subcontract work to "companies that specialize in low-wage un-benefited, part-time employment as a way of offering reduced labor costs."). The Ordinance thus impermissibly encourages unionization and is preempted. *See also Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 955-56 (N.D. Cal. 2001) (airport ordinance mandating "labor peace/card check" agreement preempted).[11]

As explained below, the Ordinance also limits an employer's ability to implement unilateral changes in working conditions after negotiating to impasse.

v. The Ordinance Is Preempted Because Interferes With Employee Rights Under § 7 and Employee And Employer Rights Under § 8

State regulations are presumptively preempted under *Garmon* when it concerns conduct that is actually or arguably protected or prohibited by federal law. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). In the NLRA context, states must yield to the NLRB's exclusive jurisdiction over conduct "actually" protected or prohibited under Sections 7 or 8 of the NLRA. *Garmon*, 359 U.S. at 243-44. If the state law regulates conduct actually protected by federal law, preemption follows as a matter of substantive right. *Brown v. Hotel & Rest. Emps. & Bartenders Int'l. Union Local 54*, 468 U.S. 491, 501-03 (1984); *Garmon*, 359 U.S. at 245. Decisions under the RLA reach the same conclusion. *See, e.g., Lindsay v. Ass'n of Prof'l Flight*

[11] The Ordinance is distinguishable from *Air Transp. Ass'n v. City & County of San Francisco*, where the Ninth Circuit found that an ordinance prohibiting discrimination in providing benefits to employees with domestic partners was not preempted because it "applies to union and nonunion employees alike and neither favors nor discourages collective bargaining." 266 F.3d 1064 (9th Cir. 2001).

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Attendants, 581 F.3d 47, 57 (2d Cir. 2009) ("to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy"). "The critical determination for preemption purposes is whether a state or federal claim involves an identical controversy to that which could have been brought before the NLRB." *Hotel Emps. & Rest. Emps., Local 8 v. Jensen*, 51 Wn. App. 676, 679, 754 P.2d 1277, 1280 (1988) (citing *Sears, Roebuck & Co. v. San Diego Cy. Dist. Coun. of Carpenters*, 436 U.S. 180 (1978)).

Section 7 guarantees employees the right to organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . . ." Section 8 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7 and makes it an unfair labor practice for either unions or employers to bargain in bad faith. Likewise, the RLA guarantees employees the right to "organize and bargain collectively through representatives of their own choosing," and prohibits employers from interfering with employees' exercise of those rights. RLA § 2, Fourth, 29 U.S.C. § 152, Fourth.

Here, section 7.45.090 of the Ordinance makes it a violation for a covered employer to "interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under [the Ordinance]." The Ordinance further makes it unlawful for employers to "take adverse action" against any employee for exercising his or her right to "inform other [employees] of their rights under [the Ordinance]." *Id.* It is also unlawful to retaliate against an employee for "informing" a union about an alleged violation. *Id.* This section of the Ordinance thus regulates conduct regulated by the NLRA and creates a cause of action that is identical to that which could be brought as an unfair labor practice charge. Foremost among the concerted activities protected by the NLRA is an employee's right to discuss his or her working conditions with other employees. *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) ("A rule prohibiting employees from communicating with one another regarding

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wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees' right to engage in protected concerted activity."). The NLRA provides the exclusive remedy for employer interference with an employee's right to discuss working conditions; because the Ordinance "functions unambiguously as a supplemental sanction for violations of the NLRA," it is preempted under *Garmon. Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986).

The Ordinance also strips employers of key economic weapons that they can use in response to union demands. The NLRA allows an employer to make unilateral changes to terms and conditions of employment if the parties are at a bargaining impasse. *Brown v. Pro Football*, 518 U.S. 231, 238 (1996). "[I]mpasse and an accompanying implementation of proposals constitute ***an integral part of the bargaining process***." *Id.* at 239 (emphasis added).[12] Section 7.45.090 of the Ordinance, however, prohibits an employer from unilaterally reducing compensation or benefits "in response to this Chapter or the pendency thereof."[13] This section intrudes on an "integral part" of the bargaining process by limiting one of the few economic weapons reserved to management under the NLRA. For example, a union may, in the course of collective bargaining, refuse to waive application of the Ordinance and insist on the $15 minimum wage in the Ordinance. The employer, in response, may propose to reduce other employment benefits—*i.e.* health care benefits. If the parties reach impasse and the employer lawfully reduces health care benefits, the union—because the Ordinance grants it seemingly limitless standing—can bring a lawsuit against the employer for reducing benefits "in response to" the Ordinance. Section 8(a)(5) of the NLRA either permits or prohibits unilateral change based on impasse and the question of whether an employer is privileged to unilaterally change the terms and conditions of employment is a determination left to the NRLB in the context of

[12] Similarly, under the RLA an employer must maintain the status quo during negotiations for a successor collective bargaining agreement, but is free to make unilateral changes to terms and conditions of employment at the conclusion of the RLA's major dispute procedures. *Conrail v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 302-03 (1989).

[13] The statute does not define "in response to" or "pendency."

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an unfair labor practice charge. *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990); *citing Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 293 (7th Cir. 1987). The Ordinance intrudes on this process and violates the NLRB's exclusive jurisdiction; it is preempted under *Garmon*.

vi. The Ordinance Allows A Union To Represent An Employee Without The Employee's Consent

The NLRA and RLA guarantee employees the right to both join a union ***and refrain from*** having a union represent them. 29 U.S.C. § 157; *Russell v. NMB*, 714 F.2d 1332, 1343 (5th Cir. 1983). The Ordinance interferes with this right by permitting a labor union to bring a claim alleging a violation of the Ordinance on behalf of an employee (or group of employees), regardless of whether the employees consent to union representation. The Ordinance's direct interference with employee's right to freely choose whether to be represented by a union runs afoul of the NLRA and is, therefore, preempted under *Garmon*. Although a union may have standing to represent ***its members*** in a lawsuit, that standing is based on the scope of representation provided under the relevant federal statute. *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004). The Ordinance impermissibly allows a union to represent non-members without taking on any of the obligations such representation otherwise entails.

C. The Ordinance Is Preempted By The Airline Deregulation Act

The Ordinance is preempted by the Airline Deregulation Act of 1978 ("ADA"), codified at 49 U.S.C. § 41713(b). Understanding the congressional purpose of ADA assists an understanding of the preemptive effect of ADA, especially as it relates to the Ordinance.

> Airline deregulation was premised on an expectation that an unregulated industry would attract new airlines and increase competition, thereby benefiting consumers with lower fares and improved service. The intent of Congress was to allow new and existing airlines to enter and serve any market they wanted (and provide service at whatever price they wanted) in order to boost competition, thereby lowering fares and expanding service. The framers of the act recognized that this approach could cause some airlines to fail...

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GAO Report to Congressional Committees, 2006, pg. 3 (Meissner Decl., Ex. I)

According to GAO, although all the causative factors are not known, the intended result has occurred. "As predicted by the framers of deregulation, airline markets have become more competitive and fares have fallen since deregulation. For consumers, airfares have fallen in real terms since 1980 while service has generally improved. Overall, median fares have declined in real terms by nearly 40 percent since 1980." GAO, pg. 4. 18-22.

To protect this purpose, the ADA prohibits a state or local government from enacting or enforcing "a law, regulation, or other provision having the force and effect of law ***related to*** a price, route, or service of an air carrier . . . ." *Id.* (emphasis added). Air carrier "services" include, among other things, activities facilitating air travel. *See DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011) ("American's conduct in arranging for transportation of bags at curbside into the airline terminal en route to the loading facilities is itself part of the 'service' referred to in the federal statute . . . ."); *Chukwu v. Bd. of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (air carrier services include "ticketing, boarding, in-flight service, and the like").[14]

The Ordinance has the force and effect of law related to air carrier services such as "curbside passenger check-in services; baggage check services; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services"; "security services"; "customer service"; "aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and cleaning; aircraft water or lavatory services; aircraft fueling; ground transportation management"; "janitorial and custodial services"; and "facility maintenance services" (7.45.010(M)), and relates to the "prices" that will be charged for such "services" by dictating how much carriers must pay for the workers who provide such services. Butler Decl. ¶ 7. This interference with air carrier services is not only apparent, but intended by the Ordinance. A study issued by an

[14] *See also Brown v. United Airlines, Inc.*, 720 F.3d 60, 64 (1st Cir. 2013) (ADA preemption applies to "air carrier's imposition of baggage-handling fees").

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organization calling itself Puget Sound Sage, which is organized and run by union officials and supports the Ordinance,[15] described the problem in these terms:

> In 1978, the Federal government deregulated the airline industry, leading to a sea change in the structure of the industry and its fundamental business models. Airlines began experimenting with new ways to lower costs and make new profits. One major change in industry practice was to outsource, or "contract out," entire functions of an airline to another company or business.
>
> Since then, U.S. airlines have relied on contractors to provide more and more passenger and aircraft services. The airlines have fostered a fierce competition between contractors that drives down overall costs, resulting in a race to the bottom by contractors for wages and benefits throughout the industry.[16]

The Ordinance takes direct aim at a core market development resulting from deregulation: air carriers' use of contractors to provide services to passengers. This is precisely the result the ADA's express preemption language is supposed to prevent. As the GAO study and case law show, economic competition was the intended effect of deregulation when Congress enacted the ADA, loosening its economic regulation of the airline industry, after determining that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices, as well as variety [and] quality . . . of air transportation." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (citations and internal quotation marks omitted). The Supreme Court has repeatedly emphasized the breadth of the ADA's preemption provision. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 235-36 (1995) (Stevens, Jr., concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *Rowe v.*

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[15] Puget Sound Sage supports the passage of the Ordinance. See, Screenshot of Puget Sound Sage website "Sound Progress" (Ex. H, Meissner Decl.).

[16] "First-class Airport, Poverty-class Jobs," Puget Sound Sage et al. (May 2012), ("Sage Report") at 9-10. The Court may consider the language of the Report because it is not being offered to establish an adjudicative fact but instead to reference the undisputed fact that the Ordinance is grounded in the belief that the ADA has negatively affected wages for persons providing services to air carriers and their passengers. Even if this were deemed to be an "adjudicative fact," judicial notice would be proper because the fact that the Ordinance proponents challenge the impact of deregulation on worker wages and conditions "is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201, Wash. Rules of Evid.

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New Hampshire Motor Transport Ass'n, 552 U.S. 364, 377 (2008) (Ginsburg, J., concurring) (noting the "breadth of [the] preemption language" in the Federal Aviation Administration Authorization Act of 1994, whose preemption provision is the same as that of the ADA); *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 649, 994 P.2d 901, 903 (2000) (phrase "related to" expresses "a broad preemptive purpose").

In *Air Transport Ass'n of Am. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008), the court held that the ADA preempted the New York state "Passenger Bill of Rights" ("PBR") law requiring airlines to provide passengers with electricity, waste removal and adequate food and drinking water and other refreshments for ground delays of more than three hours. The court stated:

> Although this Court has not yet defined "service" as it is used in the ADA, we have little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier. This conclusion draws considerable support from the Supreme Court's recent unanimous opinion in *Rowe* construing 49 U.S.C. § 14501(c)(1)'s identically worded preemption provision. (*Id.* at 222)

Prior to *Rowe* and *Cuomo*, the Third and Ninth Circuits – unlike other Circuit Courts – construed "service" narrowly, restricting the term to "the prices, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," and not to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and similar amenities. *Cuomo*, at 223 (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (*en banc*) and *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193-94 (3d Cir. 1998)). In light of *Rowe*, that narrow restriction of "service" is no longer valid. Specifically, the *Rowe* decision "necessarily define[d] 'service' to extend beyond prices, schedules, origins, and destinations." *See Cuomo* at 223 ("*Charas*'s approach . . . is inconsistent with the Supreme Court's decision in *Rowe*"); *Hanni v. American Airlines, Inc.*, No. C 08-00732 CW, 2008 WL 1885794, at *6 (N.D. Cal. April 25, 2008) (Wilken, J.) (citation omitted)

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For example, in *National Federation of the Blind v. United Airlines, Inc.*, the Federation and certain individuals filed a prospective class action against United, alleging that the airline violated California disability law by failing to make airport ticketing kiosks accessible to the blind. No. C 10-04816, 2011 WL 1544524 (N.D. Cal. April 25, 2011).[17] The court held that the ADA preempted the use of state law to require airlines to provide the "service" of making airport ticket kiosks accessible to the blind. *Id.* at *5. The United States government filed a "Statement of Interest" which agreed that the ADA preempted the plaintiffs' claims. *See* U.S. Statement of Interest, April 8, 2011; *also Hawaiian Inspection Fee Proceeding, supra*, (ADA preempted Hawaii Plant Quarantine Law because it required "air carriers to conform their service of shipping freight by air transportation in ways not dictated by the market to bill, collect, and remit fees on behalf of its shipper customers").

The Ordinance "relates to" air carrier "services" and "prices" in a manner that is not tenuous, remote or peripheral. To the contrary, the levels of compensation mandated by the Ordinance directly affects the amount of money air carriers must pay to third party contractors and other air carriers for the provision of air carrier services. In addition, the Ordinance improperly and unlawfully penalizes air carriers for their decision to use third party contractors or other air carriers to provide services to or on behalf of their passengers, because if an airline performs the services with its own employees, the Ordinance does not apply. The Ordinance plainly discriminates against airlines that rely on contractors, such as Alaska, in favor of other airlines which do not. The supporters anticipated this result: "The largest company affected by Proposition 1, although not directly, will be Alaska Airlines, which contracts with several aviation service firms." *See*, Economic Impacts of a SeaTac Living Wage, Puget Sound Sage, pg. 15 (Meissner Decl., ¶ F).

If air carriers are required to pay materially more for services, simple math dictates that other changes will have to follow, such as reduced services, increased prices, less profit,

[17] The appeal that was filed by plaintiffs has been stayed pending outcome of the Supreme Court's certiorari review in *Northwest Airlines, Inc. v. Ginsberg*, No. 12-462 (S. Ct.).

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reduced compensation to other suppliers or non-covered employees, all of which interfere with Congress' deregulated model. Even the proponents predicted a price increase of .5% to 1.5%. *supra*. The Ordinance obviously targets a core market development of deregulation: air carriers' use of contractors to provide services to passengers.

Section 7.45.010(M) of the Ordinance attempts to avoid ADA preemption by excluding from its definition of a covered Transportation Employer "a certificated air carrier performing services for itself." But the Ordinance fully applies to employees of third party contractors who provide the array of services covered by the Ordinance. The ADA preempts laws that apply not only directly to air carriers but also to third party contractors retained by air carriers to provide "services" to and on behalf of air carrier passengers. *See, e.g., Huntleigh Corp. v. La. State Bd. of Private Sec. Examiners*, 906 F. Supp. 357, 362 (M.D. La. 1995) (although ADA preemption applies on its face "only to laws regulating air carriers, the courts have not strictly limited application of the act to air-carriers"), *Marlow v. AMR Servs. Corp.*, 870 F. Supp. 295, 297-99 (D. Hawaii 1994) (ADA preemption applied to claim of employee of jet bridge maintenance company); *see also Tucker v. Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360 (S.D. Fla. 2003) (ADA preempted Florida Whistleblowers Act claim of former employee of certified repair station that overhauled and repaired generators for use in commercial and military aircraft).

D. The Ordinance Violates The Dormant Commerce Clause Of The US Constitution

State and local laws are unconstitutional when they place an undue burden on interstate commerce. The Commerce Clause provides that "[t]he Congress shall have the Power ... [t]o regulate Commerce ... among the several states." Art. I, § 8, cl. 3. The Commerce Clause has long been understood to have a "negative" aspect that denies states or local governments the power to discriminate against or burden the interstate flow of articles of commerce. *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 100-01 (1994). This negative command,

known as the dormant Commerce Clause, prohibits states from acting in a manner that burdens the flow of interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989).

"State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)). It is not necessary to look beyond the text of the Ordinance to determine that it discriminates against interstate commerce. The Ordinance distinguishes between entities that that serve a principally interstate clientele and those that primarily serve an intrastate market by singling out those businesses that principally serve the airport and air travelers. *See*, *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 576 (law violated dormant commerce clause when it denied preferential tax treatment to summer camps that primarily served out-of-state campers). For example, the Ordinance does not apply to restaurants that are outside the airport and outside a large hotel, and therefore primarily serve local citizens. But the same restaurant, if located inside the airport terminal, where its customer base is interstate travelers, is covered by the Ordinance. Indeed, as proponents of the Ordinance observe:

> Furthermore, over two-thirds of the wage increase created by Proposition 1 could be paid for by visitors. We estimate that sixty-eight percent of revenues received by covered businesses flow to the region from people and businesses located around the state, U.S. and globe. In addition, all costs of Proposition 1 could be passed onto customers in the form of marginal price increases, ranging from .5% to 1.5%.

Economic Impacts, supra, pg. 21.

The Ordinance need not deter business from interstate business to violate the dormant Commerce Clause. Imposing a discriminatory burden on interstate commerce is sufficient. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 578. Because the burden of the Ordinance falls by design in a predictably disproportionate way on out-of-staters, "the pernicious effect on interstate commerce is the same as in [Supreme Court] cases involving taxes targeting out-of-staters alone." *Id.* at 579-580; *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (fees

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assessed on non-residents when they attempt to use local services imposes an impermissible burden on interstate commerce).

Here, the discriminatory burden is imposed on the out-of-state customer indirectly by means of a substantial body of regulations imposed on those businesses that conduct business with customers who are engaged primarily in interstate commerce. "[T]he imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 580 (quoting *West Lynn Creamery v. Healy*, 512 U.S. 186, 202 (1994)). It makes no difference that the burden falls on the business and not the customers. Common sense dictates that the majority of airport patrons are engaged in interstate commerce—whether coming or going—and insofar as the Ordinance increases the burdens imposed on those business that service the airport—while not imposing any parallel burdens on those businesses that serve the local economy—it facially discriminates against interstate commerce and is invalid. *Id.* at 581; *Or. Waste Sys. Inc.*, 511 U.S. at 101 ("[Supreme Court] cases require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.'").

VI. CONCLUSION

For the reasons discussed above, Plaintiffs request that the Court enter an order declaring the Ordinance is invalid.

DATED this 15th day of November, 2013.

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of on the following:

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Dated this 22nd day of November, 2013.

s/ Margaret C. Sinnott
Margaret C. Sinnott

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2296

Chapter 121, Laws of 2014

63rd Legislature
2014 Regular Session

MUNICIPAL PETITIONS--DUPLICATE SIGNATURES

EFFECTIVE DATE: 06/12/14

Passed by the House March 10, 2014
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 4, 2014
Yeas 49 Nays 0

BRAD OWEN

President of the Senate

Approved March 28, 2014, 2:33 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2296** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 31, 2014

Secretary of State
State of Washington

HOUSE BILL 2296

AS AMENDED BY THE SENATE

Passed Legislature - 2014 Regular Session

State of Washington 63rd Legislature 2014 Regular Session

By Representatives Pike, Harris, Blake, Vick, Taylor, Overstreet, Farrell, Hunt, and Pollet

Read first time 01/15/14. Referred to Committee on Local Government.

AN ACT Relating to duplicate signatures on petitions in cities, towns, and code cities; amending RCW 35.21.005 and 35A.01.040; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature finds that in *Filo Foods, LLC v. City of SeaTac*, No. 70758-2-I (Wash. Ct. Apps. Div. I, Feb. 10, 2014), the Washington court of appeals ruled that RCW 35A.01.040(7), requiring local certifying officers to strike all signatures of any person signing an optional municipal code city initiative petition two or more times, was unconstitutional. The court held that the statute unduly burdened the first amendment rights of voters who expressed a view on a political matter by signing an initiative petition.

(2) The legislature intends to require local officers certifying city and town petitions to count one valid signature of a duplicate signer. This will ensure that a person inadvertently signing a city or town petition more than once will not be penalized for doing so.

Sec. 2. RCW 35.21.005 and 2008 c 196 s 1 are each amended to read as follows:

Wherever in this title petitions are required to be signed and filed, the following rules shall govern the sufficiency thereof:

(1) A petition may include any page or group of pages containing an identical text or prayer intended by the circulators, signers or sponsors to be presented and considered as one petition and containing the following essential elements when applicable, except that the elements referred to in (d) and (e) of this subsection are essential for petitions referring or initiating legislative matters to the voters, but are directory as to other petitions:

(a) The text or prayer of the petition which shall be a concise statement of the action or relief sought by petitioners and shall include a reference to the applicable state statute or city ordinance, if any;

(b) If the petition initiates or refers an ordinance, a true copy thereof;

(c) If the petition seeks the annexation, incorporation, withdrawal, or reduction of an area for any purpose, an accurate legal description of the area proposed for such action and if practical, a map of the area;

(d) Numbered lines for signatures with space provided beside each signature for the name and address of the signer and the date of signing;

(e) The warning statement prescribed in subsection (2) of this section.

(2) Petitions shall be printed or typed on single sheets of white paper of good quality and each sheet of petition paper having a space thereon for signatures shall contain the text or prayer of the petition and the following warning:

WARNING

> Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Each signature shall be executed in ink or indelible pencil and shall be followed by the name and address of the signer and the date of signing.

(3) The term "signer" means any person who signs his or her own name to the petition.

(4) To be sufficient a petition must contain valid signatures of qualified registered voters or property owners, as the case may be, in the number required by the applicable statute or ordinance. Within three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters, or to the county assessor for petitions signed by property owners for determination of sufficiency. The officer or officers whose duty it is to determine the sufficiency of the petition shall proceed to make such a determination with reasonable promptness and shall file with the officer receiving the petition for filing a certificate stating the date upon which such determination was begun, which date shall be referred to as the terminal date. Additional pages of one or more signatures may be added to the petition by filing the same with the appropriate filing officer prior to such terminal date. Any signer of a filed petition may withdraw his or her signature by a written request for withdrawal filed with the receiving officer prior to such terminal date. Such written request shall so sufficiently describe the petition as to make identification of the person and the petition certain. The name of any person seeking to withdraw shall be signed exactly the same as contained on the petition and, after the filing of such request for withdrawal, prior to the terminal date, the signature of any person seeking such withdrawal shall be deemed withdrawn.

(5) Petitions containing the required number of signatures shall be accepted as prima facie valid until their invalidity has been proved.

(6) A variation on petitions between the signatures on the petition and that on the voter's permanent registration caused by the substitution of initials instead of the first or middle names, or both, shall not invalidate the signature on the petition if the surname and handwriting are the same.

(7) ((~~Signatures, including the original, of any person who has~~

~~signed a petition two or more times shall be stricken.~~)) If a person signs a petition more than once, all but the first valid signature must be rejected.

(8) Signatures followed by a date of signing which is more than six months prior to the date of filing of the petition shall be stricken.

(9) When petitions are required to be signed by the owners of property, the determination shall be made by the county assessor. Where validation of signatures to the petition is required, the following shall apply:

(a) The signature of a record owner, as determined by the records of the county auditor, shall be sufficient without the signature of his or her spouse;

(b) In the case of mortgaged property, the signature of the mortgagor shall be sufficient, without the signature of his or her spouse;

(c) In the case of property purchased on contract, the signature of the contract purchaser, as shown by the records of the county auditor, shall be deemed sufficient, without the signature of his or her spouse;

(d) Any officer of a corporation owning land within the area involved who is duly authorized to execute deeds or encumbrances on behalf of the corporation, may sign on behalf of such corporation, and shall attach to the petition a certified excerpt from the bylaws of such corporation showing such authority;

(e) When the petition seeks annexation, any officer of a corporation owning land within the area involved, who is duly authorized to execute deeds or encumbrances on behalf of the corporation, may sign under oath on behalf of such corporation. If an officer signs the petition, he or she must attach an affidavit stating that he or she is duly authorized to sign the petition on behalf of such corporation;

(f) When property stands in the name of a deceased person or any person for whom a guardian has been appointed, the signature of the executor, administrator, or guardian, as the case may be, shall be equivalent to the signature of the owner of the property; and

(g) When a parcel of property is owned by multiple owners, the signature of an owner designated by the multiple owners is sufficient.

(10) The officer or officers responsible for determining the

sufficiency of the petition shall do so in writing and transmit the written certificate to the officer with whom the petition was originally filed.

Sec. 3. RCW 35A.01.040 and 2008 c 196 s 2 are each amended to read as follows:

Wherever in this title petitions are required to be signed and filed, the following rules shall govern the sufficiency thereof:

(1) A petition may include any page or group of pages containing an identical text or prayer intended by the circulators, signers or sponsors to be presented and considered as one petition and containing the following essential elements when applicable, except that the elements referred to in (d) and (e) of this subsection are essential for petitions referring or initiating legislative matters to the voters, but are directory as to other petitions:

(a) The text or prayer of the petition which shall be a concise statement of the action or relief sought by petitioners and shall include a reference to the applicable state statute or city ordinance, if any;

(b) If the petition initiates or refers an ordinance, a true copy thereof;

(c) If the petition seeks the annexation, incorporation, withdrawal, or reduction of an area for any purpose, an accurate legal description of the area proposed for such action and if practical, a map of the area;

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Passed by the House March 10, 2014.
Passed by the Senate March 4, 2014.
Approved by the Governor March 28, 2014.
Filed in Office of Secretary of State March 31, 2014.

THE SUPREME COURT
STATE OF WASHINGTON

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SUPREME COURT CLERK

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April 2, 2014

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 89723-9 - Filo Foods, et al. v. City of SeaTac, et al.
King County Superior Court No. 13-2-25352-6 KNT

Counsel:

Enclosed is a copy of the order entered after consideration of this matter by a Department of the Court on April 1, 2014.

Based on the Department granting the motion for accelerated review, this matter has been set for oral argument on June 26, 2014. A formal setting letter for oral argument on that date will be sent separately.

In light of the setting of oral argument on June 26, 2014, the parties are advised that it is extremely unlikely that any extensions of time for the filing of the remaining briefs will be allowed. The briefs of respondents and respondents/cross appellants should be served and filed by April 2, 2014. The reply briefs of appellants should be served and filed by May 2, 2014. The reply briefs of the respondents/cross appellants should be served and filed by June 2, 2014.

The Court requests that any motion to file an amicus brief in this matter be served and filed by May 14, 2014.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:alb

Enclosure

THE SUPREME COURT OF WASHINGTON

FILO FOODS, LLC; BF FOODS, LLC; ALASKA AIRLINES, INC.; and THE WASHINGTON RESTAURANT ASSOCIATION, Respondent/Cross-Appellants, v. THE CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CITY CLERK, in her official capacity, Appellant/Cross-Respondents, and THE PORT OF SEATTLE, Respondent, v. SEATAC COMMITTEE FOR GOOD JOBS, Appellant/Cross-Respondent.	NO. 89723-9 **ORDER** King County Superior Court No. 13-2-25352-6 KNT

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, J.M. Johnson, Wiggins and Gordon McCloud (Justice J.M. Johnson recused and Justice C. Johnson sat for Justice J.M. Johnson), considered this matter at its April 1, 2014, Motion Calendar and unanimously agreed that the following order be entered.

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EIM

IT IS ORDERED:

That this Court will retain this case for hearing and decision. The Appellant SeaTac Committee For Good Jobs' Motion for Accelerated Review is granted.

DATED at Olympia, Washington this 2nd day of April, 2014.

For the Court

Madsen, C.J.
CHIEF JUSTICE

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 89723-9

(On appeal from King County Superior Court Case # 13-2-25352-6 KNT)

FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC., and WASHINGTON RESTAURANT ASSOCIATION,

Respondents/Cross-Appellants,

v.

CITY OF SEATAC,

Appellant/Cross-Respondent,

and

PORT OF SEATTLE,

Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,

Appellant/Cross-Respondent.

AMENDED ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC., & WASHINGTON RESTAURANT ASSOCIATION

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I. INTRODUCTION

Although the parties arrive in this Court against a backdrop of robust national and statewide debates over wage policy, this appeal actually involves established legal limits on the local initiative power. Plaintiffs/Respondents/Cross-Appellants Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc., and Washington Restaurant Association (collectively "Plaintiffs") filed this suit challenging an initiative petition proposing a municipal ordinance (the "Ordinance"), whose primary purpose is to regulate various aspects of the employer-employee relationship for companies who do business at the Seattle-Tacoma International Airport ("Airport"). Voters' efforts to enact local laws by initiative must comply with state and federal law. Respect for the limits of local initiative power is especially important here where a few votes could have a substantial impact on air transportation, an area that is heavily regulated by both state and federal law, and where the Ordinance by its own terms prevents the city council from amending or repealing the Ordinance.

After the Court of Appeals sent the initiative to the ballot, despite its lack of sufficient valid signatures under RCW 35A.01.040(7), voters in the City of SeaTac narrowly approved the Ordinance in November 2013. Ruling on Plaintiffs' challenge, the superior court correctly determined

that because RCW 14.08.330 gives the Port of Seattle exclusive jurisdiction over the Airport, the City of SeaTac and its voters lacked authority to regulate employees and employers at the Airport. The superior court also properly ruled that the federal National Labor Relations Act ("NLRA") preempts certain of the Ordinance's enforcement provisions. This Court should affirm the lower court's rulings, which correctly applied the law governing both Washington municipal authority and federal labor preemption.

The Court may also affirm the superior court's rulings on multiple alternative grounds under state and federal law: the Ordinance violates the single subject rule; the Ordinance did not have sufficient signatures to place it on the ballot; the NLRA preempts the Ordinance in its entirety; the NLRA preempts the Ordinance's worker retention requirements; the Airline Deregulation Act preempts the Ordinance; and the Ordinance discriminates against interstate commerce in violation of the Dormant Commerce Clause of the United States Constitution.

In addition, Plaintiffs have cross appealed from the superior court's refusal to enjoin the Ordinance's application to employers located outside the Airport in the City of SeaTac. Each of the alternative grounds identified by Plaintiffs for invalidating the Ordinance (except for preemption by the Airline Deregulation Act) also supports Plaintiffs cross-

appeal of the superior court's denial of the motions to invalidate the Ordinance in its entirety, including its application elsewhere in the City of SeaTac. Finally, in light of the superior court's ruling that RCW 14.08.330 prevents the Ordinance from achieving its primary purpose of regulating employment at the Airport, the entire Ordinance should have been ruled invalid.

Plaintiffs respectfully request that this Court affirm the superior court's entry of partial summary judgment on the issues of the Port's exclusive jurisdiction and NLRA preemption. Plaintiffs further request that this Court reverse the superior court's ruling upholding the remaining provisions of the Ordinance, and remand for entry of summary judgment in favor of Plaintiffs.

II. ISSUES RELATED TO APPEAL OF PORT EXCLUSIVE JURISDICTION AND NLRA PRE-EMPTION RULINGS

1. Did the superior court correctly determine RCW 14.08.330 prohibits the City of SeaTac from enacting ordinances that regulate operations at the Airport?

2. Did the superior court correctly determine that the National Labor Relations Act ("NLRA") preempts the retaliation provisions contained in Section 7.45.090 of the Ordinance?

3. Is the Ordinance invalid under the single subject rule?

4. Is the Ordinance invalid because the proponents failed to submit sufficient valid signatures under RCW 35A.01.040(7)?

5. Does the NLRA preempt other provisions of the Ordinance?

6. Does the Ordinance violate the Dormant Commerce Clause?

7. Does the Airline Deregulation Act preempt the Ordinance?

III. ASSIGNMENT OF ERROR ON CROSS APPEAL OF CITY OF SEATAC RULING

The superior court erred by entering its December 27, 2013, Summary Judgment Order to the extent the court denied Plaintiffs' motions for summary judgment regarding the application of the Ordinance at and outside of the Airport.

IV. ISSUES RELATED TO ASSIGNMENT OF ERROR ON CROSS APPEAL

1. Issues 3 through 6 identified in Section II also relate to Plaintiffs' cross appeal assignment of error.

2. If the Ordinance cannot be applied to employers and employees at the Airport, should the Ordinance be invalidated in its entirety because it fails to achieve its primary legislative goal?

V. STATEMENT OF THE CASE

A. Parties

Plaintiff / Respondent / Cross-Appellant **Alaska Airlines, Inc.** is a federally-regulated air carrier governed by the Railway Labor Act and the Airline Deregulation Act. Alaska employs thousands of workers at the Airport, most under the terms of detailed collective bargaining agreements negotiated with national transportation unions. Alaska also contracts with numerous other companies that employ workers at the Airport. Alaska and its contractors provide passenger air transportation and related services at

the Airport. CP 932-35; 942-43. **Washington Restaurant Association** ("WRA") is a trade association representing and advocating the interests of the restaurant industry in Washington. Members of WRA operate businesses in and near the airport. CP 930-31. **Filo Foods LLC** and **BF Foods LLC** are small businesses (as defined by RCW 39.26.010, RCW 43.19, the U.S. Department of Treasury, and the Small Business Administration's guidelines based on size standards in Title 13 of the Code of Federal Regulations (CFR), Part 121) operating food and beverage concessions within the Airport. CP 936-41.

Respondent / Defendant **Port of Seattle** (the "Port") is a municipal corporation. Pursuant to RCW 14.08.330, the Port owns and operates the Airport.

Appellant / Defendant the **City of SeaTac** (the "City") adopted the Ordinance at issue pursuant to its municipal initiative power.

Appellant / Intervenor **SeaTac Committee for Good Jobs** (the "Committee") is the sponsor of the initiative that proposed the Ordinance.

B. The Ordinance

The primary purpose of the Ordinance is to regulate various aspects of the employer-employee relationship for companies doing business at the Airport, including Plaintiffs. *See* CP 752-53 (definition of "Transportation Employer"); 802-03; 808-10; 949-950. The Ordinance

also applies to a small number of companies in the City doing business near the Airport. CP 751-53. The Ordinance potentially affected approximately 6,500 jobs, the large majority of which (4,586 jobs) are located in the Airport. CP 984. The Ordinance includes at least six substantive provisions (plus subparts to facilitate implementation, enforcement, etc.): (1) a new minimum wage, (2) a new right to sick leave, (3) a new restriction on hiring part-time employees, (4) a new restriction on tip pooling, (5) a new 60-day notice requirement in the event an employer terminates or loses a contract, and (6) a new obligation for a company taking over a facility or location to retain existing employees at that facility or location. CP 751-59. Because the Ordinance was passed by voter initiative at the municipal level, it cannot be amended or repealed without a vote of the people. RCW 35.17.340.

C. Signature Validity Dispute and 2013 Election

In June 2013, the Committee filed the proposed Ordinance along with 2,506 petition signatures. CP 129-509. In the City, petitions for initiative must be signed by 15% of the voters registered in the City, which means 1,536 valid signatures were required for a measure to appear on the November 2013 ballot. CP 49. The City delivered the initiative petitions to the King County Elections Department, which validated 1,780 of the

2,506 signatures. The City then issued a Certificate of Sufficiency. *See* CP 881.

Pursuant to SMC 1.10.210, Plaintiffs challenged the sufficiency of the signatures in King County Superior Court, seeking writs to prevent the measure from being placed on the ballot. *See Filo Foods, LLC v. City of SeaTac*, __ Wn. App. __, 319 P.3d 817, 818 (2014). The court initially denied the writs, requiring Plaintiffs to present their claims to the municipality-created Petition Review Board later that same day. *Id.* at 818-19. The Board concluded that 201 signatures were invalid, but rejected Plaintiffs' challenge to the counting of 61 signatures by people who signed multiple times (despite the plain language of SMC 1.10.140(C) and RCW 35A.01.040(7)), leaving 1,579 valid signatures (43 above that required by law). 319 P.3d at 819. The City issued a Final Certificate of Sufficiency on July 23, 2013. *Id.*

Plaintiffs appealed the issuance of the Final Certificate, contending that those 61 signatures were improperly counted. *Id.* The superior court agreed and rejected those signatures, leaving only 1,518 valid signatures supporting the initiative petition. *Id.*; CP 674-84. Because the proponents had submitted an insufficient number of valid signatures, on August 26, 2013, Judge Darvas enjoined the proposed initiative from appearing on the November 5, 2013 ballot. CP 674-84. The Committee sought accelerated

appellate review of her ruling, CP 685, and the Court of Appeals summarily reversed in Case No. 70758-2-I, ruling that RCW 35A.01.040(7) violates the First Amendment to the United States Constitution. CP 825-28; *see also Filo Foods, LLC*, 319 P.3d at 817. This Court denied immediate interlocutory review in Case No.89266-1, without prejudice to Plaintiffs requesting review after the Court of Appeals had filed its opinion.[1] CP 830-32.

In the November 5, 2013 election, just half of the City's registered voters submitted ballots. The Ordinance passed 3,040 to 2,963 – a 77-vote margin. *See* Ex. E to Leishman Decl. submitted with Answer to Statement of Grounds (Election Results). The results were certified on November 26, 2013.

D. Summary Judgment and Appeal

On November 15, 2013, Plaintiffs filed summary judgment motions contending that the Ordinance is invalid on state and federal grounds. CP 897-927; 1145-71. On December 27, 2013, Judge Darvas issued a Memorandum Decision and Order granting in part and denying in part Plaintiffs' motions. CP 1934-66. The superior court concluded

[1] The Court of Appeals ultimately issued its opinion in the Signature Validity Appeal on February 10, 2014. *See Filo Foods, LLC*, 319 P.3d at 817. On March 31, 2014, Plaintiffs filed a timely petition for review by this Court of the Court of Appeals' decision. Because the First Amendment issue relates to both this Summary Judgment Appeal and the related Signature Validity Appeal, Plaintiffs intend to promptly seek consolidation of the two appeals under RAP 3.3.

pursuant to RCW 14.08.330 that the Ordinance may not apply to employers and employees doing business at the Airport, which is under the exclusive jurisdiction of the Port of Seattle. CP 1943-47. The superior court also concluded that certain of the provisions of the Ordinance purporting to regulate employers' responses to employee actions were preempted by the NLRA. CP 1960-62. The court upheld the remainder of the Ordinance, including its application to covered businesses outside the Airport, CP 1965-66, and the law went into effect in the City on January 1, 2014.

The Committee and the City sought direct review by this Court of the portions of Judge Darvas's Order granting in part Plaintiffs' motions for summary judgment. CP 1967-68; 2058-59. Plaintiffs sought cross review of the portions of the superior court's order denying their summary judgment motions in part. CP 2096.

VI. ARGUMENT FOR ANSWERING BRIEF

A. The Superior Court Correctly Determined That the Ordinance Does Not Apply to Employers and Employees At the Airport and that the NLRA Preempts the Ordinance in Part

1. The Revised Airports Act Grants the Port Of Seattle Exclusive Jurisdiction Over the Airport and Prohibits the City From Imposing Regulations There

The Ordinance is invalid because it directly conflicts with the Revised Airports Act, RCW 14.08 *et seq*. The Revised Airports Act grants

the Port of Seattle "exclusive jurisdiction and control" over the Airport. Section 14.08.330 of the Act states:

> Every airport and other air navigation facility controlled and operated by any municipality, or jointly controlled and operated pursuant to the provisions of this chapter, shall, subject to federal and state laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality or municipalities controlling and operating it.

The superior court correctly held that this grant of exclusive jurisdiction to the Port precludes the City from imposing or enforcing the Ordinance on employers and employees at the Airport. The superior court stated that the Washington State Legislature "clearly and unequivocally stated its intent that municipalities other than the Port of Seattle may not exercise any jurisdiction or control over SeaTac Airport operations, or the laws and rules governing those operations." CP 1943.

This ruling is wholly consistent with this Court's decision in *King County v. Port of Seattle*, 37 Wn.2d 338, 223 P.2d 834 (1950). There, this Court considered the Act's grant of exclusive jurisdiction to the Port and held that Section 14.08.330 of the Act "clearly removes" from an outside municipality other than the Port of Seattle the right to impose regulations on business operations at the Airport. *Id.* at 347.

Appellants argue that the superior court's ruling misconstrued the Revised Airports Act's grant of exclusive jurisdiction and that the Act

precludes the City only from imposing regulations that interfere with Airport operations. Committee's Brief at 11; City's Brief at 10. Appellants do not dispute that the Port has exclusive jurisdiction and control over the Airport, but argue that its jurisdiction is limited to matters of Airport operation. There is no statutory support for Appellants' construction of the Act. "Exclusive" jurisdiction means just that. "When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." *Post v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). By granting exclusive jurisdiction to the Port, the Act strips the City of the authority to make or enforce laws at the Airport. *King Cnty v. Port of Seattle*, 37 Wn.2d at 347 (Act "clearly removes" the authority of entities other than the Port to impose regulations at the Airport); *see also Dep't of Labor and Indus. v. Dirt & Aggregate, Inc.*, 120 Wn.2d 49, 52-53, 837 P.2d 1018 (1992) (definition of exclusive jurisdiction).

Additionally, and contrary to Appellants' contention, the Ordinance does affect Airport operations. The Ordinance applies to any employer who provides or operates the following services: curbside passenger check-in services; baggage check services; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services; aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and

cleaning; aviation ground support equipment washing and cleaning; airport water or lavatory services; aircraft fueling; and ground transportation management. *See* CP 752 (definition of "Transportation Employer"). In *King County v. Port of Seattle*, King County sought to enjoin Yellow Cab company drivers from picking up passengers at the Airport unless the drivers first obtained a license from King County. 37 Wn.2d at 339. In order to do so, drivers had to agree to charge passengers rates provided by the county. *Id.* at 343. This Court found that because the Revised Airports Act granted exclusive jurisdiction to the Port, King County did not have the authority to require that taxi cabs that served customers at the Airport obtain a license from the county.[2] Here, the City's attempt to regulate wages and employment at the Airport is analogous to King County's effort to require taxi licenses: the City seeks to regulate employers who provide a service to Airport passengers (either directly or indirectly) at the Airport (*i.e.* the airlines). Indeed, the employers that the Ordinance targets provide services (e.g., baggage and cargo handling, aircraft cleaning, water and lavatory services, and fueling) that are much more directly related to the airport operations than a taxi service that takes people to and from the Airport. The City has no more authority to regulate

[2] The City was not incorporated until 1990, forty years after the decision in *King County v. Port of Seattle*. At the time of the decision, the Airport was located solely within the physical boundaries of King County.

these aspects of Airport operations than King County did to regulate taxi licenses and fares.[3]

Appellants other substantive argument is that the City has the authority to impose and enforce the Ordinance at the Airport by virtue of its police power and if Ordinance is not applied at the Airport, a "regulatory vacuum" will exist because the Port does not have the authority to regulate wages and employment conditions at the Airport.[4] Appellants' argument fails. First, there is no vacuum because the State itself heavily regulates employment standards governing those employees, including setting a minimum wage and other protections. *Cf. Port of Seattle v. Wash. Utils. and Transp. Comm'n*, 92 Wn.2d 789, 804, 597 P.2d 383 (1979) (airport is subject to state regulation). While the Revised Airports Act exempts the Airport from municipal regulation, it makes clear that it is still subject to state and federal regulation. RCW 14.08.330. Second, police power is not absolute, and "[the] police power to enact

[3] Appellants cite numerous out-of-state authorities. These authorities are not binding and the various statutes they rely on differ significantly from the Act as enacted and interpreted in Washington. For example, Appellants rely heavily on Section 1266(8) of New York's Public Authorities Law. This law exempted the New York City Transit Authority ("NYCTA") from municipal regulation and Appellants contend that the statute is "strikingly similar" to the Revised Airports Act. Committee's Brief at 37; City's Brief at 18. However, the New York statute expressly stated that the NYCTA was exempt only from municipal regulations that "conflict[ed] with this title or any rule or regulation" of the transit authority. The Revised Airports Act contains no such express limitation. Other cases, such as *Edmonds School District No. 15 v. Mountlake Terrace*, 77 Wn.2d 609 (1970), do not involve issues of exclusive jurisdiction.

[4] Appellants discuss at length the breadth and scope of the Port's authority to regulate wages and employment benefits at the Airport. The scope of the Port's authority is not at issue in this case.

ordinances ... ceases when in conflict with general state law." *HJS Dev., Inc. v. Pierce Cnty*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). The pivotal question when analyzing issues of preemption is not the nature of the preempted regulation (in this case the Ordinance), but rather the language and legislative intent of the controlling legislation (the Revised Airports Act). *See City of Seattle v. Burlington N. R.R. Co.*, 105 Wn. App. 832, 836-37, 22 P.3d 260 (2001), *aff'd*, 145 Wn.2d 661 (2002). Here, as the superior court correctly held, the language and intent of the Revised Airports Act is to "clearly remove" the authority of the City to impose regulations, such as those in the Ordinance, at the Airport.

2. The Superior Court's Decision Was Properly Based On Uncontroverted Evidence Pursuant To CR 56

In addition to substantive arguments, Appellants now argue, for the first time on appeal, that Plaintiffs (and the Port) were required to submit "substantial evidence" sufficient to support specific findings of fact by the trial court. Committee's Brief at 16-18; City's Brief at 25. Appellants did not make this argument to the superior court and it is not preserved on appeal.[5] RAP 2.5; *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d

[5] Rule of Appellate Procedure (RAP) 2.5(a)(2) permits an appellant to claim as error, for the first time on appeal, the "failure to establish facts upon which relief can be granted." Because this matter was decided on summary judgment, and not at trial, this exception does not apply. *Mukiteo Ret. Apartments, LLC v. Mukiteo Investors LP*, 176 Wn. App. 244, 246, 310 P.3d 714 (2013) ("While functioning as an exception to the general rule that we do not consider new theories and arguments on appeal, the rule's applicability is

1123 (2012) ("While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.").

Appellants also misstate the law and the standard for granting a motion for declaratory judgment. A motion for declaratory judgment is a summary judgment motion, governed by CR 56. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 198, 11 P.3d 762 (2000) (the constitutionality and applicability of ordinance resolved via summary judgment); *Wash. Ass'n for Substance Abuse and Violence Prevention*, 174 Wn.2d 642, 652, 278 P.3d 632(2012) (same). Courts do not find facts in summary judgment proceedings.[6] *See United Pac. Ins. Co. v. Boyd*, 34 Wn. App. 372, 377, 661 P.2d 987 (1983) (factual determinations are "beyond the scope of a summary judgment proceeding"). "Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."

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limited to circumstances wherein the proof of particular facts ***at trial*** is required to sustain a claim.") (emphasis added).

[6] Appellants incorrectly cite the law for when factual determinations are required. Citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990) ("*Douglass*") and *In re Detention of Mulkins*, 157 Wn. App. 400, 237 P.3d 342 (2010) ("*Mulkins*"), Appellants argue that when a challenged ordinance does not involve First Amendment interests, the ordinance is not evaluated on its face and must be "judged as applied." *Douglass* and *Mulkins*, however, involved void-for-vagueness challenges and the standard that those cases articulate applies only to vagueness challenges. *See State v. Worrell*, 111 Wn.2d 537, 541, 761 P.2d 56 (1988) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.") (citation omitted). This standard is inapplicable here.

Amalgamated, 142 Wn.2d at 780. Plaintiffs expressly relied on CR 56 and submitted sworn testimony in support of their motions.

Appellants never argued that summary judgment was not appropriate. They did not object to any of the evidence submitted by Plaintiffs, nor did they submit contradictory testimony that might have created disputed issues of fact.[7] *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 429-30, 788 P.2d 1096 (1990) (summary judgment opponent "must do more than simply show that there is some metaphysical doubt as to the material facts") (internal quotation marks omitted); *Parkin v. Colocousis*, 53 Wn. App. 649, 652, 769 P.2d 326 (1989) (party waives objections to affidavits submitted on summary judgment unless it registers an objection which specifies the deficiency or moves to strike the affidavit). Further, Appellants did not seek a continuance under CR 56(f), and they did not appeal or assign error to the superior court's decision to stay discovery. Because Plaintiffs' evidence in support of their summary judgment motion was undisputed, the superior court appropriately ruled as a matter of law. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) ("Construction of a statute is a question of law which is reviewed de novo.").

[7] At oral argument, Appellants argued that they disputed the facts submitted by Plaintiffs, but they did not submit or attempt to submit any controverting evidence, as demonstrated by the absence of any such evidence in the record. Report of Proceedings at p.8:25-9:8.

3. The Superior Court Correctly Determined That Portions of the Ordinance Are Preempted by Federal Law

The superior court properly found that SMC 7.45.090 of the Ordinance is preempted, in part, by the NLRA under the *Garmon* doctrine. Under *Garmon*, the National Labor Relations Board has exclusive jurisdiction to regulate and provide remedies for conduct prohibited by the NLRA. According to the U.S. Supreme Court, this exclusive jurisdiction prohibits states from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

Here, SMC 7.45.090(A) prohibits employers from interfering with employees' exercise of rights under the Ordinance, and SMC 7.45.090(B) makes it unlawful for an employer to retaliate against an employee who discusses his or her rights under the Ordinance with co-workers or reports a violation of the Ordinance to a labor union. CP 758. However, Section 8 of the NLRA already makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, including an employee's right to discuss his or her working conditions with other employees. Since the Ordinance duplicates the remedies provided by the NLRA, for conduct

prohibited by the NLRA, it is preempted.

B. The Record Supports Additional Grounds for Affirming the Superior Court's Judgment for Plaintiffs

The lower court's ruling may be affirmed by any grounds supported by the record. RAP 2.5(a). Here, the record provides several additional grounds for affirming the judgment.

1. The Ordinance Is Invalid Because It Violates the Single Subject Rule

Legislation adopted by initiative in the City must comply with the single-subject rule applicable to other legislation. *See* RCW 35A.12.130; CP 758 (SMC 7.45.080); *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 553-54, 901 P.2d 1028 (1995) (single-subject rule applies to initiatives). These provisions mirror the requirements of article II, section 19 of the Washington Constitution.

The purpose of the single-subject rule is to "prevent logrolling or pushing legislation through by attaching it to other legislation." *Amalgamated*, 142 Wn.2d at 207. When an initiative embodies multiple subjects, "it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided." *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001) (citing *Power, Inc. v. Huntley*, 39 Wn.2d 191, 200, 235 P.2d 173 (1951)). The risk of logrolling is "more

significant" with initiatives than it is with the legislative process. *Wash. Fed'n*, 127 Wn.2d at 567 (Talmadge, J., concurring in single-subject analysis);[8] *Fritz v. Gorton*, 83 Wn.2d 275, 333, 517 P.2d 911 (1974) (Rosellini, J.).

The Ordinance here comprises at least six new laws, each of which can (and usually does) stand on its own. The Ordinance

1. Sets a new minimum wage of $15 per hour, with increases tied to inflation (this section also requires yearly publication of adjusted rates and payroll adjustments and prohibits counting tips as part of the new minimum wage), 7.45.050;

2. Creates a right to paid leave for sick and safe time (this section also identifies when leave must be granted, sets the accrual rate, prohibits employers from requiring certification of the need for leave, prohibits retaliation, and requires cashout of unused time), 7.45.020;

3. Restricts employers' ability to hire new employees by requiring them to offer additional hours to existing part-time employees before hiring additional part-time employees or subcontractors, 7.45.030;

4. Requires that service charges to customers or tips be paid to the employees performing the services related to the charge or tips (this section prohibits tip-pooling/sharing, prohibits sharing tips with supervisors, requires "equitable" allocation of tips or service charges, and details what that means for banquets, room service, and porterage), 7.45.040;

[8] Justice Talmadge concurred in the opinion with respect to the article II, section 19 analysis and dissented only with respect to the scope of remand. Both the majority and the concurring opinions in *Washington Federation* relied heavily on Justice Rosellini's opinion in *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974), for his explanation of the importance of the single-subject rule. *See Wash. Fed'n*, 127 Wn.2d at 551-52 (discussing opinions in *Fritz*).

5. Restricts an employer's right to choose its workforce by requiring a "successor" employer to offer employment to the employees of a "predecessor" before hiring new employees or transferring employees from another location; to retain such employees for 90 days; and to use seniority to determine which employees to hire if there are not sufficient positions for all of them, 7.45.060(B)–(D); and

6. Requires an employer to provide employees and the City with a notice 60 days in advance of the termination of an employer's contract, 7.45.060(A).[9]

This Ordinance is a perfect example of impermissible logrolling. There is no way for the Court to know if any of these new laws would have been adopted if voters had been allowed to vote on each of them separately. Such legislation is invalid. *See Kiga*, 144 Wn.2d at 824-25.

The Ordinance violates the single-subject rule whether this Court deems its title to be restrictive or general.[10] The ballot title of the Ordinance is:

> Proposition No. 1 concerns labor standards for certain employers.
>
> This Ordinance requires certain hospitality and transportation employers to pay specified employees a $15.00 hourly minimum wage, adjusted annually for inflation, and pay sick and safe time of 1 hour per 40 hours

[9] In addition, the Ordinance imposes incidental, facilitating, and enforcement provisions such as new "work environment reporting" requirements, recordkeeping requirements, union-only waiver provisions, anti-retaliation provisions, enforcement rights, and City auditing requirements, etc. *See* CP 757-59 (SMC 7.45.070 - .110).

[10] The relevant title for analysis of an initiative under the single-subject rule is the ballot title. *Amalgamated*, 144 Wn.2d at 211-12. The ballot title consists of the statement of the subject of the measure, the concise description, and the question of whether or not the measure should be enacted into law. RCW 29A.36.071; *Wash. Ass'n*, 174 Wn.2d at 668 (noting that courts "treat the whole ballot title as the initiative's 'title'").

> worked. Tips shall be retained by workers who performed the services. Employers must offer additional hours to existing part-time employees before hiring from the outside. SeaTac must establish auditing procedures to monitor and ensure compliance. Other labor standards are established.
>
> Should this Ordinance be enacted into law?

CP 808-810; 949-950.

Plaintiffs contend the title is restrictive, because it is not a generic statement of a broad subject of legislation or "[a] few well-chosen words, suggestive of the general topic." *See Kiga*, 144 Wn.2d at 825; *Amalgamated*, 142 Wn.2d at 207-09. Rather, the title here indicates that the measure applies only to certain employers, in two specified industries, and it lists five specific subjects addressed in the Ordinance. *See State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997) (restrictive title "is of specific rather than generic import"); *Blanco v. Sun Ranches, Inc.*, 38 Wn.2d 894, 901-02, 234 P.2d 499 (1951) (title "expressly limited in scope to the protection of employees in factories where machinery is used" is restrictive); *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wn.2d 819, 831-32, 176 P.2d 429 (1947) (title that specifically stated it applied to "charitable institutions" is restrictive).[11] And if the title is restrictive, all a

[11] Indeed, in litigation over the title of the Ordinance at issue, the City itself argued that it drafted the ballot title to be specific and to "avoid ***generalities*** . . . ." City of SeaTac's Response to Petitioner's Appeal of Ballot Title, at 5:9-12 (emphasis added). *SeaTac Committee for Good Jobs v. City of SeaTac*, No. 13-2-28409-0 KNT, Dkt. No. 17.

challenger needs to show is that the measure contains more than one subject, as this Ordinance does. Such legislation is invalid. *Amalgamated*, 142 Wn.2d at 215 n.8 ("[W]here a restrictive title is used, the rational unity analysis does not apply.").

In addition, the Ordinance fails single-subject review under the general title standard. If a measure has a general title, the Court must ask whether its subjects share a rational unity ***both*** with the title ***and*** with each other. *Id.* at 216-17; *Kiga*, 144 Wn.2d at 826 . "[T]he existence of rational unity or not is determined by whether the matters within the body of the initiative are germane to the general title ***and*** whether they are germane to one another." *Id.* (emphasis added); *Amalgamated*, 142 Wn.2d at 209-10.

Making this inquiry, courts examine several things: whether the several parts of a measure are "incidental" to a single topic; whether they "facilitate the accomplishment" of a single stated purpose; and whether one part "is necessary to implement the other." *Amalgamated*, 142 Wn.2d at 209, 217. If a measure addresses more than one subject and each is not necessary to implement the other, the subjects lack rational unity and the measure violates the single-subject rule. *See, e.g., id.*; *Kiga*, 144 Wn.2d at 826; *Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978). Here, each of the six major subjects of the measure could stand alone as separate legislation, and none is necessary to implement any of the others.

Courts also consider whether the subjects have historically been treated together or in separate legislation. *Wash. Ass'n*, 174 Wn.2d at 657 (long recognition of the relationship between liquor regulation and public welfare in legislation supports rational unity) (citing with approval *Wash. Fed'n*, 127 Wn.2d at 575, 901 P.2d 1028 (Talmadge, J.,) (courts should consider whether legislature has historically treated issues together)); *id.* at 659 (noting that spirits and wine "have been governed . . . by the same act for decades"). Where subjects are traditionally addressed in separate legislation—or have historically been introduced as separate legislation and failed to pass—the subjects lack rational unity. *Power, Inc.*, 39 Wn.2d at 198-99. A bill that attempts to combine such subjects into a single piece of legislation violates the single-subject rule. *Id.*

Here, the subjects combined in the Ordinance are typically addressed in separate legislation. For example, a "living wage" ordinance enacted in Bellingham—the only other municipal living wage ordinance in Washington—addresses only wages. Bellingham Mun. Code Ch. 14.18. In 1998, when voters approved the Washington State Minimum Wage Initiative (Initiative 688, codified as RCW 49.46.020), the initiative dealt solely with the subject of a minimum wage increase—nothing else. Similarly, the City of Seattle Paid Sick Time and Paid Safe Time ordinance, Seattle Mun. Code Chapter 14.16, deals only with the subject

of paid leave. And the worker retention portion of the SeaTac Ordinance (imposing obligations on successor employers) has been proposed at both the state and municipal level. However, not linked to any wage hike or paid leave provisions, these proposals were rejected.[12]

In contrast to these laws and proposals, the measure before the voters here lumped together at least six topics historically addressed separately. This kind of logrolling violates the single-subject rule. *See Wash. Ass'n*, 174 Wn.2d at 657 (considering whether issues were historically treated together in legislation); *Kiga*, 144 Wn.2d at 827-28 (measure violated single-subject rule because it "required the voters who supported one subject of the initiative to vote for an unrelated subject they might or might not have supported").

The wording of a measure's title also informs whether there is rational unity among its parts. "If the title of the enactment is a 'laundry list' of the contents of the legislation, this is suggestive of the possibility

[12] In 2011, the Washington Legislature considered and rejected SHB 1832 that addressed the worker retention issue addressed by the SeaTac Ordinance but included none of the other wage, sick leave, tip pooling, or other issues. H.R. 1832, 62nd Leg. Reg. Sess. (Wash. 2011). SHB 1832 also included language requiring food and beverage concessionaires to sign labor peace agreements with labor unions, a provision that was strenuously objected to by Filo and BF on the grounds that it was preempted by the NLRA. *Id.* This bill was sponsored by Rep. Upthegrove, a representative for the district encompassing the City of SeaTac. The Port of Seattle Commissioners also considered, but did not adopt, a regulation that would have imposed a worker retention rule similar to that in section 7.45.050 of the Ordinance. CP 960-77 (Port of Seattle Comm'n, (Draft) *Proposed Directive on Worker Retention for the Concessions Program at Seattle-Tacoma Int'l Airport* (2011), discussed in *Approved Minutes: Comm'n Regular Meeting July 26, 2011*). Plaintiffs Filo and BF opposed the Port's proposal as well.

that the . . . proponents of a popular enactment could not articulate a single unifying principle for the contents of the measure." *Wash. Fed'n*, 127 Wn.2d at 576 (Talmadge, J., concurring in single-subject analysis). Here, as noted, the title identifies two industries and five separate subjects of the legislation.

All of the factors considered by Washington courts in evaluating whether a law passes muster under the single-subject rule point to the same conclusion here: The Ordinance is invalid. This Court should, therefore, affirm the superior court's judgment.

2. The Ordinance Is Invalid Because There Were Insufficient Signatures to Support Placing It on the Ballot

The superior court's decision should also be affirmed because, at the initiative stage, the City failed to follow a state law and municipal code provision for determining the validity of signatures counted in support of an initiative petition that proposes a new city ordinance. The City counted 61 signatures that should have been "stricken" and not counted under both RCW 35A.01.040(7) and SMC 1.10.140(C). [13]

RCW 35A.01.040(7) provide that "[s]ignatures, including the original, of any person who has signed a petition two or more times shall

[13] Both the RCW and SMC provisions regarding the treatment of duplicate signatures are identical. For purposes of clarity, this brief refers solely to the RCW.

be stricken."[14] The court of appeals erroneously concluded that this section violated First Amendment protections of core political speech. Specifically, the court erroneously assumed that ***any*** burden on the right to vote is subject to "exacting scrutiny." *Filo Foods LLC v. City of SeaTac*, 319 P.3d 817, 819 (Wash. Ct. App. 2014).

States "have considerable leeway to protect the integrity and reliability of the ballot-initiative process." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191-92 (1999). Therefore, "the mere fact that a State's system 'creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 504 U.S. 428, 433, (1992) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 3 (1972)) (emphasis added).

Cases make clear that the heightened standard of scrutiny applies ***only to a subset of regulations governing initiatives***—*i.e.*, those that impinge on "core political speech", which includes the one-on-one communicative aspects of the petition process. *See e.g., Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley*, 525 U.S. at 206. Other regulations, such as

[14] In response to the court of appeals' decision, the Legislature passed a bill that provides "If a person signs a petition more than once, all but the first valid signature must be rejected." HB 2296, 63rd Leg. Reg. Sess. (Wash. 2014). Governor Inslee signed the bill, but it does not apply retroactively to the Ordinance. *See, e.g., In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). Moreover, the statute at issue contains numerous other regulations of the initiative process, such as the six-month expiration for petition signatures contained in the next paragraph, RCW 35A.01.040(8), that may also be covered by the Court of Appeals' erroneous First Amendment analysis. The SMC has not been amended.

those that regulate the electoral process more broadly, need only be neutral, nondiscriminatory, and reasonably related to the state's interests in administering a fair, honest, and efficient election. *Burdick*, 504 U.S. at 434 ("[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions."); *Anderson v. Celebrezze*, 460 U.S. 780, at 788 n.9 (1983) (confirming the general rule that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are constitutional). "[I]t is constitutionally permissible ... to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1991) ("*Taxpayers United*").

RCW 35A.01.040(7) imposes a neutral, nondiscriminatory requirement for participating in the petition process. It is also reasonably related to Washington's interest in protecting fair, efficient, and honest elections. RCW 35A.01.040(7) does not prevent anyone from expressing a political viewpoint, whether that view is an endorsement of proposed initiative or the more limited opinion that the voters should decide the

issue on a general ballot. Because voters remain free to express their political opinions, their ability to act as citizen legislators and to fully participate in the initiative process is not infringed. Nor does it constitute a regulation of pure speech, prohibit any political expression, or alter the content of any speaker's message. It places no limitations whatsoever on the number of voices that can convey an initiative proponents' message or on the size of the audience that the proponents can reach.

In *Taxpayers United*, the Sixth Circuit upheld a nearly identical provision against challenge. 994 F.2d at 299. The practice in Michigan was "[to exclude] the signatures of any person who has signed the petition twice...." *Id.* Both the first signature and the subsequent duplicative signature were excluded. *Id.* This practice was upheld as "rationally related to Michigan's interest in protecting against fraud in its initiative system." *Id.* If RCW 35A.01.040(7) imposes any burden at all, it is indistinguishable from other examples of permissible regulations. *See, e.g., Taxpayers United*, 994 F.2d at 299; *Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1098-99 (10th Cir. 1997) (upholding a six-month signature expiration date for petition signatures); *Paxton v. City of Bellingham*, 129 Wn. App. 439, 446-47, 119 P.3d 373 (2005) (upholding Washington's six-month signature expiration date); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (upholding photo

identification requirements); *Biddulph v. Mortham*, 89 F.3d 1491, 1494 (11th Cir. 1996) (upholding single subject and unambiguous title requirements for initiative proposals). Ordinary and widespread burdens requiring "nominal effort" of everyone such as these are not severe and do not warrant "exacting scrutiny." *See Clingman v. Beaver*, 544 U.S. 581, 591, 593-97 (2005).[15]

Furthermore, the burden (if any) imposed by the requirement to sign only once is justified by the State's or the City's compelling purposes of administering efficient and fraud-free elections. *See John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."). Abuses of the initiative petition process are well documented, and the signature gathering process is fertile ground for misconduct.[16] Striking all signatures, including the original, thus provides a reasonable disincentive

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[15]Moreover, signing a petition is a legislative as well as a political act. "A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue." *Reed*, 130 S.Ct. at 2833 (Scalia, concurring). It is thus not unreasonable to expect citizen legislators to remain attentive to the pieces of paper they sign, especially in matters such as these where a decision to sign or not sign bears potentially significant legal and economic consequences/

[16] *See* Erik Smith, *A Guilty Plea in SEIU Initiative Signature-Forging Case- But the Left Turns Embarrassment to its Advantage in the Legislature*, Washington State Wire, (Feb. 26, 2011) http://washingtonstatewire.com/blog/a-guilty-plea-in-seiu-initiative-signature-forging-case-but-the-left-turns-embarrassment-to-its-advantage-in-the-legislature/, (last visited Sept. 4, 2013); Erik Smith, *Oh, No! Not Again! – Another SEIU Initiative is Tarnished by Signature Fraud*, Washington State Wire (July 23, 2011) http://washingtonstatewire.com/blog/oh-no-not-again-another-seiu-initiative-is-tarnished-by-signature-fraud/ (last visited Sept. 4, 2013).

(not counting a signature) to those who would try to cheat the system by signing multiple times in the hope of not getting caught, especially in municipal elections such as this where a small handful of signatures decides whether an initiative proposal is certified for placement on a general ballot.

Because RCW 35A.01.040(7) is a generally applicable, nondiscriminatory voting regulation, and it is reasonably related to the State's interest in conducting an honest, fair and fraud-free election, the statute passes constitutional muster.[17]

Even under "exacting scrutiny," RCW 35A.01.040(7) is still constitutional. The State has a compelling interest in identifying and eliminating election fraud. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) ("[A] State has a compelling interest in ensuring that an individual's right

[17] The court of appeal also relied heavily on *Sudduth v. Chapman*, 88 Wn. 2d 247, 558 P.2d 806 (1977), which struck down a provision similar to RCW 35A.01.040(7). *Sudduth* is inapposite. It involved the scope of initiative power under article II, section 1 of the Washington Constitution, which reserves to citizens the power to adopt state legislation through the initiative process. As the superior court observed, an unbroken line of cases holds that those powers do not apply to citizens that wish to petition cities and municipalities to adopt ordinances. CP 677-680 (citing *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7-8, 239 P.3d 589 (2010); *Save Our State Park v. Bd. of Clallam Cnty Comm'rs*, 74 Wn. App. 637, 643-44, 875 P.2d 673 (1994); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 173, 149 P.3d 616 (2006); *Washam v. Sonntag*, 74 Wn. App. 504, 511, 874 P.2d 188 (1994); *Paxton*, 129 Wn. App. at 444-47). Rather, the State Legislature granted cities and municipalities the option of direct legislation by initiative when in 1967 it enacted Title 35A RCW. *See* 1967 Ex. Sess. ch. 119. Thus, if a city or municipality opts to exercise those rights, as SeaTac did, that exercise is subject to Legislative restrictions, even if those restrictions would not otherwise be permissible for state-wide initiatives governed by the State Constitution. *See Our Water-Our Choice!*, 170 Wn.2d at 7-8, *Save Our State Park,* 74 Wn. App. at 643-44.

to vote is not undermined by fraud in the election process."). RCW 35A.01.040(7) is narrowly tailored to achieve this interest. As discussed above, the regulation does not impose a significant or unreasonable burden on individuals; rather the regulation is tailored to address the specific issue of multiple signatures being used to improperly place a municipal ordinance on the ballot.

Because the City improperly counted signatures that should have been stricken pursuant to both RCW 35A.01.040(7) and SMC 1.10.140(c), the initiative petition was invalid and should not have appeared on the ballot. The remedy in this situation is invalidation of the resulting Ordinance. RCW 35A.01.040(4); *see also State ex rel. Uhlman v. Melton*, 66 Wn.2d 157, 161, 401 P.2d 631, 633 (1965) (The rule that strict compliance with such statutory requirements is mandatory and jurisdictional, and that failure to so comply is fatal . . .").

3. The Entire Ordinance Is Invalid Because It Is Preempted by Federal Labor Law

This Court may affirm the superior court's judgment on the independent alternative ground that the Ordinance violates the supremacy clause of the United States Constitution because it is preempted by the NLRA. *State v. Labor Ready, Inc.*, 103 Wn. App. 775, 779, 14 P.3d 828 (2000); *Hume v. American Disposal Co.,* 124 Wn.2d 656, 662, 880 P.2d

988 (1994) ("Congress has long exercised its power to regulate labor relations.").

There are two types of preemption analysis under the NLRA. *Labor Ready*, 103 Wn. App. at 779. "The *Machinists* doctrine preempts any attempt by the state to regulate activity that Congress intentionally left unregulated." *Id.* (quoting *Hume*, 124 Wn.2d at 662); *see also Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976) ("*Machinists*"). "The *Garmon* doctrine operates to preempt claims based upon a state law which attempts to regulate conduct that is arguably either prohibited or protected by the National Labor Relations Act." *Labor Ready*, 103 Wn. App. at 780; quoting *Hume*, 124 Wn.2d at 662 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*")). Courts also apply *Garmon* and *Machinists* preemption in the RLA context. *Bhd. of R.R. Trainmen v. Jacksonville Terminal,* 394 U.S. 369, 381 (1969); *Dunn v. Air Line Pilots Ass'n*, 836 F. Supp. 1574, 1578-80 (S.D. Fla. 1993); *aff'd* 193 F.3d 1185 (11th Cir. 1999). The present case implicates both pre-emption doctrines.

a. The Ordinance As a Whole Is Preempted Because It Impermissibly Interferes With the Collective Bargaining Process and Is Not a Minimum Labor Standard

The Ordinance is preempted by the NLRA under the *Machinists*

doctrine because, as a whole, it regulates conduct Congress intended to be left to the free play of economic forces and intrudes upon the collective bargaining process. *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) ("*Machinists* pre-emption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.") (internal quotation marks omitted). The U.S. Supreme Court has clearly held that state or local legislation that interferes with the economic forces that labor or management can employ in reaching agreements is pre-empted by the NLRA because of its interference with the bargaining process. *See, e.g.*, *Machinists,* 427 U.S. at 143-44; *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614-15 (1986). The essential question in determining whether a local law is preempted is whether it is incompatible with the goals of the NLRA. *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995). Imposing burdensome and substantive requirements on employers, especially when they can be avoided only by reaching an agreement with a union, frustrates the NLRA's goal of allowing the bargaining process "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 144.

Here, the Ordinance imposes onerous substantive requirements on nearly every aspect of the employment relationship: the Ordinance, *inter*

alia, increases the minimum wage by 63% (SMC 7.45.050); mandates additional benefits in the form of paid time off (SMC 7.45.020) and additional compensation from tips and service charges (SMC 7.45.040); directly affects hiring by imposing worker retention and full-time employment requirements (SMC 7.45.060, 7.45.030); limits employers' ability to terminate employees (SMC 7.45.090); and limits employers' ability to make unilateral changes to terms and conditions of employment (SMC 7.45.090).[18] CP 753-59. All of these provisions favor employees and are typically issues negotiated in a collective bargaining agreement. Mandating them runs afoul of federal labor policy. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1052 (D.C. Cir. 1995) ("As the terms of the NLRA amply demonstrate, federal labor policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices."); *aff'd* 518 U.S. 231 (1996). The only way for an employer to avoid application of the Ordinance is to enter into a collective bargaining relationship with a union and negotiate a waiver. SMC 7.45.080. CP 758. By skewing so many aspects of the employment

[18] SMC 7.45.090 prohibits an employer from unilaterally reducing compensation or benefits "in response to this chapter or the pendency thereof." CP 759. The NLRA, however, allows an employer to make unilateral changes to terms and conditions of employment if the parties are at a bargaining impasse. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238-239 (1996) ("[I]mpasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.").

relationship in favor of employees and unionization, the overall effect of the Ordinance is to impose a virtual collective bargaining agreement on employers without the benefit of the collective bargaining process.

Indeed, organized labor concedes that it used the political process here to obtain benefits that it tried but failed to effectively obtain through collective bargaining: "[W]here workers couldn't use traditional organizing to essentially solve that problem, and now turn to the ballot to essentially impose what in some other era was imposed by the strike." Josh Eidelson, *Defying Koch cash and D.C. gridlock, airport town will vote on a $15 minimum wage*, Salon, October 23, 2013. CP 979-80. This evidence – which was not controverted or disputed by Appellants – shows the intent of the Ordinance is to pressure employers into recognizing unions and entering collective bargaining agreements. Targeted employers either have to accept the results of a politically manipulated regulatory scheme (that is designed and intended to supplant collective bargaining) or enter into a collective bargaining agreement themselves.[19] Where unions

[19] The Ordinance's effect on employers like airlines that are subject to the RLA is even more severe. The National Mediation Board ("NMB"), which is responsible for conducting union elections under the RLA, has "consistently held that [union] representation must be on a system-wide basis" and "must include ***all*** of the employees working in the classification deemed eligible, ***regardless*** of work locations." *Aircraft Service Int'l Group*, 40 NMB 43, 48-49 (2012) (emphasis added); *see also Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 795 (2d Cir. 1980) ("The Board's long-standing practice, in keeping with its statutory mandate, is to certify only unions that represent the majority of a system-wide class of employees."). A union interested in representing employees at the Airport, but which did not have enough

have tried to obtain certain conditions through collective bargaining and have failed to do so effectively, a political body, or for that matter, the Court, should not reach a solution for them. *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995). ("A precedent allowing this interference with the free-play of economic forces could be easily applied to other business or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies."); *Fortunato Enterprises, L.P. v. City of Los Angeles*, 673 F.Supp, 2d 1000, 1010 (C.D. Cal. 2008) ("Legitimate concerns exist that employees and unions might focus their efforts to petition the local government for more localized ordinances in order to target individual businesses. This could lead to the result where cities and counties are passing ordinances with such onerous terms that business owners are virtually forced to enter into a collective bargaining agreement in order to pay lower wages.").

The Ordinance does not affect union and non-union employers equally. *See* CP 758. The Ordinance's waiver provision compels

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support to obtain nationwide certification, would normally have to seek voluntary recognition by the employer at the Airport, as permitted under the RLA. *See, e.g., Summit*, 628 F.2d at 795. The Ordinance creates an incentive for an RLA employer to recognize a union by imposing huge new burdens on employers with only one way out: negotiation of a collective bargaining agreement that waives those provisions.

employers to enter into collective bargaining in order to pay lower wages and avoid its other onerous requirements. It expressly draws a distinction between union and non-union employees and targets non-union employers by permitting unionized employers to avoid the Ordinance completely by negotiating a waiver. The waiver provision upsets the balance of power between labor and management by placing non-union employers in positions where they will be required to recognize unions in order to avoid the Ordinance. By restricting only non-union employers, the Ordinance impermissibly substitutes the results of political forces for the free play of economic forces that was intended by the NLRA. *See Bragdon*, 64 F.3d at 504.

Relying on the U.S. Supreme Court decisions in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the superior court found that the Ordinance is a minimum labor standard and as such is not preempted by the NLRA. To reach this conclusion, the superior court reviewed each component part of the Ordinance separately and concluded that, standing alone, no single piece of the Ordinance was sufficiently onerous to interfere with the balance between labor and management to trigger preemption. The superior court, however, failed to consider the cumulative effect of the Ordinance on union organizing and collective bargaining.

Taken together, these onerous provisions cannot reasonably be classified as a "minimum" labor standard. *See Fort Halifax Packing Co.*, 482 U.S. at 21 (minimum labor standards set a low-threshold that serves as a floor for negotiations). Moreover, the Ordinance's application is not one of general application and instead, targets those businesses, and only those businesses, that are associated, either directly or indirectly, with air travel. *See, 520 S. Mich. Ave. Assocs. Ltd. v. Shannon*, 549 F.3d 1119, 1130 (7th Cir. 2008) (in order to be considered a minimum standard, regulation must be one of general application). Thus, the superior court's approach did not address the "essential question" of whether the Ordinance, as a whole, is incompatible with the goals of the NLRA. While an isolated statutory provision of general application, such as the regulations at issue in *Metropolitan Life* and *Fort Halifax*, may not affect collective bargaining, the Ordinance here compels concessions and imposes substantive contract provisions on employers (without any tradeoff from employees), and severely restricts general bargaining freedom, in conflict with the NLRA. The superior court erred by not considering the practical effect of the Ordinance when applied in its totality.

b. The Ordinance's Worker Retention Requirement Is Preempted Because It Interferes With an Employer's Right o Select or Discharge Employees

Declaratory judgment also should have been granted in favor of Plaintiffs because the Ordinance's worker retention requirement is preempted by the NLRA. Section 7.45.060 of the Ordinance obligates a successor employer to offer employment to all qualified retention employees of any predecessor employer for an initial period of 90-days. CP 756-57. The successor employer may not discharge any retention employee without just cause during this 90-day period, and it may not hire new employees or transfer existing employees from other locations unless and until all retention employees have been offered employment. CP 756-57. This section is preempted by the NLRA under the *Machinists* doctrine because it inhibits the free play of economic forces by restricting an employer's right to make hiring decisions and interferes with the collective bargaining process. *See Labor Ready*, 103 Wn. App. at 780 (state law restricting employer's right to hire replacement workers is preempted under *Machinists*).

Under *Machinists*, the U.S. Supreme Court has repeatedly held that state laws that affect the economic powers of employers and unions in connection with organizing or collective bargaining are preempted. "[T]he

crucial inquiry" for whether a state law is preempted "[is] whether Congress intended that the conduct involved be unregulated" and whether the conduct is "to be controlled by the free play of economic forces." *Machinists,* 427 U.S. at 140. Therefore, even where the NLRA does not address a particular economic weapon, preemption may still apply if Congress intentionally left the area to be controlled by the free play of economic forces. *Id.*

The U.S. Supreme Court recognizes a successor employer's right to operate its business in the manner in which it best sees fit. *NRLB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-88 (1972). A potential employer might be willing to assume a moribund or marginally profitable business "only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and the nature of supervision." *Id.* Consistent with this right to reorganize an acquired business, "***nothing*** in the federal labor laws '***requires*** that an employer . . . who purchases the assets of a business be obligated to ***hire all of the employees of the predecessor***.'" *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261 (1974) (quoting *Burns Int'l Sec. Servs.*, 406 U.S. at 280 n.5) (emphasis added). The vast majority of an employer's hiring selections are fundamental decisions that are regulated by the NLRA only in very limited circumstances. Congress, therefore,

intentionally left this area to be controlled by the free play of economic forces, and *Machinists* preemption applies to any state or local law that purports to add more restrictions. 427 U.S. at 140.

The Ordinance inhibits this free play of economic forces by broadly defining successor employer,[20] creating a duty to hire certain of a predecessor's employees, and restricting the right to discharge. *See* CP 756-57. By requiring private employers to hire particular individuals, the Ordinance restricts an employer's prerogative to select members of its workforce and is therefore preempted.

Additionally, the Ordinance is preempted under *Machinists* because the worker retention provision has a collateral effect on collective bargaining that significantly alters the balance of power between labor and management. 427 U.S. at 146. Ordinarily, a successor employer does not have a duty to bargain with the union that represented the employees of its predecessor unless and until the new employer voluntarily hires a majority of the employees from its predecessor and maintains the same general business. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40-46 (1987).

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[20] The Ordinance presumes the new employer is a "successor," without regard to the U.S. Supreme Court's three-part test to determine successorship under "substantial continuity between the enterprises." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 107 S.Ct. 2225, 2236 (1987)

By requiring that employers retain their predecessors' employees, the Ordinance attempts to mandate that all employers become "successors" for NLRA purposes. As a result, the Ordinance imposes upon employers a duty to bargain that would not necessarily arise in the free market. This retention requirement, and the corresponding duty to bargain that it triggers, upsets the balance of power between labor and management and entrenches unions at particular locations. The Ordinance improperly distorts the federally created laissez faire environment for determining terms and conditions of employment by putting a thumb on the scale in favor of unions.

The superior court failed to make the "crucial inquiry" of whether a state law is preempted under *Machinists* and did not analyze whether Congress intentionally left the area of worker retention unregulated, as required by *Howard Johnson Co.* 417 U.S. at 261. Instead, it found that the worker retention requirement is not preempted because the First Circuit upheld "an identical law" in *Rhode Island Hospitality Association v. City of Providence*, 667 F.3d 17 (1st Cir. 2011). The superior court's reliance on this decision is erroneous for two reasons. First, the *Rhode Island Hospitality Association* decision is not binding on this Court, and there is no U.S. Supreme Court decision directly addressing whether *Machinists* preemption should apply when regulation dictates a private

employer's hiring decisions. Second, *Rhode Island Hospitality* was wrongly decided; it misconstrues a lack of federal regulation to mean that local government is free to regulate. 667 F.3d at 34. This reasoning ignores the purpose of *Machinists* preemption. As explained above, the mere fact that the NLRA does not protect or prohibit certain conduct does not mean that the regulations addressing such conduct are permissible and not preempted. Congress' goal in enacting the NLRA was to create a collective bargaining process free of any control beyond that established by federal law. *Burns Int'l Sec. Servs.*, 406 U.S at 287 ("[P]arties need not make any concessions as a result of Government compulsion."). The Ordinance here directly conflicts with Congress' goals and takes away an employer's right to select a workforce.

4. The Ordinance Is Invalid Because It Is Preempted by the Airline Deregulation Act

The Ordinance also is preempted by the Airline Deregulation Act of 1978 ("ADA"), codified at 49 U.S.C. § 41713(b). Understanding the congressional purpose of ADA assists an understanding of the preemptive effect of ADA, especially as it relates to the Ordinance. According to the Government Accountability Office ("GAO"):

> Airline deregulation was premised on an expectation that an unregulated industry would attract new airlines and increase competition, thereby benefiting consumers with lower fares and improved service. The intent of Congress

> was to allow new and existing airlines to enter and serve any market they wanted (and provide service at whatever price they wanted) in order to boost competition, thereby lowering fares and expanding service. The framers of the act recognized that this approach could cause some airlines to fail…

CP 1066 (U.S. Gov't Accountability Office GAO-06-630, Airline Deregulation (2006) ("GAO Report") at 3).

According to the GAO, although all the causative factors are not known, the intended result has occurred. "As predicted by the framers of deregulation, airline markets have become more competitive and fares have fallen since deregulation. For consumers, airfares have fallen in real terms since 1980 while service has generally improved. Overall, median fares have declined in real terms by nearly 40 percent since 1980." CP 1067 (GAO Report at 4).

To protect this purpose, the ADA prohibits a state or local government from enacting or enforcing "a law, regulation, or other provision having the force and effect of law ***related to*** a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1) (emphasis added). Air carrier "services" include, among other things, activities facilitating air travel. *See DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011) ("American's conduct in arranging for transportation of bags at curbside into the airline terminal en route to the loading facilities is itself part of the

'service' referred to in the federal statute ."); *Chukwu v. Bd. of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (air carrier services include "ticketing, boarding, in-flight service, and the like"), *aff'd* 101 F.3d 106 (1st Cir. 1996); *see also Brown v. United Airlines, Inc.*, 720 F.3d 60, 64 (1st Cir. 2013) (ADA preemption applies to "air carrier's imposition of baggage-handling fees").

The Ordinance has the force and effect of law related to air carrier services including "curbside passenger check-in services; baggage check services; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services"; "security services"; "customer service"; "aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and cleaning; aircraft water or lavatory services; aircraft fueling; ground transportation management"; "janitorial and custodial services"; and "facility maintenance services," CP 752, and relates to the "prices" that will be charged for such "services" by dictating how much carriers must pay for the workers who provide such services. CP 932-35. This interference with integral air carrier services is not only apparent, but intended by the Ordinance. A study issued by an organization calling itself Puget Sound Sage, which is organized and run by union officials and

supports the Ordinance,[21] described the problem addressed by the Ordinance in these terms:

> In 1978, the Federal government deregulated the airline industry, leading to a sea change in the structure of the industry and its fundamental business models. Airlines began experimenting with new ways to lower costs and make new profits. One major change in industry practice was to outsource, or "contract out," entire functions of an airline to another company or business.
>
> Since then, U.S. airlines have relied on contractors to provide more and more passenger and aircraft services. The airlines have fostered a fierce competition between contractors that drives down overall costs, resulting in a race to the bottom by contractors for wages and benefits throughout the industry.[22]

The Ordinance takes direct aim at a core market development resulting from deregulation: air carriers' use of contractors to provide services to passengers. This is precisely the kind of interference the ADA's express preemption language is supposed to prevent. As the GAO study and case law show, economic competition was the intended effect of deregulation when Congress enacted the ADA, loosening its economic

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[21] Puget Sound Sage supported the passage of the Ordinance. *See* CP 10418-58 (Screenshot of Puget Sound Sage website "Sound Progress").

[22] CP 1019-46 (David Mendoza et al., *First-class Airport, Poverty-class Jobs*, Puget Sound Sage et al. (May 2012) ("Sage Report") at 9-10). The Court may consider the language of the Sage Report because it is not being offered to establish an adjudicative fact but instead to reference the undisputed fact that the proponents of the Ordinance contend that the ADA has negatively affected wages for persons providing services to air carriers and their passengers. Even if this were deemed to be an "adjudicative fact," judicial notice would be proper because it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201, Wash. Rules of Evidence.

regulation of the airline industry, after determining that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices, as well as variety [and] quality . . . of air transportation." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (citations and internal quotation marks omitted). The Supreme Court has repeatedly emphasized the breadth of the ADA's preemption provision. *See Northwest, Inc. v. Ginsberg*, No. 12-462 (Apr. 2, 2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 235-36 (1995) (Stevens, Jr., concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 377 (2008) (Ginsburg, J., concurring) (noting the "breadth of [the] preemption language" in the Federal Aviation Administration Authorization Act of 1994, whose preemption provision is the same as that of the ADA); *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 649, 994 P.2d 901 (2000) (phrase "related to" expresses "a broad preemptive purpose").

In *Air Transport Association of America v. Cuomo*, 520 F.3d 218 (2d Cir. 2008), the court held that the ADA preempted the New York state "Passenger Bill of Rights" ("PBR") law requiring airlines to provide passengers with electricity, waste removal and adequate food and drinking water and other refreshments for ground delays of more than three hours. The court stated:

> Although this Court has not yet defined "service" as it is used in the ADA, we have little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier. This conclusion draws considerable support from the Supreme Court's recent unanimous opinion in *Rowe* construing 49 U.S.C. § 14501(c)(1)'s identically worded preemption provision.

Id. at 222. Prior to *Rowe* and *Cuomo*, the Third and Ninth Circuits – unlike other Circuit Courts – construed "service" narrowly, restricting the term to "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," and not to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and similar amenities. *Cuomo*, 520 F.3d at 223 (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (*en banc*) *accord Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193-94 (3d Cir. 1998)). In light of *Rowe*, that narrow restriction of "service" is no longer valid. Specifically, the *Rowe* decision "necessarily define[d] 'service' to extend beyond prices, schedules, origins, and destinations." *See Cuomo* at 223 ("*Charas*'s approach . . . is inconsistent with the Supreme Court's recent decision in *Rowe*"); *Hanni v. American Airlines, Inc.*, No. C 08-00732 CW, 2008 WL 1885794, at *6 (N.D. Cal. April 25, 2008).

For example, in *National Federation of the Blind v. United*

Airlines, Inc., the Federation and certain individuals filed a prospective class action against United, alleging that the airline violated California disability law by failing to make airport ticketing kiosks accessible to the blind. No. C 10-04816 WHA, 2011 WL 1544524 (N.D. Cal. April 25, 2011).[23] The court held that the ADA preempted the use of state law to require airlines to provide the "service" of making airport ticket kiosks accessible to the blind. *Id.* at *5. The United States filed a "statement of interest" which agreed that the ADA preempted the plaintiffs' claims. *Id.* at *1; *see also Hawaiian Inspection Fee Proceeding,* U.S. DOT Order 2012-1-18 (ADA preempted Hawaii Plant Quarantine Law because it required "air carriers to conform their service of shipping freight by air transportation in ways not dictated by the market to bill, collect, and remit fees on behalf of its shipper customers").

The Ordinance "relates to" air carrier "services" and "prices" in a manner that is not tenuous, remote or peripheral. To the contrary, the level of compensation mandated by the Ordinance directly affects the amount of money air carriers must pay to third party contractors and other air carriers for the provision of air carrier services. In addition, the Ordinance improperly and unlawfully penalizes air carriers for their decision to use

[23] The appeal that was filed by plaintiffs has been stayed pending outcome of the Supreme Court's certiorari review in *Northwest Airlines, Inc. v. Ginsberg*, No. 12-462 (S. Ct.).

third party contractors or other air carriers to provide services to or on behalf of their passengers, because if an airline performs the services with its own employees, the Ordinance (and its onerous wage, leave, and other provisions) does not apply. The Ordinance plainly discriminates against airlines that rely on contractors, such as Alaska, in favor of other airlines which do not. The proponents anticipated this result: "The largest company affected by Proposition 1, although not directly, will be Alaska Airlines, which contracts with several aviation service firms." CP 982-1017 (Nicole Vallestero Keenan and Howard Greenwich, *Economic Impacts of a SeaTac Living Wage*, Puget Sound Sage (2003), at 15).

If air carriers are required to pay materially more for services, simple math dictates that other changes will have to follow, such as reduced services, increased prices, reduced profit, and reduced compensation to other suppliers or non-covered employees, all of which interfere with Congress' deregulated model. *See*, *Northwest*, No. 12-462, *8 ("...it defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry."); quoting *Brown v. United Airlines, Inc.*, 720 F.3d 60, 68 (1st Cir. 2013). Even the proponents predicted a price increase of .5% to 1.5%. CP 982-1017 (Economic Impacts of a SeaTac Living Wage, Puget Sound Sage, pg. 15). The Ordinance

obviously targets a core market development of deregulation: air carriers' use of contractors to provide services to passengers at lower cost.

Section 7.45.010(M) of the Ordinance attempts to avoid ADA preemption by excluding from its definition of a covered Transportation Employer "a certificated air carrier performing services for itself." CP 752. However, the Ordinance nevertheless applies to employees of air carrier contractors who provide the array of services covered by the Ordinance. And the ADA preempts laws that apply not only directly to air carriers, but also to third party contractors retained by air carriers to provide "services" to and on behalf of air carrier passengers. *See, e.g., Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs*, 906 F. Supp. 357, 362 (M.D. La. 1995) (although ADA preemption applies on its face "only to laws regulating air carriers, the courts have not strictly limited application of the act to air-carriers"), *Marlow v. AMR Servs. Corp.*, 870 F. Supp. 295, 297-99 (D. Haw. 1994) (ADA preemption applied to claim of employee of jet bridge maintenance company); *see also Tucker v. Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360, 1362-64 (S.D. Fla. 2003) (ADA preempted Florida Whistleblowers Act claim of former employee of certified repair station that overhauled and repaired generators for use in commercial and military aircraft).

5. The Ordinance Violates the Dormant Commerce Clause and Is Invalid Because It Discriminates Against Interstate Commerce by Targeting Business That Serve a Predominantly Interstate Market

The Ordinance is unconstitutional because it places an undue burden on interstate commerce. The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." Art. I, § 8, cl. 3. The Commerce Clause has long been understood to have a "negative" aspect that denies states or local governments the power to discriminate against or burden the interstate flow of articles of commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 93-94 (1994). This negative command, known as the dormant Commerce Clause, prohibits states from burdening the flow of interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989).

"State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)). It is not necessary to look beyond the text of the Ordinance to determine that it discriminates against interstate commerce. The Ordinance distinguishes between entities that serve a principally interstate clientele and those that primarily serve an

intrastate market by singling out those businesses that principally serve the Airport and air travelers. *See*, *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 576 (law violated dormant commerce clause when it denied preferential tax treatment to summer camps that primarily served out-of-state campers). For example, the Ordinance does not apply to restaurants that primarily serve local customers (it applies only to restaurants in the Airport or in large hotels). But the same restaurant, if located inside the Airport terminal, where its customer base is interstate travelers, is covered by the Ordinance. Indeed, as proponents of the Ordinance observe:

> Furthermore, over two-thirds of the wage increase created by Proposition 1 could be paid for by visitors. We estimate that sixty-eight percent of revenues received by covered businesses flow to the region from people and businesses located around the state, U.S. and globe. In addition, all costs of Proposition 1 could be passed onto customers in the form of marginal price increases, ranging from .5% to 1.5%.

CP 1006.

The Ordinance need not deter business from interstate commerce to violate the dormant Commerce Clause. Imposing a discriminatory burden on interstate commerce is sufficient. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 578. Because the burden of the Ordinance falls by design in a predictably disproportionate way on out-of-staters, "the pernicious effect on interstate commerce is the same as in [Supreme Court] cases

involving taxes targeting out-of-staters alone." *Id.* at 579-80; *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (fees assessed on non-residents when they attempt to use local services imposes an impermissible burden on interstate commerce).

Here, the discriminatory burden is imposed on the out-of-state customer indirectly, by means of a substantial body of regulations and costs imposed on those businesses that conduct business with customers who are engaged primarily in interstate commerce. "[T]he imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 580 (quoting *West Lynn Creamery v. Healy*, 512 U.S. 186, 202 (1994)). It makes no difference that the burden falls on the business and not the customers. Common sense dictates that the majority of Airport patrons are engaged in interstate commerce—whether coming or going—and insofar as the Ordinance increases the burdens imposed on those businesses that serve Airport travelers—while not imposing any parallel burdens on those businesses that serve the local economy—it facially discriminates against interstate commerce and is invalid. *Id.* at 581; *Or. Waste Sys. Inc.*, 511 U.S. at 101 ("[Supreme Court] cases require that justifications for discriminatory

restrictions on commerce pass the 'strictest scrutiny.'").

In sum, this Court may affirm the superior court's judgment by relying either on the grounds identified by the court, or on any of the alternative federal and state law grounds set forth in this brief.

VII. ARGUMENT FOR CROSS APPEAL

A. The Supreme Court Should Reverse the Superior Court's Denial of Summary Judgment in Favor of Plaintiffs and Find That the Ordinance Is Invalid in Its Entirety

Plaintiffs have cross appealed from the superior court's refusal to enjoin the Ordinance's application to employers located outside the Airport in the City of SeaTac. Each of the alternative grounds identified by Plaintiffs for invalidating the Ordinance's application at the Airport, other than the ADA, applies equally to bar its enforcement against employers located elsewhere in the City of SeaTac. The superior court's ruling regarding the application of the Ordinance outside the Airport, therefore, should be reversed because:

1. The Ordinance violates the single subject rule, *supra* at IV.B.1;

2. The Ordinance is preempted by federal labor law, *supra* at IV.B.3;

3. The Ordinance petitions failed to contain sufficient valid signatures under RCW 35A.01.040(7) and SMC 1.10.140(C), *supra* at

IV.B.2; and

4. The Ordinance violates the dormant commerce clause of the U.S. Constitution, *supra* at IV.B.5.

B. Because It Does Not Apply to Employers and Employees At the Airport, the Ordinance Also Should Be Invalidated in Its Entirety Because It Fails to Achieve Its Primary Legislative Goal

The superior court also erred by not invalidating the entire ordinance when it held that the Ordinance was inapplicable and invalid at the Airport. When a court strikes down a portion of a legislative act, the entire act is invalid if either (1) it cannot reasonably be believed that the act would have passed without the invalid portions or (2) elimination of the invalid portion would render the remaining part useless to accomplish the legislative purpose. *Amalgamated Transit*, 142 Wn.2d at 227-28; *see also Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (stating test for severability). The superior court failed to conduct this analysis and, instead, relied solely on the existence of Section 5, a severability clause, to preserve the Ordinance. CP 1946-47. While a severability clause may sometimes "provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid," the existence of a severability clause is not dispositive of the issue. *Amalgamated Transit*, 142 Wn.2d at 228; *Leonard v. City of Spokane*, 127 Wn.2d 194,

201, 897 P.2d 358 (1995).

Here, the Ordinance's severability clause cannot save it. First, the Ordinance's legislative purpose is to regulate wages and employment at the Airport. This was made clear in both the text of the Ordinance (including the definition of "transportation employer" which targets almost exclusively Airport employers and companies doing business at the Airport) and its legislative history as revealed in the voter's pamphlet: "***corporations doing business at the airport*** ... continue to use the recession as an excuse to cut wages, hours and benefits. ... Proposition 1 ***requires airport-related employers*** to do the right thing...." CP 809; 950 (Emphasis added). Second, it cannot reasonably be believed that the Ordinance would have passed if the voters had known it would apply only to local businesses, but not those doing business at the Airport. Arguments in favor of the Ordinance focused exclusively on the Airport and further pointed out that free-standing, non-Airport related local businesses would be exempt. (CP 803; 985).

The trial court simply failed to conduct this analysis, resulting in error. On appeal, this Court should invalidate the Ordinance in its entirety.

VIII. CONCLUSION

The power of voters to legislate by local initiative is constrained by state and federal law. As discussed above, the Ordinance conflicts with

controlling legal authority. This Court should affirm the superior court's entry of partial summary judgment on the port jurisdiction and NLRA preemption issues. The Court should also reverse the superior court's ruling upholding the remaining provisions of the Ordinance, and remand for entry of summary judgment in favor of Plaintiffs.

RESPECTFULLY SUBMITTED this 8th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of AMENDED ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC., AND WASHINGTON RESTAURANT ASSOCIATION on the following:

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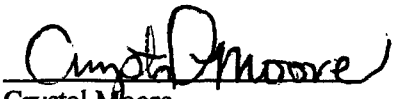
Dated this 8th day of April, 2014.



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