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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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> RAP 2.5; *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d

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<sup>5</sup> 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.<sup>6</sup> *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).

<sup>6</sup> 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.<sup>7</sup> *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.”).

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<sup>7</sup> 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);<sup>8</sup> *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 portage), 7.45.040;

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<sup>8</sup> 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).<sup>9</sup>

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.<sup>10</sup> 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

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<sup>9</sup> 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).

<sup>10</sup> 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).<sup>11</sup> And if the title is restrictive, all a

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<sup>11</sup> 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.<sup>12</sup>

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

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<sup>12</sup> 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).<sup>13</sup>

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

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<sup>13</sup> 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.”<sup>14</sup> 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

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<sup>14</sup> 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).<sup>15</sup>

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.<sup>16</sup> Striking all signatures, including the original, thus provides a reasonable disincentive

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<sup>15</sup>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/

<sup>16</sup> *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.<sup>17</sup>

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

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<sup>17</sup> 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).<sup>18</sup> 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

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<sup>18</sup> 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.<sup>19</sup> Where unions

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<sup>19</sup> 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 to 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,<sup>20</sup> 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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<sup>20</sup> 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,<sup>21</sup> 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.<sup>22</sup>

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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<sup>21</sup> Puget Sound Sage supported the passage of the Ordinance. *See* CP 10418-58 (Screenshot of Puget Sound Sage website “Sound Progress”).

<sup>22</sup> 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).<sup>23</sup> 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

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<sup>23</sup> 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 Vallesterro 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 Env’tl. 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 8<sup>th</sup> 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 8<sup>th</sup> day of April, 2014.

  
Crystal Moore

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Dear Clerk:

Attached for filing please find:

1. Respondents/Cross-Appellants Alaska Airlines, Inc., and Washington Restaurant Association's Motion to Corrected Brief; and
2. Amended Answering Brief and Opening Cross-Appeal Brief of Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc., & Washington Restaurant Association.

Thank you.

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