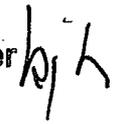


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Washington State Supreme Court

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Ronald R. Carpenter  
Clerk 

NO. 89723-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and  
WASHINGTON RESTAURANT ASSOCIATION,  
Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,  
Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,  
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,  
Appellant/Cross-Respondent.

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**REPLY BRIEF AND CROSS-RESPONSE BRIEF OF APPELLANT  
SEATAC COMMITTEE FOR GOOD JOBS**

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**ARGUMENT ON REPLY TO ANSWERING BRIEFS OF ALASKA  
AIRLINES, *ET AL.*, AND PORT OF SEATTLE**

**I. THE SUPERIOR COURT ERRED IN VOIDING THE  
ORDINANCE AS APPLIED AT SEA-TAC AIRPORT  
PURSUANT TO RCW 14.08.330 IN THE ABSENCE OF  
SUBSTANTIAL EVIDENCE OR FINDINGS OF  
INTERFERENCE WITH AIRPORT OPERATIONS.**

**A. This Court's Interpretation Of RCW 14.08.330 In *King  
County v. Port of Seattle* Controls And Precludes Only  
Regulation By A Municipality That Interferes With  
Airport Operations.**

SeaTac Committee for Good Jobs ("the Committee") relies heavily on the two key Washington cases that have addressed the operative statutory language at issue in this appeal: *King County v. Port of Seattle*<sup>1</sup> and *Normandy Park v. King County Fire Dist. No. 2*.<sup>2</sup> *King County's* analysis of the "exclusive jurisdiction and control" language in RCW 14.08.330 (quoted in the Committee's Opening Brief) is as follows:

"The effect of this section," the Court held, "is merely to preclude [King County] from interfering with respect to the operation of the Seattle-Tacoma airport and forbids [King County's] exacting any license fees since the legislature has declared its policy to be that the responsibility of providing adequate and satisfactory transportation and other public services shall belong to the Port." *Id.* at 348.

Committee's Br. at 12. The Committee argued:

In *City of Normandy Park v. King County Fire Dist. No. 2*, the Court of Appeals explained the meaning of this holding as follows:

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<sup>1</sup>37 Wn.2d 338, 223 P.2d 834 (1950).

<sup>2</sup>43 Wn. App. 435, 717 P.2d 769 (1986).

In *King Cy. v. Port of Seattle*, 37 Wn.2d 338, 223 P.2d 834 (1950), our Supreme Court held that the phrase “exclusive jurisdiction and control” *only* precludes other entities “from interfering with respect to the operation of the Seattle-Tacoma airport ...” *King Cy. v. Port of Seattle, supra* at 348, 223 P.2d 834. ....

*Id.* (emphasis added) (quoting *Normandy Park*, 43 Wn App. at 441.)

The trial court’s Memorandum Decision and Order on Plaintiffs’ Motions for Declaratory Judgment (“Order”) is wholly inconsistent with this controlling precedent, because it interprets “exclusive jurisdiction and control” as used in RCW 14.08.330 to preclude the application of any and all rules, regulations or ordinances by any other municipality at an airport even if doing so does not *interfere* with airport operations. CP 1943-45.

The trial court also misreads this Court’s interpretation of the statute in *King County* to mean that “**the County was forbidden from exercising its authority to enforce its laws ... within that airport territory.**” *Id.* at 1945 (emphasis in original). The words “to the extent it interferes with the airport’s operation” must be added to that sentence in order for it to conform to the holding of *King County*. Put differently, *King County* does not preclude the City of SeaTac (“SeaTac”) from promulgating worker protective or other police power regulations applicable at Seattle-Tacoma International Airport (“Sea-Tac Airport”), so long as doing so does not interfere with respect to the airport operations.

The arguments by Plaintiffs and the Port of Seattle in favor of the trial court's interpretation of *King County* and *Normandy Park* fail.

*1. Plaintiffs Ignore Controlling Precedent.*

In the trial court, Plaintiffs *agreed* with the Committee's interpretation of *King County* as follows:

The Supreme Court has confirmed that the *effect* of the Revised Airport Act is to preclude other municipalities "from *interfering* with respect to the *operation* of the Seattle-Tacoma airport." *King County v. Port of Seattle*, 37 Wn.2d 338, 348, 223 P.2d 834 (1950).

CP 911 (emphasis added). Plaintiffs' 58-page brief to this Court not only does not acknowledge this admission, but it omits any discussion whatsoever of this Court's holding at page 348 of *King County*, quoted above. Nor do plaintiffs bother to cite *Normandy Park*. Arguing for a particular interpretation of RCW 14.08.330 without acknowledging the contrary interpretation by the only two published Washington appellate cases considering the statute is both inadequate and unpersuasive.

Plaintiffs argue 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).

Plaintiffs' Br. at 11. The Court in *Post*, however, goes on to say that the "plain meaning" of a statutory provision is to be discerned "from the ordinary meaning of the language at issue, as well as from the context of

the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Post*, 167 Wn.2d at 310. This Court did just that in *King County* when, in interpreting RCW 14.08.330 to have the effect “merely to preclude [King County] from interfering with respect to the operation of the Seattle-Tacoma airport,” it read the provision “in the light of the entire Revised Airports Act.” 37 Wn.2d at 348.

Plaintiffs ignore that this Court’s interpretation of “exclusive jurisdiction” as used in a different statute in *Department of Labor and Industries of State of Wash. v. Dirt & Aggregate, Inc.*, 120 Wn.2d 49, 837 P.2d 1018 (1992) was in the quite different context of a state ceding territory and jurisdiction to the United States. That opinion never addresses *King County* or *Normandy Park*, nor does it indicate that this Court’s analysis of “exclusive jurisdiction” in *King County* was incorrect.<sup>3</sup>

The Committee’s Brief at page 13 also cited and relied on *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004), which held:

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<sup>3</sup> Moreover, this Court cannot impute to the 1946 Legislature any knowledge of how this Court would, almost half a century later in *Dirt & Aggregate, Inc.*, interpret the meaning of a phrase used by the Legislature in the wholly unrelated 1901 law relied upon by plaintiffs as the basis for their argument, RCW 37.08.200. Even in *Dirt & Aggregate, Inc.*, this Court did not interpret the phrase “exclusive jurisdiction” to have the unlimited scope urged by plaintiffs here. To the contrary, this Court made it clear that state laws regulating at Rainier National Park that preceded the 1901 cession law would still be in effect, except to the extent that they “offend or interfere with federal jurisdiction.” 120 Wn.2d at 52 n.1. In other words, even as used in RCW 37.08.200, the “exclusive jurisdiction” of one entity (the federal government) does not necessarily preempt the exercise of authority by another (Washington State), so long as the exercise of authority by the latter entity is not in conflict with the authority of the former.

The doctrine of stare decisis “requires a *clear showing* that an established rule is incorrect *and* harmful before it is abandoned.” *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970). Further, “[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,” and where statutory *language remains unchanged* after a court decision the court *will not overrule clear precedent* interpreting the same statutory language.

(Emphasis added). *Riehl* – which both Respondents ignore – sets a bar for overruling *King County’s* “interference with airport operations” standard that Plaintiffs and the Port cannot meet.<sup>4</sup>

2. *The Port of Seattle’s Arguments Are Equally Unpersuasive.*

The Port concedes, as it must, that the Court of Appeals in *Normandy Park* deferred to *King County’s* ruling “that the phrase ‘exclusive jurisdiction and control’ only precludes other entities ‘from interfering with respect to the operation of the Seattle-Tacoma airport.’” Port Br. at 16. Indeed, the Court of Appeals in *Normandy Park* found *King County’s* interpretation of RCW 14.08.330 to be controlling and held that the “exclusive jurisdiction” language in RCW 14.08 does not remove airport property from the territory of the Fire District. 43 Wn. App. at 442.

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<sup>4</sup> See also *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (“This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision”); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999) (same).

The Port attempts to minimize the impact of *Normandy Park*. It argues (1) that *Normandy Park* did not interpret the phrase “operation of Seattle-Tacoma airport” and (2) that the Court in *Normandy Park* “did not rule on the scope of the Port’s jurisdictional authority at STIA.” Port Br. at 16. The first argument is irrelevant since the Committee does not rely on *Normandy Park* for a definition of “operation of the Seattle-Tacoma airport.” The second argument misses the point that the primary significance of *Normandy Park* here is not the Court of Appeals’ ruling *per se* but rather that Court’s understanding, interpretation and reaffirmation of this Court’s opinion in *King County*.

The Court in *King County* acknowledged that “the Legislature has declared its policy to be that the responsibility of providing adequate and satisfactory transportation and other public services shall belong to the Port.” This does not undermine *King County*’s holding that the grant of “exclusive jurisdiction and control” “merely precludes [King County] from interfering with respect to the operation of the Seattle-Tacoma Airport.” To the contrary, implicit in this part of the holding is that the “interference” standard is *appropriate* in light of the Port’s responsibility to provide “adequate and satisfactory” “public services.”

The Port correctly concludes that *King County* is the seminal case construing RCW 14.08.330. Yet it urges an interpretation of the statute in

contravention of 54-year old controlling precedent when it asserts that the Port has “sole and undivided jurisdiction at STIA, subject only to federal and state law” and that “[t]he City does not have the statutory authority to regulate any matters occurring at STIA.” Port Br. at 9. The Court in *King County* expressly rejected such a notion.<sup>5</sup>

Additionally, if the phrase “exclusive jurisdiction and control” absolutely prohibited any police power regulation by other municipalities at the Airport, as opposed to having the more limited meaning ascribed to it by *King County*, *Normandy Park*, the Committee and SeaTac, the third sentence of RCW 14.08.330 would be entirely superfluous, since there would be no need for the statute to go on to state that no municipality shall have “any police jurisdiction of the same [referring to the airport or air navigation facility] or any authority to charge or exact any license fees or occupation taxes for the operations.” The rule against surplusage requires rejection of this interpretation of the statute. *See, e.g., Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607 (2011).

The Port attempts to work around this problem by arguing that the phrase “police jurisdiction” should be understood as “the jurisdiction of a

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<sup>5</sup> Contrary to what the Port argues in its brief at pages 9-10, moreover, the fact that RCW 14.08.330 provides that municipalities controlling an airport shall have “concurrent jurisdiction over the adjacent territory described in RCW 14.08.120(2)” does not shed any light on the extent to which a city within which the airport is located can exercise authority over territory that is within its borders.

municipality to regulate matters outside its borders,” referring to the City of SeaTac’s ability to “exercis[e] its own police powers” at Sea-Tac Airport. Port Br. at 11-12. The Port’s suggested interpretation of “police jurisdiction” to mean extraterritorial jurisdiction in this instance contravenes the express language of RCW 14.08.330 and defies common sense, since the provision unambiguously prohibits the exercise of “police jurisdiction” over an airport by the municipality “*in which the airport or air navigation facility is located*” (e.g., within, not outside of its territory). Of course, Sea-Tac Airport is entirely within the City of SeaTac’s borders.

Nor is the Port’s implicit (and internally contradictory) argument that “police jurisdiction” and “police power” are synonymous based on RCW 14.08.120(2) at all persuasive. Port Br. at 12. Municipal regulatory “police power” flows directly from the authority granted to counties, cities, towns and townships by article 11, § 11 of the Washington State Constitution to “make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.” This grant “is a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself.” *Detamore v. Hindley*, 83 Wash. 322, 326-327, 145 P. 462 (1915).<sup>6</sup> Police jurisdiction

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<sup>6</sup> See also *Covell v. City of Seattle*, 127 Wn.2d 874, 878, 905 P.2d 324 (1995) (municipal police power encompasses “all those measures which bear a reasonable and substantial relation to promotion of the general welfare”); *State v. Carey*, 4 Wash. 424, 427-28, 30 P.

as used in RCW 14.08.120(2), on the other hand, obviously refers to the *geographic* reach of certain regulatory authority of the municipality owning and operating an airport. *See* RCW 14.08.120(2) (authorizing port district to adopt regulations “designed to safeguard the public upon or beyond the limits of private airports or landing strips within the municipality or its police jurisdiction”); *cf.* RCW 53.08.280 (police jurisdiction statute authorizing port district operating an airport with a police department as authorized by RCW 14.08.120 to appoint police officers with full police powers to enforce laws upon any port-owned or operated properties or operations).

*Normandy Park’s* statement that “police jurisdiction,” as used in RCW 14.08.330 means simply the responsibility for police operations, 43 Wn. App. at 442-43, is entirely consistent with the statutory language, the decision in *King County*, and with the Committee’s asserted interpretation here. So interpreted, the first sentence in RCW 14.08.330 means that SeaTac may regulate at the Airport so long as such regulation does not interfere with the Port’s airport operations, while the third sentence means that SeaTac is absolutely prohibited not only from charging or exacting any license fees or occupation taxes for the airport operations, but also from assuming responsibility for police operations at the Airport – at least

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729 (1892) (police power includes “plenary power. . . to prohibit all things hurtful to the comfort, safety and welfare of society”).

where the Port has established such police operations. So interpreted, no provision of the law is superfluous and the statute is perfectly harmonized with the Ordinance, a result which this Court must accomplish if possible.<sup>7</sup>

The Port's remaining arguments are equally unpersuasive.

First, its discussion of the 1946 amendments by the National Association of State Aviation Officials (NASAO) to the previously-adopted language of the proposed uniform airports act, Port Br. at 17-18, borders on the frivolous. The intent of the Washington legislature in 1944 cannot be inferred from the words or actions of NASAO two years later.<sup>8</sup> And no authority holds that failure to *amend* a model act just because the proponents of that act subsequently recommend such an amendment provides a basis for any inference at all.<sup>9</sup>

Equally unpersuasive is the Port's effort to draw inferences from the enactment in 1985 of the "uniform fire code" amendment to RCW

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<sup>7</sup> See, e.g., *HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 477, 482, 61 P.3d 1141 (2003); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560-61, 566, 29 P.3d 709 (2001).

<sup>8</sup> The Port's citation to *Lundberg v. Coleman*, 115 Wn. App. 173, 177-78, 60 P.3d 595 (2002), for the contrary conclusion is inapposite. Failure to include one provision of a model act that is otherwise being adopted *in toto* is properly seen as a contemporaneous rejection of that provision, but that is clearly not what occurred in 1944.

<sup>9</sup> Indeed, even if the Legislature had specifically *rejected* a subsequent attempt to amend RCW 14.08.330 to make it consistent with the revised model act, this Court would not speculate as to the reason. See *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992); *State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) ("legislative intent cannot be gleaned from the failure to enact a measure"); *City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007) ("We decline to speculate on the reasons for the legislature's failure to adopt [an amendment to RCW 3.50.020]... nothing can be inferred from the legislature's inaction on the proposed bill.").

14.08.330, allowing municipalities in which airports are located to be responsible, by agreement with the municipality operating the airport, for the “administration and enforcement of the uniform fire code.” See Port Br. at 13-14. Testimony in favor of the bill explained that the City of Seattle “has been enforcing its uniform fire code on the portion of the King County airport located within its boundaries, but their attorney feels they may not have this authority.” H.B. Rep. on H.B. 139, 49th Leg. Reg. Sess. (Wash. 1985). CP 2050-51. Given the absence of any meaningful legislative history, there is no basis to conclude that this amendment was made for any reason other than to alleviate unfounded concerns that “administration and enforcement” of a fire code might be part of the “police jurisdiction” of the municipality operating the airport that no other municipality could exercise.<sup>10</sup>

Finally, the Port misunderstands the legal principle of “field preemption.” “Field preemption” occurs “when the state enacts a general law upon the particular subject” and has left no room for any municipality to exercise any authority regarding that subject. *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971) (cited for precisely this proposition in *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807

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<sup>10</sup>See also 1955 WL 44287, Wash. AGO 1955-57 NO. 180 (Dec. 28, 1955) (determining that a fire protection district has the duty to furnish fire protection at the airport, given that RCW 14.08.330 “was strictly construed by the supreme court in [*King County*]”).

P.2d 353 (1991)). *Accord: Lenci v. Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964). In no way does RCW 14.08 constitute a “general law” on “the field of airport regulations,” as the Port appears to claim. *See* Port Br. at 24 (heading). Instead, RCW 14.08 indisputably assigned certain authority over airport operations to municipalities that operate airports.

The question before this Court is to what extent that grant of authority was intended to strip other municipalities in which these airports are located of their extremely broad authority to regulate within their own geographic territory – “the broadest powers of local self-government consistent with the Constitution of this state,” per RCW 35A.01.010 – even where, as here, the municipal regulation in question is wholly unrelated to airport operations. While preemption could occur if a direct and irreconcilable conflict exists between the Ordinance and RCW 14.08.330 such that they cannot be harmonized<sup>11</sup> (not the case here), no serious argument can be made that the State “preempted the field” of all worker-protective legislation at airports by enacting its own general law upon that subject.

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<sup>11</sup> *See Brown*, 116 Wn.2d at 559; *Spokane v. J-R Distribs., Inc.*, 90 Wn.2d 722, 731, 585 P.2d 784 (1978).

**B. The Record Does Not Contain Evidence Sufficient To Sustain A Finding That The Ordinance Interferes With The Operation Of The Airport.**

The trial court erred by determining that the Ordinance was void as applied to employees and employers doing business at the Airport pursuant to RCW 14.08.330 without substantial evidence or findings that the Ordinance interfered with the Port's airport operations. The fundamental error in the trial court's analysis was the Court's belief that it did not have to consider the Ordinance's validity in light of the paucity of evidence presented by Plaintiffs.

The Committee explained in its Opening Brief at pages 15-16, giving specific examples, that it had:

Propounded discovery requests seeking precisely the types of information that would have allowed the trial court to determine as factual matters whether the provisions of the Ordinance would actually interfere in some way with the Port's operation of the airport.

Plaintiffs provided no discovery responses and instead sought a stay of such discovery. CP 1203-11. In opposing the stay at oral argument, the Committee disputed plaintiffs' factual assertions. RP 7-9. The trial court granted the stay *only* after stating her "understanding that the motions that are before me today are purely based on issues of law and that no factual findings are appropriate or necessary." *Id.* at 7. The trial court went on to say that factual findings would require an "evidentiary hearing," "which is

not what we are here for.” *Id.* at 9. Thus, the trial court’s Order did not depend on disputed facts or on a finding that there were no material facts in dispute (as CR 56 would require).

In order to comply with *King County*, the trial court was required to find the Ordinance would interfere with the operation of the airport. It did not so find. Nor based on the record could it (or this Court) so find.

This is true for several reasons. First, even the Port (which supports Plaintiffs on this issue) acknowledged to the trial court that from the plaintiffs’ evidence alone “we don’t know” whether the Ordinance would interfere with airport operations.<sup>12</sup> Secondly, by granting the stay of the Committee’s discovery, the trial court prevented the Committee from obtaining relevant facts to dispute plaintiffs’ claim. It appears from the Report of Proceedings that the trial court would not have granted the stay of discovery had she believed she needed to make findings regarding interference with the airport’s operation. *See* RP 7-9. Nor would it be fair (or comply with due process) to prevent one side from gathering evidence

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<sup>12</sup> THE COURT – ... *why would establishing minimum wages and benefits for companies that do things like baggage handling, fueling, transport between terminals and so forth, interfere with the Port’s ability to operate the airport.*

MR. LEYH: Yeah. *And the answer is, we don’t know that yet*, but what we do know is that there are declarations from the companies that are doing that work that *suggest* that it will. In other words, there are declarations in this case that *suggest* that *it will* cause them to have to renegotiate their contracts, it will cause them to have to reduce their services, and that will impact Port operations.  
RP 37 (emphasis added).

it properly requested during discovery and then make findings against that side to which such evidence was relevant.

Plaintiffs make several procedural arguments based on RAP 2.5, CR 56, or the Declaratory Judgment Act to claim that the Committee waived its discovery requests and objections to the stay and thus cannot now seek reversal based on the absence of substantial evidence or findings that the Ordinance interferes with the Port's airport operations. None of those arguments are supported by the record here or by Washington law.

As an initial matter, although the trial court erred in concluding that this particular dispute could be resolved without factual findings, declaratory judgment actions are proper "to determine the facial validity of an enactment, as distinguished from its application or administration." *Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wn. App. 365, 374, 198 P.3d 1033 (2008). *Accord: City of Federal Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790 (1991). A determination whether the Ordinance is "facially valid" could certainly have been made under the Declaratory Judgment Act without any evidence being considered or findings made, if (as is not the case) that would have been consistent with the legal standard that must be applied.

Moreover, plaintiffs did not file a motion for summary judgment in the trial court pursuant to CR 56. To the contrary, two weeks after filing

their amended complaint, plaintiffs served two motions for declaratory judgment. CP 897-927, 1145-1171. Those motions never cited CR 56 or mentioned the summary judgment standards, and did not provide defendants or Interveners with the 28 days' notice required for summary judgment by CR 56.<sup>13</sup> While plaintiffs at page 16 of their brief assert that “[p]laintiffs expressly relied on CR 56,” they cite no Clerk Papers supporting that assertion. The first reference to “summary judgment” or CR 56 the Committee has located was during oral argument. RP 8, 101.

These facts, along with the extensive authority and argument in the Committee’s briefing to the trial court that RCW 14.08.330 could not preempt the Ordinance absent a finding that the Ordinance interfered with the Port’s authority over airport operations, CP 1505-37, demonstrate that the Committee raised to the trial court the issue of plaintiffs’ failure to submit sufficient evidence of the Ordinance’s interference with airport operations. This satisfies RAP 2.5, which provides only that “[t]he appellate court *may* refuse to review any claim of error which was not raised in the trial court.” (Emphasis added.)

Finally, the trial court’s Order did not make any factual finding that the Ordinance interfered with airport operations; rather, it concluded

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<sup>13</sup> Plaintiffs’ motions for declaratory judgment were filed on November 22, 2013. CP 897-927; 1145-1171. The Court heard oral argument on December 13, seven days earlier than a CR 56 schedule would allow, CP 1928-29, and the parties were not afforded CR 56 briefing timelines. *See* CP 1462-1504; 1505-37; 1818-29; 1842-80.

that “RCW 14.08.330 prohibits the City of SeaTac from exercising jurisdiction or police power over *any* airport property” (emphasis added), even if the ordinance did not interfere “with respect to the operation of the Seattle-Tacoma airport.” CP 1943. Since, as discussed above, that analysis is inconsistent with *King County*, this Court should reverse the trial court’s ruling voiding the Ordinance pursuant to RCW 14.08.330 as applied to employers and employees at Sea-Tac Airport.<sup>14</sup>

**C. Neither Plaintiffs Nor The Port Rebutted The Important Policy Reasons For This Court To Adhere To *King County’s* Interference With Airport Operations Standard.**

The trial court’s ruling unacceptably deprives both employers and employees at airports operated by port districts of the right to petition their local governments for redress of grievances, leaving a regulatory vacuum devoid of any possible local authority over a whole range of worker protective subjects that are specifically and commonly addressed by municipal governments. These arguments were essentially un rebutted by Respondents. That federal and state minimum wage and other employee protections would still apply, Port Br. at 33, in no way eliminates the harm

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<sup>14</sup> Plaintiffs do argue, weakly, that “contrary to appellant’s contention, the ordinance does affect Airport operations.” Plaintiffs’ Br. at 11. Similarly, the Port argues that the Ordinance’s effect at the airport would be more than “merely ‘incidental.’” Port Br. at 23. Yet neither Plaintiffs nor the Port presented any substantial evidence to support these assertions, and of course, evidence that the Ordinance might “affect” airport operations would not in any event constitute evidence that the Ordinance “interferes” with those operations, which is a different standard entirely.

that would be done by depriving the residents of SeaTac who work at Sea-Tac Airport, as well as the countless other people in this state who live in cities or counties that encompass airports and also work at those airports, from reaching out to their local governments to address issues of local (rather than state-wide or nation-wide concern).

**II. THIS COURT SHOULD REVERSE THE PORTION OF THE ORDER HOLDING THE NLRA PREEMPTS THE ANTI-RETALIATION PROVISIONS OF THE ORDINANCE.**

Plaintiffs give short shrift to the Committee’s appeal of the portion of the superior court’s Order holding certain provisions in SMC 7.45.090 are preempted by the National Labor Relations Act (“NLRA”) pursuant to the doctrine of *Garmon*<sup>15</sup> preemption. Plaintiffs fail to address the argument and authority provided by the Committee in support of its appeal, instead casually referencing the “*Garmon* doctrine” and asserting without explanation their erroneous conclusion that “[s]ince the Ordinance duplicates the remedies provided by the NLRA, for conduct prohibited by the NLRA, it is preempted.” Plaintiffs’ Br. at 17-18.

For the reasons set forth in the Committee’s Opening Brief, the anti-retaliation provisions of the Ordinance, SMC 7.45.090, do not “establish a ‘supplemental sanction for violations of the NLRA’” such that they are preempted by the NLRA and void. CP 1961. The trial court erred

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<sup>15</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

when it so held. *See Hume v. American Disposal Co.*, 124 Wn.2d 656, 664-664, 880 P.2d 988 (1994) (upholding state statute prohibiting retaliatory discharge of employees who assert overtime wage claims) *cert. denied*, 513 U.S. 1112 (1995); *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992) (rejecting argument that unionized waitresses' claims arising from their having been fired for striking were preempted by *Garmon*). Prohibition of discriminatory employer practices related to the rights *granted by the Ordinance* reflects "deeply rooted local concerns" distinct from unfair labor practices under the NLRA and does not interfere with the federal industrial relations scheme established by the NLRA. *See Hume*, 124 Wn.2d at 665; *Delahunty*, 66 Wn. App. at 839.

### **III. PLAINTIFFS' OTHER SUBSTANTIVE CHALLENGES TO THE ORDINANCE SHOULD BE ADDRESSED ON CROSS APPEAL.**

RAP 2.5(a) provides that a party may seek *affirmance* on a ground not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. However, Plaintiffs do not seek only affirmance; they also ask this Court to *reverse* all portions of the Order upholding the Ordinance and to invalidate the Ordinance on the following grounds: violation of the single-subject rule, sufficiency of signatures supporting Proposition 1, federal preemption and violation of the dormant Commerce Clause of the U.S. Constitution. For that reason,

the Committee addresses the merits of each of these arguments in its cross-response brief, *infra*.

### **CONCLUSION**

For the reasons set forth above and in the Committee's Opening Brief, Sections II.B and III.B.7 and the corresponding orders in section IV of the trial court's Order should be reversed.

### **CROSS-RESPONSE OF APPELLANT TO OPENING CROSS-APPEAL BRIEF OF ALASKA AIRINES, *ET AL.***

### **INTRODUCTION**

The trial court correctly ruled that the Ordinance does not violate the single subject rule of article II, § 19 of the Washington State Constitution, that (with the exception of the anti-retaliation provisions) the Ordinance is not preempted by the NLRA, that the Airline Deregulation Act ("ADA") does not preempt the Ordinance, that the Ordinance does not violate the dormant Commerce Clause of the U.S. Constitution, and that the invalidity of one portion of the Ordinance does not invalidate the remainder. This Court should affirm each of these rulings.

### **COUNTER-STATEMENT OF THE CASE**

Although the averments in Plaintiffs' Statement of the Case are generally accurate, Plaintiffs misstate the primary purpose of the Ordinance, which is to ensure that, to the extent reasonably practicable,

people employed in the hospitality and transportation industries in the City of SeaTac have a living wage, job security, paid sick and safe time, and certain other improved conditions of employment. This purpose is not limited, as Plaintiffs contend, to companies doing business at the Airport, Plaintiffs' Br. at 5, but rather it applies to all employers who meet the statutory thresholds for coverage.

Additionally, in discussing the proceedings below, Plaintiffs omit that the Committee contended to the trial court in the pre-election proceedings, and subsequently argued on appeal in Case No. 89266-1, that even disregarding the petition signatures affixed by voters who signed petitions more than once, Proposition 1 was supported by a sufficient number of signatures to justify its placement on the November 5, 2013 SeaTac ballot. At issue before the Court of Appeals, therefore, was not only whether 61 signatures should have been stricken pursuant to former RCW 35A.01.040(7), but also whether the Petition Review Board that was empanelled by the City of SeaTac subsequent to the date the King County Department of Elections ("the King County Auditor") validated the signatures as sufficient erred in deeming 201 signatures void for reasons wholly unrelated to former RCW 35A.01.040(7).

Regarding this issue, the Committee contended, first, that under state law "it is the King County Auditor—and only the King County

Auditor” that has the duty to determine the sufficiency of a petition. Appendix 6-7. Second, the Committee contended that even if the Petition Review Board had some authority to independently determine the validity of petition signatures, it erred (for various reasons) in rejecting some 159 signatures (out of the 201 the Petition Review Board rejected) that King County had previously deemed valid. Appendix 10-17.

The Court of Appeals did not rule on either of these arguments, resolving the issue in the Committee’s favor solely on the grounds that former RCW 35A.01.040(7) was unconstitutional. *See Filo Foods, LLC v. City of SeaTac*, --- Wn.App. ---, 319 P.3d 817, 822 (2014) However, Judge Stephen J. Dwyer, in his concurrence, agreed with the Committee that the Petition Review Board had no power in any event to second-guess the determination of the King County Auditor, *id.* at 823, and the majority opinion did not reject his analysis.

Finally, Plaintiffs refer to the November 15, 2013 motions and the trial court’s December 27, 2013 Order as summary judgment proceedings, which, for the reasons set forth at page 15, *supra*, is inaccurate and misleading. These were *declaratory judgment* proceedings.

## ARGUMENT IN RESPONSE TO ISSUES ON CROSS-APPEAL

### I. THE SUPERIOR COURT CORRECTLY HELD THE ORDINANCE COMPLIES WITH THE SINGLE SUBJECT MANDATE.

The superior court correctly rejected Plaintiffs' assertions that Proposition 1 violates article II, § 19 of the Washington Constitution. CP 1938-42. Article II, § 19 contains two distinct prohibitions: (1) the single-subject rule and (2) the subject-in-title rule. *Washington Association for Substance Abuse and Violence Prevention v. State* (“WASAVP”), 174 Wn.2d 642, 654, 278 P.3d 632 (2012).<sup>16</sup> Plaintiffs' contention that Proposition 1 violates the single subject rule is contrary to settled law.

Article II, § 19 requires that “No bill shall embrace more than one subject, and that subject shall be expressed in the title.” A court must construe this constitutional provision liberally in favor of the challenged legislation. *WASAVP*, 174 Wn.2d at 654; *Amalgamated Transit Union Local 587 v. State* (“ATU 587”), 142 Wn.2d 183, 206, 11 P.3d 762, 27 P.3d 608 (2000).<sup>17</sup> A court presumes that a voter-enacted measure

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<sup>16</sup> Plaintiffs do not assign error to the superior court's determination that Proposition 1 does not violate the subject-in-title requirement. Therefore, that issue is not before the Court on appeal.

<sup>17</sup> Technically, Plaintiffs claim that Proposition 1 violates SMC 1.10.080, which mandates that an ordinance “not contain more than one subject and that subject is clearly expressed in its title.” All parties agree that the legal analysis under SMC 1.10.080 is the same as under article II, § 19.

complies with article II, § 19, just as it presumes the constitutionality of any other legislation. *WASAVP*, 174 Wn.2d at 654.

As the superior court recognized, the primary purpose of the single subject requirement is to prevent “logrolling.” Order at p. 5. CP 1938. “Logrolling” is when a measure is drafted in a manner such that a legislator or voter may be required to vote for something of which he or she disapproves in order to secure approval of an *unrelated* law. *See id.*; *WASAVP*, 174 Wn.2d at 639; *Washington Fed’n of State Employees v. State*, 127 Wn.2d 544, 552, 901 P.2d 1028 (1995)).

The superior court properly began its analysis of whether Proposition 1 complied with the single subject requirement by looking at the law’s title. CP 1939; *see also WASAVP*, 174 Wn.2d at 640. A court must consider an initiative’s entire ballot title. *Id.* at 668.

Proposition 1’s ballot title was:

Proposition No. 1 concerns labor standards for certain employers.

This Ordinance requires certain hospitality and transportation employers to pay specified employees a \$15.00 hourly minimum wage, adjusted annually for inflation, and pay sick and safe time of 1 hour per 40 hours worked. Tips shall be retained by workers who performed the services. Employers must offer additional hours to existing part-time employees before hiring from the outside. SeaTac must establish auditing procedures to monitor and ensure compliance. Other labor standards are established.

Should this Ordinance be enacted into law?

CP 1940.

A court's first step is to decide whether the ballot title is "general" or "restrictive." *Washington Association of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003). The answer to this question determines the type of analysis the court subsequently undertakes in evaluating the law's compliance with article II, § 19. *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001).

Correctly applying this Court's precedent, the superior court held that Proposition 1 had a "general" ballot title. CP 1940. The superior court recognized that a ballot title is general where its language "suggests a general, overarching subject for the initiative." *Id.* (citing *Washington Association of Neighborhood Stores*, 149 Wn.2d at 369.) "A few well-chosen words, suggestive of the general topic stated, are all that are necessary" to create a general title under article II, section 19. *Kiga*, 144 Wn.2d at 825; *ATU 587*, 142 Wn.2d at 209.

The superior court also correctly concluded that Proposition 1's title "is at least as general as other ballot measures that the Supreme Court has recently found to qualify as 'general.'" CP 1940.<sup>18</sup> Most recently, the

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<sup>18</sup> In *ATU 587*, for example, this Court held that the following ballot title was general: "Shall voter approval be required for any tax increase, license tab fees be \$30 per year for

Court unanimously held in *WASVAP* that the following ballot title was general:

Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor).

This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

*WASAVP*, 174 Wn.2d at 636, 640; *id.* at 677 (Wiggins, J., dissenting).

This precedent leaves no doubt that the superior court correctly held that Proposition 1 has a general ballot title.

Despite the clear guidance from this Court, Plaintiffs continue to insist that Proposition 1 has a “restrictive” ballot title. Plaintiffs’ Br. at 19. Relying on two cases that are more than 60 years old,<sup>19</sup> Plaintiffs erroneously claim that Proposition 1’s ballot title is restrictive because “the measure applies only to certain employers, in two specified industries, and it lists five specific subjects addressed in the Ordinance.” Plaintiffs’ Br. at 21.

Plaintiffs cite no support for the proposition that the number of employers and industries a law applies to indicates anything about whether

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motor vehicles, and existing vehicle taxes be repealed?” 142 Wn.2d at 212. In *Citizens for Responsible Wildlife Mgt. v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003), the Justices ruled that the ballot title for I-713 was also general: “Shall it be a gross misdemeanor to capture an animal with certain body-gripping traps, or to poison an animal with sodium fluoroacetate or sodium cyanide?” 149 Wn.2d at 635.

<sup>19</sup> *Blanco v. Sun Ranches Inc.*, 38 Wn.2d 894, 901-02, 942 P.2d 363 (1951) and *Swedish Hosp. v. Dep’t of Labor & Indus.*, 26 Wn.2d 819, 831-32, 176 P.2d 429 (1947).

the measure has a general or restrictive ballot title. Nor does the fact that a ballot title describes specific provisions in the text of the measure render the title restrictive rather than general. *Washington Association of Neighborhood Stores*, 149 Wn.2d at 369. Proposition 1 did not expressly limit the scope of the act to that expressed in its title. Therefore, this Court should affirm the Superior Court's conclusion that the measure had a general ballot title. *ATU 587*, 142 Wn.2d at 210; *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997).

Once a ballot title is identified as being "general," a court looks to the body of the ballot measure to determine whether rational unity exists among the matters addressed in the law. CP 1941 (citing *City of Burien*, 144 Wn.2d at 826). A law embraces only one subject if its parts rationally relate to one another. *Pierce County v. State*, 150 Wn.2d 422, 431, 78 P.3d 640 (2003). There is no constitutional violation if a ballot measure contains incidental subdivisions or subjects as long as they all reasonably relate to the law's general subject. *Washington Fed'n of State Employees*, 127 Wn.2d at 556; *WASVAP*, 174 Wn.2d at 656 ("[w]here a title is general, all that is required by the constitution is that there be some rational unity between the general subject and incidental subdivisions" (internal quotations omitted)). "The existence of rational unity or not is determined by whether the matters in the body of the [ballot measure] are

germane to the general title and whether they are germane to one another.”  
*WASVAP*, 174 Wn.2d at 656.

The superior court correctly applied these precepts and determined that Proposition 1 easily met the rational unity test, holding that “the overarching subject of the Ordinance is, as is stated in its title, labor standards for certain employees.” CP 1942. In addition “all of Proposition 1’s provisions relate to labor standards and to pay and benefits for historically low-paid workers in certain industries.” CP 1941. Every one of Proposition 1’s provisions rationally relates to “labor standards.”

The superior court properly rejected Plaintiffs’ claim that because “many or even all of Proposition 1’s provisions could have been addressed separately,” this rendered the initiative constitutionally deficient under this Court’s precedents. CP 1941-42. Plaintiffs repeat their same legally erroneous arguments on appeal, claiming that Proposition 1 fails the single subject test simply because other jurisdictions have enacted less ambitious living wage ordinances. Plaintiffs’ Br. at 23-24.

A legislative body’s history of treating together two arguably separate subjects is persuasive evidence that they constitute a single subject for article II, § 19. See *WASVAP*, 174 Wn.2d at 657 (citing *Washington Fed’n of State*, 127 Wn.2d at 575) (Talmadge, J., concurring)). However, this Court has never found a single subject

violation based on the fact there *had not been* a prior law that combined the incidental subjects of the legislation at issue.

*Fritz v. Gordon*, 83 Wn.2d 275, 517 P.2d 911 (1974), demonstrates the fallacy of Plaintiffs' argument. The initiative in that case contained provisions related to (1) campaign financing; (2) the activities of lobbyists; (3) access to public records; (4) access to the financial affairs of elective officers and candidates; (5) requiring disclosure of sources of campaign contributions, objects of campaign expenditures, and amounts thereof; (6) limiting campaign expenditures; (7) restricting use of public funds to influence legislative decisions; (8) governing access to public records and specifying the manner in which public agencies will maintain such records; and (9) establishing a public disclosure commission to administer the act; and (10) providing civil penalties. There was no precedent for treating these subtopics in a single piece of legislation. *See Fritz*, 83 Wn.2d at 286 ("The reporting, public disclosure, public information and other requirements of Initiative 276 are new, novel, and, in a comparative sense, most extensive and very, very detailed."). That did not deter this Court from concluding the initiative met the rational unity test because "each of the subtopics of Initiative 276 bears a close interrelationship to the dominant intendment of the measure." *Fritz*, 83 Wn.2d at 291.

The same is true here. Each of the sub-topics of Proposition 1 bears a close interrelationship to the dominant intendment of the measure: establishing and enforcing labor standards for certain employers.

This case bears no resemblance to *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951), upon which Plaintiffs rely. That case involved a situation in which two bills, one an appropriations bill and the other a corporation income tax bill, could not pass through the Washington Legislature on their own merits. 39 Wn.2d at 198. The proponents combined both bills into a single measure, which was enacted into law. *Id.* This Court properly described this as “the clearest possible illustration of the kind of ‘logrolling,’ the ‘you-scratch-my-back-and-I’ll-scratch-yours that the constitutional provision [article II, § 19] was designed to prevent.” *Id.* at 199. There is no similar evidence of “logrolling” with regard to the enactment of Proposition 1. *Id.* at 204.

Plaintiffs are also simply wrong that there is no historical precedent for combining in a single piece of legislation the regulation of both employee wages and other conditions of labor. Over a hundred years ago, the Industrial Welfare Act, 1913 Laws of Washington, c. 174 § 2, made it unlawful to employ women or minors “under conditions of labor detrimental to their health and morals” and also made it unlawful to employ “women in any industry within the State of Washington at wages

which are not adequate for their maintenance,” thus combining in the same law requirements relating to wage rates and regulations related to other “conditions of labor.”<sup>20</sup> Proposition 1 thus follows in the well-established tradition of legislation in Washington that addresses the problem of inadequate wages simultaneously with the problem of other “conditions of labor.”

Plaintiffs additionally assert that “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.” Plaintiffs’ Br. at 22 (citing *ATU 587*, 142 Wn.2d at 209, 217). This Court has directly rejected that argument. In *Citizens for Responsible Wildlife Mgt. v. State*, the initiative challengers asserted that “there is no rational unity between banning body-gripping traps and the use of the pesticides because it is completely unnecessary to ban traps in order to implement the ban on the use of these chemical compounds as pesticides.” 149 Wn.2d at 637 (internal quotations omitted). This Court held that that argument “misconstrued” the *ATU 587* decision. *Id.* at 638. It reasoned: “An analysis of whether the incidental subjects are germane to one another

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<sup>20</sup> See also RCW 49.12 generally (requiring adequate wages, forbidding wage discrimination based on sex, enabling use of paid time off for sick leave, addressing other conditions of labor, and authorizing rules and regulations “fixing minimum wages and standards, conditions and hours of labor” to be promulgated by the Department of Labor and Industries, RCW 49.12.091, all in one chapter of one title of the Revised Code of Washington).

does not necessitate a conclusion that they are necessary to implement each other, although that may be one way to do so. This court has not narrowed the test of rational unity to the degree claimed by Citizens.” *Id.*

Likewise, this Court has not narrowed the rational unity test to the degree claimed by Plaintiffs. As the following review demonstrates, Proposition 1 bears no resemblance to the mere handful of laws with general titles that this Court has struck down on this basis during the more than 120 years of the constitutional provision’s existence.

- *Power, Inc.*, struck down a legislative enactment that combined a corporation excise tax and an unrelated appropriations provision.
- *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 523-524, 304 P.2d 676 (“*Wash. Toll Bridge Auth. II*”) (1956), struck down an act that provided both a procedure for the establishing and financing of toll roads generally and the financing for a specific toll road from Tacoma to Everett. The Court concluded that the statute had two component parts with two different purposes, the first continuing and general in character, the second specific and temporary.
- *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 353-54, 357 P.2d 702 (1960), struck down an act that provided for a cemetery fund and administrative board on the one hand, and banned racial discrimination in private cemeteries on the other.
- *Barde v. State*, 90 Wn.2d 470, 472, 584 P.2d 390 (1978) struck down an enactment that provided criminal sanctions for “dognapping” and the recovery of attorneys’ fees in civil replevin actions, finding that the two subjects had no rational unity to one another.
- *ATU 587* found that I-695 embraced two subjects – (1) setting license tabs at \$30 and (2) providing a method for approving future tax increases – that both fell under the general topic of taxes. 142 Wn.2d

at 217. This Court invalidated the initiative in its entirety because the purposes of the two subjects were unrelated to each other. *Id.*

- *City of Burien* held that the initiative had two subjects: a tax refund and changes to the assessment process including a cap on property taxes. 144 Wn.2d at 827. The Court held that the refund provision was unrelated to the changes to property tax assessments in that the provision encompassed much more than property taxes in general. *Id.*

Proposition 1 does not even arguably suffer from the same structural defect as the measures struck down in *ATU 587* and *City of Burien*, and the bill at issue in *Wash. Toll Bridge Auth. II*.<sup>21</sup> Nor does Proposition 1 comprise subtopics as disparate as those in the laws the Court struck down in *Barde, Power, Inc.*, or *Price*. All of Proposition 1's subtopics rationally relate to establishing and enforcing labor standards with respect to certain employers. It easily satisfies the rational unity test.

In sum, article II, § 19 provides no basis for reversing the superior court's order finding the Ordinance valid.

## **II. PLAINTIFFS' CHALLENGE TO THE SUFFICIENCY OF THE SIGNATURES SUPPORTING PROPOSITION 1 DOES NOT JUSTIFY INVALIDATING THE ORDINANCE.**

### **A. This Court Should Not Reach the Constitutional Issue Addressed By The Court of Appeals In Its February 10, 2014 Opinion In Case No. 89266-1, Because The November 5, 2013 Election Cured Any Procedural Defect.**

This Court should not reach the question of the constitutionality of

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<sup>21</sup>In *WASVAP* this Court explained that the fundamental flaw with the initiatives at issue in *ATU 587* and *City of Burien*, and the bill at issue in *Wash. Toll Bridge Auth. II*, was that they combined a very specific law with an immediate impact with a general measure having only a future impact. 174 Wn.2d at 659.

former RCW 35A.01.040(7) and its municipal law equivalent, SMC 1.10.140(C),<sup>22</sup> because even resolving that question in Plaintiffs' favor could not serve as a basis to invalidate Proposition 1 since a majority of voters approved the measure in the November 2013 election.<sup>23</sup>

The principle that pre-election procedural defects cannot serve as a basis post-election to invalidate a measure passed into law by a public vote has been adopted by every state court that has considered the question, including Washington's. *See, e.g., Vickers v. Schultz*, 195 Wash. 651, 654-55, 81 P.2d 808 (1938). In *Vickers*, the county auditor failed to post notices which alerted voters to the fact that a special election was to be held on the formation of a public utility district and election of district commissioners. *Id.* at 651. While this undisputedly failed to comply with the requirements of the public utility district statute, the Court found that the vote nonetheless represented "an intelligent and well-formed expression of the popular will." *Id.* at 657. The Court announced that an election will not be void for failure to strictly observe statutory requirements "unless the statute itself declares that the election shall be void if the statutory requirements are not strictly observed." *Id.*

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<sup>22</sup> Effective June 12, 2014, RCW 35A.01.040(7) has been amended to require the first valid signature to be counted. Laws of 2014, Ch. 121, § 3(7).

<sup>23</sup> It is a "fundamental principle" that "if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752-53, 49 P.3d 867 (2002); *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

As this Court stated in *Groom v. Port of Bellingham*, 189 Wash. 445, 447, 65 P.2d 1060 (1937), another case involving insufficient notice of a special election:

An election will not be declared invalid for any irregularities when it appears that the result of the election was an intelligent expression of the popular will, and the want of statutory notice did not result in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election.

*See also State ex rel. Sampson v. Superior Court for King Cnty.*, 71 Wash. 484, 487, 128 P. 1054 (1913) (irregularities should not be held to defeat and set aside the popular will).

Other state courts have articulated the rationale for this rule. In *Renck v. Superior Court*, 66 Ariz. 320, 327, 187 P.2d 656, 661 (1947), the Supreme Court of Arizona explained that even where a legal challenge to the sufficiency of initiative petition signatures is initiated *before* the general election,

once the measure has been placed upon the ballot, voted upon and adopted by a majority of the electors, the matter becomes political and is not subject to further judicial inquiry as to the legal sufficiency of the petition originating it.

Similarly, in *Montanans for Equal Application of Initiative Laws v. State ex rel. Johnson*, 336 Mont. 450, 457, 154 P.3d 1202, 1207 (2007), the Supreme Court of Montana observed that:

[A]fter a majority of the Montana electorate have voted to support an initiative, it is absurd for the State and the courts to be tied up with the question of whether five percent of Montana voters had wanted it on the ballot.

*Accord Hernandez v. Frohmiller*, 68 Ariz. 242, 259, 204 P.2d 854, 865 (1949) (“after a statute has been passed by a vote of the people and promulgated as the law, this court’s sphere of inquiry is and should be whether the law itself in its final form is constitutional as to its provisions, and not whether there was a constitutional defect in the proceedings leading to its final passage”); *State ex rel. Graham v. Bd. of Examiners*, 125 Mont. 419, 428-29, 239 P.2d 283, 289-90 (1952) (same); *Wadsworth v. Neher*, 138 Okl. 4, 4, 280 P. 263, 263 (1929) (election will not be held invalidated by violation of mandatory provisions of state election laws unless statute so requires); *City of Albuquerque v. Water Supply Co.*, 24 N.M. 368, 368, 174 P. 217, 217 (1918) (irregularities do not render election results void); *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420, 424-25 (1936) (“substance is more important than form, and ... the will of the people expressed...at the ballot box...ought not to be lightly disregarded and set at naught” despite technical irregularities).

The case and statute cited by Plaintiffs do not require that the Ordinance must be overturned should this Court rule that it was not supported by a sufficient number of petition signatures. RCW

35A.01.040(4), relied on at Plaintiffs Br. at 31, contains no such mandate. Neither has any case or administrative decision read into the statute the remedy Plaintiffs urge.

The case cited by Plaintiffs, *State ex rel. Uhlman v. Melton*, 66 Wn.2d 157, 161, 401 P.2d 631 (1965), likewise fails to support the claim that invalidation of the Ordinance could be an appropriate remedy in this situation. That case involved a failed attempt to invalidate two ordinances passed by a city council through a popular referendum based on insufficiency of signatures. *Id.* at 158. The court held that the petitioners' failure to strictly comply with the charter's filing requirements was "fatal" to petitioners' efforts to supplement their filing with additional signatures after the ordinances had gone into effect. *Id.* at 161. However, the case did not address a situation where procedural irregularities were cured through a vote of the general public and has no applicability here.

The only other case that Plaintiffs have cited on this issue, *Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006), does not – as Plaintiffs contend – stand for the proposition that parties may challenge the validity of legislation on the grounds that the initiative was not properly presented to the voters even after an election has taken place.<sup>24</sup>

That case involved a legal challenge to an initiative which the City argued

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<sup>24</sup> Plaintiffs made this contention in their Reply in Support of Motion for Consolidation in Supreme Court No. 90113-9.

was beyond the scope of the initiative power. *Id.* at 255. The Court’s holding in *Sequim* establishes only that where an initiative’s subject matter is beyond the scope of the initiative power, it continues to be *ultra vires* even after the election; no amount of signatures, votes, or other pre-election procedure can make an otherwise unlawful initiative lawful.

The controlling authority discussed above mandates that any procedural defect in the sufficiency of the signatures supporting Proposition 1 cannot result in post-election invalidation of the measure.

**B. If This Court Holds That The Election Did Not Cure Any Procedural Defect In The Sufficiency Of Signatures And Reaches The Merits Of Plaintiffs Challenge To The Sufficiency Of The Signatures, Supplemental Briefing Is Required.**

On February 10, 2014, the Washington Court of Appeals correctly and unanimously held that former RCW 35A.01.040(7) and its municipal equivalent, SMC 1.10.140(C), violated the First Amendment to the U.S. Constitution because the statute “impermissibly burdens” the speech rights of those who signed the initiative more than once. *Filo Foods, LLC v. City of SeaTac*, --- Wn. App. ---, 319 P.3d 817, 818 (Feb. 10, 2014).<sup>25</sup>

Plaintiffs urge this Court to reject the Court of Appeals’ conclusion and to void the Ordinance on the basis that the signatures presented in

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<sup>25</sup> This holding is supported by ample precedent. See *Sudduth v. Chapman*, 88 Wn2d 247, 252, 558 P.2d 806 (1977); *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L.Ed.2d 425 (1988); *Doe No. 1 v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 2817, 177 L.Ed.2d 493 (2010).

support of Proposition 1 were insufficient. However, addressing the sufficiency of signatures issue requires not only addressing the merits of the Court of Appeals' First Amendment analysis, but also the merits of the Committee's other arguments regarding why Proposition 1 was supported by sufficient signatures, which were (as noted *supra*, in the Committee's Counter-Statement of the Case), presented to both the trial court and to the Court of Appeals, and which at least one Court of Appeals Judge, Stephen J. Dwyer, found to be a separate and independent basis to reject Plaintiffs' challenge to the sufficiency of the signatures.

This Court has been (and will, given the likely participation of *amici curiae*, very likely continue to be) presented in this case with a substantial amount of briefing on an accelerated timeframe. Given that the sufficiency of signatures was not an issue presented to or ruled on by the trial court in the Order that is the subject of this appeal, the Committee sees no reason to burden the Court with the extensive briefing that would be necessary to fully address the merits of all of the arguments presented to the Court of Appeals as to why Proposition 1 was properly placed on the November 5, 2013 SeaTac ballot. Thus, if this Court holds that the election potentially did *not* cure whatever defects in the sufficiency of signatures might have existed, the Committee respectfully requests that the

Court order supplemental briefing on the merits of the underlying question of whether Proposition 1 should or should not have been on the ballot.

### **III. THE ORDINANCE IS NOT PREEMPTED BY THE NLRA.**

#### **A. Minimum Labor Standards Such As Those Contained in the Ordinance Are Not Preempted By the NLRA.**

The question of whether any provisions of the Ordinance are preempted by federal labor law must begin with the well-established presumption that state laws regarding matters historically within a state's police powers are not preempted by federal statute, absent the clear and manifest intent of Congress. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995); *Cal. Div. of Labor Stds. v. Dillingham Constr.*, 519 U.S. 316, 325, 331, 117 S.Ct. 837, 136 L.Ed.2d 791 (1997).<sup>26</sup>

A federal statute will not be read to supersede a state's historic powers unless that is Congress's clear and manifest purpose... Because employment standards are within a state's traditional police powers, preemption "should not be lightly inferred."

*Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 647, 9 P.3d 787 (2000). (citation omitted) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987)). The trial court correctly held the Ordinance was not preempted by the *Machinists* preemption

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<sup>26</sup> See also *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (recognizing the "presumption that Congress does not intend to supplant state law"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (Court presumes Congress did not intend to preempt areas of traditional state regulation).

doctrine.<sup>27</sup> CP 1950-60, 1965.

The U.S. Supreme Court has repeatedly held that state-enacted minimum labor standards are not *Machinists* preempted because the NLRA “is concerned [ ] with establishing an equitable *process* for determining the terms and conditions of employment” and is “entirely unrelated to local or federal regulation establishing minimum terms of employment.” *Metropolitan Life Ins. Co. v. Travelers Ins. Co.*, 471 U.S. 724, 754, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). There, the Court rejected a preemption challenge to a state law mandating minimum health benefits, even though such benefits would otherwise have been subject to bargaining between the parties. Similarly, in *Fort Halifax*, the Court rejected a preemption challenge to a state law that required employers, in the event of a plant closing, to provide a one-time severance payment to employees not covered by an express contract providing for severance pay. 482 U.S. at 20-22.

Citing and quoting *Metropolitan Life*, the Court stated:

It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a ‘backdrop’ for their negotiations. Absent a collective-bargaining agreement, for

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<sup>27</sup> *Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Empl. Rel. Comm’n*, 427 U.S. 132, 147, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, pre-existing state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it. Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for “there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.”

482 U.S. at 21-22 (citations omitted).<sup>28</sup>

Plaintiffs assert that because the Ordinance establishes a minimum wage along with other worker protections like sick leave, the Ordinance is not a minimum labor standard. Plaintiffs’ Br. at 32-38. However, *Metropolitan Life* and *Fort Halifax* did not merely carve out an exception for insignificant, *de minimis* employment rights. Rather, the Court determined that the NLRA referees the bargaining *process*; it does not guarantee either side that its opponent will be weak or strong at the bargaining table. “[T]here is no suggestion in the legislative history of the

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<sup>28</sup> *Accord: Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811, 818 (D.C. Cir. 1995) (holding “the District has enacted substantive employee protective legislation having nothing to do with rights to organize or bargain collectively. The NLRA does not preempt such legislation”).

Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.” *Metropolitan Life*, 471 U.S. at 756.<sup>29</sup> Similarly, in *Fort Halifax*, the Court upheld minimum state-law employment rights, not because they were insignificant, but because the added bargaining capital they give workers does not affect the fairness of the *process*. *See* 482 U.S. at 20-22.

In short, state law minimum labor standards “form a backdrop” for negotiations between employers and employees; they do not preempt that relationship. *Id.*, 482 U.S. at 21. Under *Metropolitan Life* and *Fort Halifax*, whether a state law is preempted does not depend on how significant or “onerous”<sup>30</sup> an employer or a court might perceive the employment rights provided in the statute to be.<sup>31</sup> To the contrary, the cases recognize that it is a fundamental prerogative of state and local

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<sup>29</sup> The Court in *Metropolitan Life* rejected the employers’ argument, which is virtually identical to the position urged by Plaintiffs here, Plaintiffs’ Br. at 32-38, thusly: “[The Employers] argue that, not only did Congress establish a balance of bargaining power between labor and management in the Act, but it also intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law.” 471 U.S. at 751-752.

<sup>30</sup> Plaintiffs’ Br. at 33, 38.

<sup>31</sup> For these reasons, the Supreme Court has stated that “[i]n labor pre-emption cases ... our office is not to pass judgment on the reasonableness of state [or local] policy...” *Livadas v. Bradshaw*, 512 U.S. 107, 120, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). *See also, California Grocers Assn. v. City of Los Angeles*, 52 Cal.4th 177, 254 P.3d 1019, 1037 (Cal. 2011) (“When evaluating claims of NLRA preemption, we may not substitute our own views of sound economic policy for those of the elected branches”), *cert. denied*, 132 S.Ct. 1144.

government to establish minimum wages and working conditions, and such minimum employment standards do not run afoul the NLRA:

No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power [referring to the NLRA], and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

*Metropolitan Life*, 471 U.S. at 754-55.

In light of the foregoing, Plaintiffs' argument that the *combination* of subjects contained in the Ordinance results in preemption even if none of the individual standards does is entirely without merit. The trial court properly so held. CP 1962.

**B. The Provisions Contained In The Ordinance Do Not Interfere With The Process of Collective Bargaining.**

Plaintiffs complain that the collective bargaining "opt-out" language in the Ordinance "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." Plaintiffs' Br. at 37. The identical objection was squarely rejected in *Livadas v. Bradshaw*, 512 U.S. 107, 131-132 & n.26, 114 S.Ct. 2068, 129 L. Ed. 2d 93 (1994) and subsequent cases, including *Calop Business Systems v. City of Los Angeles*, --- F.Supp.2d ----, 2013 WL 6182627

(C.D. Cal. Oct. 30, 2013); *Fortuna Enterprises, L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1011-12 (C.D. Cal. 2008); *Rui One v. City of Berkeley*, 371 F.3d 1137, 1142-43 (9th Cir. 2004).

In *Livadas*, employers argued that if state employment standards gave unionized workers the power to opt out, the opt-out right would create an unlawful incentive for employers to unionize. The Court rejected that theory: “Nor does it seem plausible to suggest that Congress meant to pre-empt such opt-out laws, as ‘burdening’ the statutory right of employees not to join unions by denying non-represented employees the ‘benefit’ of being able to ‘contract out’ of such standards.” *Id.*, 512 U.S. at 132 n.26. Following *Livadas*, courts have consistently reached the same conclusion. See *Fortuna Enterprises*, 673 F.Supp.2d at 1011-12 (upholding in a comprehensive opinion the union opt-out provision in Los Angeles’ Airport Hospitality Zone living wage ordinance against NLRA preemption challenge); *Calop Business Systems*, 2013 WL 6182627, \*16 (following *Fortuna Enterprises* to reject RLA challenge to opt-out in local minimum wage ordinance); *St. Thomas-St. John Hotel & Tourism Assn. v. Virgin Islands*, 218 F.3d 232, 244-245 (3d Cir. 2000) (following *Livadas*).

Indeed, the presence of an opt-out provision *undermines* an NLRA preemption attack, because it preserves the parties’ freedom to bargain for their own terms in place of the Ordinance. As the United States Supreme

Court explained in *Fort Halifax*:

The fact that the parties are free to devise their own severance pay arrangements ... *strengthens the case that the statute works no intrusion on collective bargaining.* Maine has sought to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment. If a statute that permits no collective bargaining on a subject escapes NLRA pre-emption, see *Metropolitan Life*, surely one that permits such bargaining cannot be pre-empted.

482 U.S. at 22 (emphasis added); *see also California Grocers Assn. v. City of Los Angeles*, 52 Cal.4th 177, 254 P.3d 1019, 1039 (Cal. 2011) (concluding based on *Fort Halifax* that opt-out provisions are non-preempted), *cert. denied*, 132 S.Ct. 1144 (2012); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 490-491 (9th Cir. 1996) (upholding labor protections subject to a collective bargaining opt-out provision because the legislature rationally could have believed unionized workers are competent to negotiate their own protections); *Calop Business Systems*, 2013 WL 6182627, \*16 (living wage ordinance containing opt-out “does not frustrate the purpose of the RLA because it does not discourage collective bargaining or dictate the outcome of such a process.”); *Garcia v. Four Points Sheraton LAX*, 188 Cal.App.4th 364, 385–386, 115 Cal.Rptr.3d 685 (Cal.App. 2010) (upholding opt-out provision in wage ordinance for

airport corridor).<sup>32</sup>

**C. Employee-Retention Provisions Have Been Repeatedly Upheld Against Preemption Challenges: *Rhode Island Hospitality, California Grocers, and Washington Service Contractors Coalition.***

The Ordinance, at SMC 7.45.060, gives employees a right against discharge (except for just cause) during the first 90 days after a successor employer takes over. Plaintiffs challenge this provision with a carbon copy of the arguments made against similar retention ordinances that were rejected by the Courts in *Rhode Island Hospitality Ass'n v. City of Providence*, 667 F.3d 17, 23-40 (1st Cir. 2011), *California Grocers Ass'n*, and *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811, 818 (D.C. Cir. 1995).

Plaintiffs misstate the law in asserting that the U.S. Supreme Court's decision in *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-88, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), "recognizes a successor employer's right to operate its business in the manner in which it best sees fit," Plaintiffs' Br. at 40, as if *Burns* identified a federally protected right on the part of employers to hire and fire whomever they choose. It did not. While nothing in federal law *requires* that an employer hire its predecessor's employees, nothing in federal law limits the power of states

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<sup>32</sup> Plaintiffs' *Machinists* preemption argument, summarized on page 33 of their brief, runs directly contrary to the well-established and oft-applied authority discussed above, including *Metropolitan Life, Fort Halifax* and *Livadas*.

to regulate in this area. Instead, the right to hire and fire remains subject to underlying state and local law. *Rhode Island Hospitality*, 667 F.3d at 33-34; *California Grocers*, 254 P.3d at 1034. For this reason, state and local laws giving predecessor employees a right to retain their jobs do not violate the NLRA. *See id.*; *see also*, *Washington Service Contractors Coalition*, 54 F.3d at 817 (upholding a law very similar to this provision of the Ordinance against a preemption challenge).<sup>33</sup>

*Rhode Island Hospitality* and *California Grocers* both also rejected arguments like Plaintiffs' here that, by requiring retention of certain workers for 90 days, the Ordinance imposes a duty to bargain on otherwise unwilling employers and that by doing so, the Ordinance "upsets the balance of power" between labor and management. *Rhode Island Hospitality*, 667 F.3d at 30; *California Grocers*, 254 P.3d at 1035-1036. Plaintiffs fail to acknowledge that the National Labor Relations Board ("NLRB")'s decision whether to require a successor employer to bargain with the predecessor employees' union likely depends on whether the successor made a voluntary decision to retain the predecessor's employees, not just on whether the successor *in fact* retains those employees. *See, id.* Because retention of employees during the 90-day

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<sup>33</sup> *See also St. Thomas-St. John Hotel & Tourism Assn. v. Virgin Islands*, 218 F.3d 232, 244-245 (3d Cir. 2000) (rejecting NLRA preemption attack on local law giving employees the right not to be discharged except for just cause).

period mandated by the Ordinance is not likely to trigger a duty on the part of the successor employer to recognize the former union, the 90-day retention period is non-preempted for this reason as well. *See also Paulsen ex rel. NLRB. v. GVS Properties, LLC*, 904 F.Supp.2d 282, 292-293 (E.D.N.Y. 2012).

**D. The Ordinance Is Not Preempted Just Because Some Labor Unions May Have Supported It.**

Plaintiffs also argue that the Ordinance should be struck down because “organized labor concedes that it used the political process here to obtain benefits that it tried but failed to effectively obtain through collective bargaining.” Plaintiffs’ Br. at 35-36. This argument is premised on the idea that it is illegitimate for workers’ organizations to use the political process to seek stronger employment rights.

This is a deeply elitist argument, contrary to both the First Amendment and the NLRA. The dicta in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) upon which Plaintiffs rely in making this argument flies in the face of *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). In *Eastex*, the Court held that the NLRA affirmatively *protects* union workers’ political efforts to secure stronger individual employment rights. The Court held that “labor’s cause often is advanced on fronts other than collective bargaining” – in that case,

workers' efforts to lobby for a higher minimum wage. 437 U.S. at 565. The Court held that "employees' appeals to legislators to protect their interests as employees are within the scope of [the mutual aid or protection] clause" of the NLRA. *Eastex*, 437 U.S. at 566.

The Ninth Circuit also subsequently repudiated the contrary dicta in *Bragdon*. In *Rui One*, *supra*, the Court rejected a challenge that alleged Berkeley's Living Wage Ordinance "was [] motivated by a desire to help in the unionization campaign at a Marina hotel." 371 F.3d at 1155. The Court held that attacks on the identity and motivation of the proponents were entirely irrelevant. *Id.* That the Court "may not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" is also compelled by Washington law. *See, State v. Brayman*, 110 Wn.2d 183, 204, 751 P.2d 294 (1988); *Andersen v. King County*, 158 Wn.2d 1, 34-35, 138 P.3d 963 (2006).

**E. The Ordinance Is Not Preempted Because It Applies To Some, But Not All, Industries.**

It is well established that local legislation may target specific industries and specific areas without running afoul of the NLRA. For example, the Ninth Circuit repudiated prior dicta in *Bragdon* on this point in *Associated Builders & Contractors v. Nunn*, in which the Court wrote:

the NLRA does not authorize us to pre-empt minimum labor standards simply because they are applicable only to

particular workers in a particular industry. It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.

356 F.3d 979, 990 (9th Cir. 2004) (citations omitted). *Accord: California Grocers*, 254 P.3d at 1032 n.8 (recognizing repudiation of *Bragdon* and rejecting contrary suggestion in *520 South Michigan Ave. Associates v. Shannon*, 549 F.3d 1119, 1131 (7th Cir. 2008) in favor of other Circuit decisions, including *Rondout Electric Co. v. NYS Dept. of Labor*, 335 F.3d 162, 169 (2d Cir. 2003) and *St. Thomas-St. John Hotel*, 218 F.3d at 244)).

In arguing the contrary, Plaintiffs are simply repeating the long-discredited doctrine exemplified by *Lochner v. New York*, 198 U.S. 45, 57 25 S. Ct. 539, 49 L. Ed. 937 (1905), which struck down a state labor standard for bakers as an “unreasonable” interference with freedom of contract, in large part because it only applied to bakers rather than all professions. *Lochner* has been discredited since *West Coast Hotel v. Parrish*, 300 U.S. 379, 392-393, 57 S. Ct. 578, 81 L. Ed. 703 (1937). In overruling *Lochner*, *West Coast Hotel* specifically approved of state and local employment laws limited to particular industries, citing *Spokane Hotels v. Younger*, 113 Wash. 359, 360-361, 194 P. 595 (1920), which defined a special minimum wage for hotel housekeepers but no other job classifications, and *Miller v. Wilson*, 236 U.S. 373, 382-384, 35 Sup.Ct.

342, 59 L.Ed. 628 (1915), which rejected the argument that a maximum-hours law was unconstitutional because it only applied to hotels, and not to boarding houses or domestic servants. 300 U.S. at 390, 395.

Plaintiffs' argument that the Ordinance is preempted because it targets businesses associated with air travel, Plaintiffs' Br. at 38, is foreclosed by this well-settled rule. Legislatures may draw lines between one industry and another without being second-guessed by the courts.<sup>34</sup>

#### **IV. THE ORDINANCE IS NOT PREEMPTED BY THE AIRLINE DEREGULATION ACT.**

##### **A. Introduction.**

The Airline Deregulation Act ("ADA") preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(B)(1). A statute is preempted if it has either (1) "reference to" a price, route, or service, or (2) a "connection with" prices, routes, or services that is more than tenuous, remote or peripheral. *Morales v. TWA*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *ATA v. San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001).<sup>35</sup>

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<sup>34</sup> See also *Rui One*, *supra* (upholding portion of Berkeley's living wage ordinance that applied to just one portion of the city – the Marina Zone – and to just certain employers within that zone); *Fortuna Enterprises*, *supra* (upholding Los Angeles ordinance that created a Zone within which hotels with fifty or more rooms are required to pay their employees a "living wage.").

<sup>35</sup> Although the statutory language uses the phrase "relates to," rather than the words "reference to" or "connection to," the "relate to" clause of the preemption provision "is meant, not to set forth a *test* for preemption, but rather to identify the field in which ordinary *field pre-emption* applies." *Mendonca*, 152 F.3d at 1189 (emphasis in original).

ADA preemption analysis “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by the [ADA] unless that was the clear and manifest purpose of Congress’ and that ‘Congress does not cavalierly pre-empt state-law causes of action.’” *ATA*, 266 F.3d at 1071 (quoting *Charas v. TWA*, 160 F.3d 1259, 1265 (9th Cir. 1998)). The presumption against preemption “is especially true in the area of employment law. . .” *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010). The burden of proving ADA preemption is on the proponent. *S.C. Johnson & Son, Inc., v Transport Corp. of America, Inc.*, 697 F.3d 544, 547 (7th Cir. 2012); *Helde v. Knight Transportation, Inc.*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 5588310 \*1 (W.D. WA 2013).

**B. Because The Ordinance Does Not “Refer To” Carrier Prices, Routes or Services, It Does Not Fall Within The “Refer To” Subset of Laws That May Be Preempted by the ADA.**

The Ordinance does not refer to carrier prices, routes, or services, but instead refers only to the wages and benefits paid by contractors to their employees. It in no way addresses the manner in which contractor employees perform their functions or the nature of those functions. Because a law that does not purport to regulate the “prices, routes and services of *a carrier*,” 49 U.S.C. § 41713(b)(1) (emphasis added), but instead only regulates the wages paid by a carrier contractor to its

employees, does not “refer to” carrier prices, routes or services, the “refer to” prong of ADA preemption has not been established here.<sup>36</sup>

In a case with similar facts, the court in *Amerijet International, Inc. v Miami-Dade County*, \_\_\_ F.Supp.2d \_\_\_, 2014 WL 866406 (S.D.Fla. 2014), rejected the claim that a living wage ordinance (“LWO”) covering airport contractors was ADA preempted. Noting that the LWO “does not implicate Amerijet’s, or any other airlines’, operations as an air carrier engaged in air transportation,” but instead “is intended to apply to third party service contractors that provide ‘covered services’ to an airline, not the airline itself,” the Court concluded that “[t]o hold otherwise would preempt every law that regulates a business providing services to airlines, whether it is a food vendor, janitor or cargo handler . . .” *Id.* at \*5-6.<sup>37</sup>

Plaintiffs contend that the Ordinance “has the force and effect of law” related to air carrier services. Plaintiffs’ Br. at 45. However, the

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<sup>36</sup> Importantly, air carriers themselves are excluded from the coverage of the Ordinance. SMC 7.45.010(M)(1).

<sup>37</sup> The three district court cases cited by Plaintiffs at page 51 of their brief are each distinguishable or discredited. *Huntleigh Corp. v. L.A. State Board of Private Security Examiners*, 906 F. Supp. 357, 362 (M.D. LA 1995) preempted a state licensing requirement that set standards for pre-flight screeners because state law “would frustrate the intent of the Congress to provide uniform federal standards” for pre-flight screening. The Ordinance, in contrast, does not impinge on any uniform federal standard, which was the “service” affected by the state law in *Huntleigh*. The other two decisions, *Marlow v. AMR Services Corp.*, 870 F. Supp. 295 (D. Haw. 1994) and *Tucker v Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360 (S.D. FL 2003), found whistleblower retaliation suits preempted. The Ninth and Eleventh Circuits subsequently invalidated both cases, finding that whistleblower actions are *not* preempted. *Ventress*, 603 F.3d at 683; *Branche*, 342 F.3d at 1259-60. Additionally, *Marlow* has been criticized for its lack of analysis. *See, e.g., Esponosa v. Continental Airlines*, 80 F.Supp.2d 297, 301 (D.N.J. 2000).

Ordinance simply does not address or regulate “services” as such have been defined by pertinent federal authority.

The Ninth Circuit, for example, defines “services” as referring “to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided....,” and has noted that “[t]o interpret ‘service’ more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does.” *Charas*, 160 F.3d at 1265-66. The Third Circuit has adopted a similar definition. *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 195 (3rd Cir. 1998).<sup>38</sup> Clearly, the Ordinance has no effect at all on the frequency and schedule of flights or the selection of markets for the airlines; thus, the Ordinance does not refer to services as defined by the ADA.<sup>39</sup> The Eleventh Circuit has suggested that carrier services may include “the elements of air travel that are

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<sup>38</sup>Congress used “service” in this sense throughout its discussions of the ADA. The House Report on the ADA uses the word “service” 186 times. H.R. REP. 95-1211, 6, 1978 U.S.C.C.A.N. 3737. In nearly every instance, the word is used in the way *Charas* understood it, to refer to the frequency and scheduling of transportation and the selection of markets to or from which transportation is provided. *Id.* For example, the House Reports refers to: “non-stop service”; “low fare service”; “air service”; “service to secondary or satellite airports”; “service to U.S. possessions and territories”; “intrastate and interstate service”; and “termination of service to a city”. *Id.*

<sup>39</sup> Plaintiffs contend that *Rowe v. New Hampshire Motor Transport Assoc.*, 552 U.S. 364, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) invalidated *Charas*. *Rowe* found preempted a state statute governing delivery of tobacco products which required a specified recipient-verification service and prohibited delivery unless the sender or receiver had a state license. The statutes in *Rowe* dictated to whom deliveries could be made, the equivalent of *Charas*’s reference to the markets airlines serve. The Ninth Circuit has reaffirmed and cited *Charas* after *Rowe*. *ATA*, 266 F.3d at 1070-711; *Ventress*, 603 F.3d at 682.

bargained for by passengers with air carriers.” *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2013). Passengers do not choose airlines based on the employment standards applicable to contractors’ employees. *Air Transport Ass’n v. Cuomo*, 520 F.3d 218, 222 (2nd Cir. 2008), which found that a state law requiring airlines to provide food, water, electricity and restrooms to passengers during lengthy ground delays related “to the service of an air carrier,” similarly reached that conclusion because the law in question directly affected the air carrier-passenger relationship, which the Ordinance does not do. Neither these nor any other Circuits have ever held that “services” include the wages and benefits paid by contractors to their employees.<sup>40</sup>

**C. The Ordinance’s Indirect Connection To Fares and Services Is, At Most, Tenuous.**

Plaintiffs argue that regardless of the absence of any direct regulation in the Ordinance of any carrier’s “prices, routes, or services,” the Ordinance creates significant effects (1) on fares, by imposing costs which the airlines will absorb, and (2) on service, by creating an incentive to stop using contractors, who must abide by the Ordinance, and use

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<sup>40</sup> *DiFiore v. American Airlines*, 646 F.3d 81 (1st Cir. 2011) found an action applying a tipped-worker protection law to sky caps preempted. The court did not reach this conclusion based on the fact that this law regulated the employment relationship between the skycaps and the airline contractor, however. Instead, the law was found preempted because “the tip law does *more* than simply regulate the employment relationship between the skycaps and the airline.” 646 F.3d at 87 (emphasis added).

airline employees instead.

However, a statute is not preempted by the ADA unless it requires or *freezes in place* certain fares, routes, or services. See *Dan's City Used Cars, Inc. v. Pelkey*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1769, 1780, 185 L.Ed.2d 909 (2013); *ATA*, 266 F.3d at 1071 (“the question is whether the Ordinance compels or binds [the complaining airlines] to a particular price, route or service”). As Western District of Washington District Court Judge Robert S. Lasnik recently held in *Helde*, 2013 WL 5588310, \*3, “The fact that defendant’s costs will increase, even with the attendant possibility that defendant might choose to pass those costs along to consumers, does not mean that the regulation binds defendant to particular prices.”

Plaintiffs do not come close to showing that the Ordinance “compels” airlines to raise fares or alter services. Courts reject the argument (made by Plaintiffs here) that the possibility, or even the likelihood, that a state law might increase an airline’s *costs* meets the threshold of compulsion necessary to establish ADA preemption. This is why, in *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), the California prevailing wage statute survived a Federal Aviation

Administration Authorization Act (“FAAAA”) preemption challenge.<sup>41</sup>

The plaintiffs claimed that the prevailing wage would raise its prices by 25%. *Id.* at 1189. The Court found this lacked significance in terms of the pertinent legal question, noting:

Dump Truck ... argues that CPWL [California’s Prevailing Wage Law] increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, Dump Truck alleges that its rates for “services” are based on: (1) costs, including cost of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, *including prevailing wage requirements*.

While CPWL in a certain sense is “related to” Dump Truck’s prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous. We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition. Nor can it be said, borrowing from Justice Scalia’s concurrence in *Dillingham*, that CPWL falls into the “field of laws” regulating prices, routes, or services. Accordingly, we hold that CPWL is not “related to” Dump Truck’s prices, routes, and services within the meaning of the FAAA Act’s preemption clause.

152 F.3d at 1189 (emphasis in original) (citations omitted) (footnote omitted).

This Court reached the same conclusion in *Bostain v. Food*

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<sup>41</sup>In 1994, Congress passed the FAAAA, Pub. L. 103-272, which, with changes immaterial to this action, incorporated the ADA. Courts look to cases under the trucking provision of the FAAAA in interpreting the ADA. *E.g., Rowe*, 552 U.S. at 368.

*Express, Inc.*, 159 Wn.2d 700, 721 n. 9, 153 P.3d 846, *cert. denied*, *Food Express, Inc. v. Bostain*, 552 U.S. 1040, 128 S.Ct. 661, 169 L.Ed.2d 512 (2007). Addressing the question of whether hours worked by truck drivers out-of-state must be counted as “hours worked” for purposes of determining overtime wages owed pursuant to RCW 49.46.130(1), *Bostain* noted that the United States Supreme Court has “pulled back” from its earlier broad interpretation of the ADA preemption clause and followed the reasoning in *Mendonca*.<sup>42</sup>

The problem with Plaintiffs’ cost argument is that it would preempt any state regulation that imposed any cost on an airline, a result contrary to Congressional intent. *See Duncan v Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000) (no preemption of a flight attendant’s second-hand smoke law suit even though “all successful class-action tort suits invariably carry with them an economic cost” which may result in changes to operations); *Helde*, 2013 WL 5588310, \*3 (upholding Washington meal break law and characterizing the fact that the law might impose costs on carriers as “irrelevant”); *DiFiore, supra*, 646 F.3d at 89 (“We do not endorse American’s view that state regulation is preempted

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<sup>42</sup> *Accord: Calop Business Systems*, 2013 WL 6182627, \*14-15 (upholding Los Angeles living wage ordinance against ADA challenge); *Amerijet International*, 2014 WL 866406 \*5-6 (upholding Miami living wage ordinance against ADA challenge); *DiFiore*, 646 F.3d at 87 (prevailing wage laws unlikely to be preempted); *S.C. Johnson*, 697 F.3d at 558 (“no one thinks that the ADA or the FAAAA preempts” minimum wage laws).

wherever it imposes costs on airlines and therefore affects fares because costs ‘must be made up elsewhere, i.e., other prices raised or charges imposed.’”); *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 84 (2nd Cir. 1997) (rejecting argument that as a “matter of simple economics” a class-action age discrimination case’s damages would “indisputably relate to Delta’s rates.”).<sup>43</sup>

Finally, Plaintiffs argue that the Ordinance affects services by discouraging carriers from outsourcing work. Plaintiffs’ Br. at 50. This argument is premised on the wholly unsupported assertion that if an airline brought work in-house, those employees would be paid less than contractor employees. Yet contractor employees “often receive lower pay and benefits than traditional workers.” *Burlington Northern Santa Fe Railway Co. v. IBT Local 174*, 203 F.3d 703, 710 (9th Cir. 2000). Plaintiffs cannot show that the Ordinance *compels* it to stop using contractors, and absent such proof, Plaintiffs’ argument is unavailing. The trucking companies in *Mendonca* argued unsuccessfully that the prevailing wage’s 25% increase in price would “cause it to use independent owner-

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<sup>43</sup> While courts admit the hypothetical possibility that an exorbitant increase in costs could compel higher air carrier fares, *ATA*, 266 F.3d at 1071-72, Plaintiffs have introduced no facts to show that the Ordinance will in fact have any effect at all on airline ticket prices. Plaintiff Alaska Airlines has access to a treasure trove of data concerning the wage rates of its employees and contractor employees, other costs, fare and other revenue and passenger traffic. It has not presented any of these facts, and therefore has utterly failed to carry its burden of proof.

operators” rather than employees. 152 F.3d at 1189. The plaintiff in *Amerijet International* actually *ceased* providing services to third party airlines and outsourced that work following application of the Miami-Dade County living wage Ordinance. 2014 WL 866406, at \*2. Yet, that ordinance survived a preemption challenge. So should the Ordinance here.

**V. THE SUPERIOR COURT CORRECTLY HELD THAT THE ORDINANCE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION.**

**A. Introduction.**

The “dormant” Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8, cl. 3, precludes states from enacting laws or regulations that excessively burden interstate commerce. *Roussio v. State*, 170 Wn.2d 70, 75-76, 239 P.3d 1084 (2010). It “prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Bostain*, 159 Wn.2d at 718 (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994)).

To prevail on its claim that the Ordinance violates the dormant Commerce Clause, Plaintiffs would need to prove that the Ordinance is unconstitutional “beyond a reasonable doubt.” *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404, *cert. denied*, 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001). The trial court correctly held that Plaintiffs did not

meet this burden of proof, and that the Ordinance does *not* violate the dormant Commerce Clause, because a) “[t]he Ordinance clearly does not ‘discriminate on its face against interstate commerce’” such that it treats in-state and out-of-state economic interests differently in a manner that benefits the former and burdens the latter, and b) Plaintiffs did not meet their burden to show that the Ordinance places a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits” of the law. CP 1963-64 (citations omitted).

**B. The Ordinance Does Not Discriminate Against Interstate Commerce.**

The trial court correctly held that the Ordinance does not “‘discriminate on its face against interstate commerce’ because ‘discrimination’ in this context ‘simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” CP 1963 (citations omitted); *see also Rousso*, 170 Wn.2d at 79, n. 4.<sup>44</sup>

It is obvious from the text of the Ordinance that the “direct effect of the statute evenhandedly applies” to companies serving in-state and out-

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<sup>44</sup> Such discrimination usually arises when a regulation provides a competitive advantage for local business vis-à-vis their out-of-state competitors. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992) (holding statute imposing additional fee on all hazardous waste “which are generated outside of Alabama and disposed of at [Alabama facilities]” facially discriminated against out-of-state waste); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (invalidating law which advantaged local production via a tax exemption for certain liquors produced in Hawaii).

of-state customers, *Rouso*, 170 Wn.2d at 76, because the Ordinance applies to all transportation and hospitality employers within the City of SeaTac that meet certain employee thresholds.<sup>45</sup> SMC 7.45.010. As a result, only a fraction (fewer than 40) of the over 550 companies that do business at Sea-Tac Airport are covered by the Ordinance. CP 1801, ¶ 3. Conversely, numerous car rental and shuttle companies, hotels, motels and concessionaires that cater to people travelling to and from Sea-Tac Airport are not covered by the Ordinance, because they fall below the statutory thresholds for coverage. CP 1801-03, ¶¶ 4-5, 7, 8. The purpose of the Ordinance is wholly unrelated to economic protectionism but rather is to ensure minimum employment standards for workers in the City of SeaTac. *See, generally*, SMC 7.45; CP 949-50 (Voter's Pamphlet).

Because the Ordinance is wholly indifferent to whether a covered employer and its customers are local or out-of-state, the Ordinance does not discriminate against interstate commerce. *Rouso*, 170 Wn.2d at 78. *C.f.*, *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 468 (9th Cir. 2001) (upholding ordinance requiring city contractors to provide nondiscriminatory benefits, where the law did not target either out-of-state entities or entities engaged in interstate commerce); *Indep. Training and Apprenticeship Prog. v. Cal. Dept. of Indus. Rel.*, 730 F.3d 1024, 1038

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<sup>45</sup> The Ordinance makes *no reference whatsoever* to the geographic reach of the company's commercial operations or the residence of the customers served.

(9th Cir. 2013); *Bostain*, 159 Wn.2d at 718.

In sharp contrast, in the Maine state statute at issue in the case primarily relied on by Plaintiffs, the text of the statute itself distinguished between entities based on whether they did, or did not, primarily serve persons who reside within the state and directly penalized the former. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997).<sup>46</sup> Because Plaintiffs presented absolutely no evidence, much less proof beyond a reasonable doubt, substantiating their claim of discriminatory language or inevitable effect, the trial court's rejection the dormant Commerce Clause challenge should be affirmed.

**C. Any Burden on Interstate Commerce Is Not “Clearly Excessive” In Relation To The Local Benefit.**

Where “the statute does not openly discriminate and applies evenhandedly, it does not violate the dormant Commerce Clause if (1) there is a legitimate state purpose and (2) the burden imposed on interstate commerce is not ‘clearly excessive’ in relation to the local benefit.” *Rousso*, 170 Wn.2d at 76 (quoting *State v. Heckel*, *supra*, 143 Wn.2d at 832-33). *Accord: Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct.

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<sup>46</sup> In the other cases cited by Plaintiffs, the statutory language was explicitly based on geography - the only basis for the additional fee was, respectively, the origin of the waste, *Hunt*, 504 U.S. at 344, the residence of the campers, *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 100-01, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

844, 25 L.Ed.2d 174 (1970).

Here, the Ordinance serves a number of important legitimate local interests including assuring good wages, job security and paid sick and safe time for hospitality and transportation employees working in the City of SeaTac. *See, generally*, SMC 7.45. Several cases involving employment-related benefits support the district court's conclusion that Plaintiffs failed to demonstrate that any alleged burden on interstate commerce was "clearly excessive in relation to the putative local benefits" of the Ordinance. CP 1964.

In *Bostain*, the Washington Supreme Court rejected a dormant Commerce Clause challenge to overtime provisions of the state Minimum Wage Act. 159 Wn.2d at 718. "Assuring proper compensation for Washington employees is an important legitimate local interest served by the overtime provisions," *id.* at 719, and no burden on interstate commerce existed where the law regulated "only employers who are doing business in Washington and who have hired Washington-based employees." *Id.* at 721. *Accord: Indep. Training and Apprenticeship Prog.*, 730 F.3d at 1038-39 (improving graduating apprentice's chances to obtain employment in a specific trade within a particular geographic area was a "putative local benefit" that outweighed any burden on interstate commerce caused by apprenticeship program test); *Sullivan v. Oracle*

*Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (labor code provision requiring an employer to pay resident *and* non-residents employees overtime raised no plausible dormant Commerce Clause argument); *S.D. Myers, Inc.*, 253 F.3d at 471 (absent specific details as to how the costs of the Ordinance burdened interstate commerce, the benefit of ensuring nondiscriminatory employment benefits for City contractors was not clearly outweighed by a burden on interstate commerce).<sup>47</sup>

Finally, Plaintiffs' appeal to "common sense" as proof of a dormant Commerce Clause violation is unavailing. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 39 (1st Cir. 2007) (denying a party's "naked appeal" to logic and explaining that conjecture "cannot take the place of proof."). The superior court thus correctly held that Plaintiffs failed to demonstrate that important local interests served by the Ordinance are substantially outweighed by any burden on interstate commerce. CP 1964.<sup>48</sup>

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<sup>47</sup> *See also In re Tourism Assessment Fee Litig.*, 391 F. App'x 643, 644, 2010 WL 3069916 (9th Cir. 2010) (upholding regulation which requires that rental car companies pay an assessment for each rental car transaction that commences at an airport or hotel location; program did not discourage rental car companies from serving out-of-state customers).

<sup>48</sup> Even if there were evidence (there is none) that the Ordinance might raise a business's costs and make it less competitive, that would not constitute a "burden" on interstate commerce. *Nat'l Solid Waste Mgm't Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004), *cert. denied*, 546 U.S. 812, 126 S.Ct. 332, 163 L.Ed.2d 45 (2005); *Bostain*, 159 Wn.2d at 721 ("We are not convinced that a commerce clause violation occurs when an employer is subject to additional expense...").

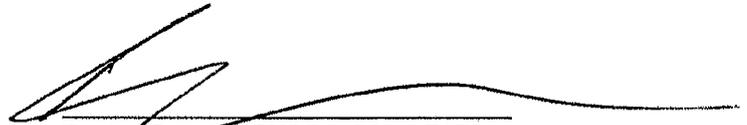
**VI. THE COURT SHOULD UPHOLD ANY PART OF THE ORDINANCE NOT STRUCK DOWN.**

As was noted in the Committee's Counter-Statement of the Case, *supra*, the primary purpose of the Ordinance is to ensure that, to the extent reasonably practicable, all people employed in the hospitality and transportation industries in the City of SeaTac have a living wage, job security, paid sick and safe time, and certain other improved conditions of employment. This purpose is not limited, as Plaintiffs contend, to companies doing business at the Airport, Plaintiffs' Br. at 5, but rather the Ordinance applies even-handedly to all employers who meet the statutory employee or other thresholds for coverage. Plaintiffs have put forth no evidence or persuasive reasoning that the Ordinance would not have passed if it applied to fewer than all of the employers and employees it covers or if it provided fewer improved conditions of employment. This Court should affirm the trial court's ruling, CP 1947, that the invalidity of one portion of the Ordinance does not invalidate the remainder.

**CONCLUSION**

For all of the foregoing reasons, the Good Jobs Ordinance is valid in its entirety, it does not contravene the Washington State or U.S. constitutions, and it is not preempted by the NLRA or the ADA. This Court should affirm all portions of the trial court's order upholding the Ordinance.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 2014.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of May, 2014, I caused the foregoing Committee's Reply Brief and Cross-Response Brief to Cross Appeal to be sent via UPS Overnight Delivery to the Clerk of the Supreme Court, and a true and correct copy of the same to be sent via UPS Overnight Delivery to:

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Washington State Supreme Court

NO. 89723-9

MAY - 2 2014

**Ronald R. Carpenter**  
Clerk  
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and  
WASHINGTON RESTAURANT ASSOCIATION,  
Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,  
Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,  
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,  
Appellant/Cross-Respondent.

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**APPENDIX TO REPLY BRIEF AND CROSS-RESPONSE BRIEF  
OF APPELLANT SEATAC COMMITTEE FOR GOOD JOBS**

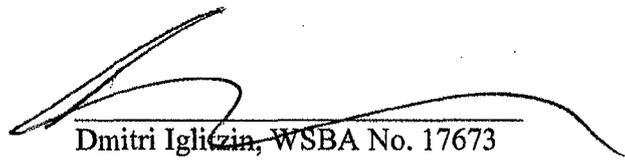
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## INDEX TO APPENDIX

APPENDIX PAGE NUMBER	DESCRIPTION
1-23	SeaTac Committee for Good Jobs' Emergency Motion for Discretionary Review (COA Div. I – 70758-2-1)

Respectfully submitted this 1<sup>st</sup> day of May, 2014.



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I hereby certify that on this 1<sup>st</sup> day of May, 2014, I caused the foregoing Appendix to Reply Brief and Cross-Response Brief of Appellant SeaTac Committee For Good Jobs to be delivered via UPS Overnight Mail to the Clerk of the Supreme Court, and a true and correct copy of the same to be delivered via UPS Overnight mail to:

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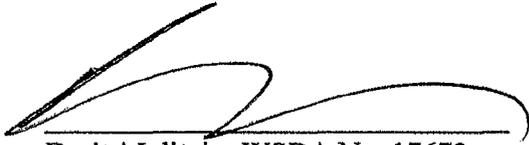
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# Appendix

NO. \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

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

v.

CITY OF SEATAC,  
Respondents/Defendants,

and

SEATAC COMMITTEE FOR GOOD JOBS,  
Petitioner/Intervenor.

---

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

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**A. IDENTITY OF PETITIONER**

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

**B. DECISION BEING APPEALED**

The Committee is appealing King County Superior Court’s August 26, 2013, Order Granting Plaintiffs’ Motion and Application for Writs of Review, Mandate and Prohibition and Issuing Writs of Review, Mandate, and Prohibition (“the Order”), a copy of which is attached hereto. A-6-16.<sup>1</sup>

**C. ISSUES PRESENTED FOR REVIEW**

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

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

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<sup>1</sup> All “A-\_\_” references refer to documents in the Appendix submitted with Petitioner’s Emergency Motion for Discretionary Review.

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

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

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

**D. STATEMENT OF THE CASE**

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

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

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

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

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

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

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

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

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

**E. ARGUMENT**

**1. Standard for Discretionary Review.**

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

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

RAP 2.3(b)(2).

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup>See also, RCW 35.21.005(4).

upon which such determination was begun, which date shall be referred to as the terminal date.

...

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

...

**(10) The officer or officers responsible for determining the sufficiency of the petition shall do so in writing and transmit the written certificate to the officer with whom the petition was originally filed.** (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

This category’s signatures are included at A-429-505. As demonstrated, seven signatures *did* contain at least partial dates, despite the characterization made by the Plaintiffs to the Board.<sup>5</sup> The remaining 138

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

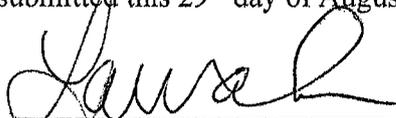
resulted in total disenfranchisement of enough petitioners to prevent certification of the initiative for the ballot. This easily satisfies the “significant disenfranchisement” element the Ninth Circuit expressed in *Bennett*. Rejecting the original signatures now without any notice thus violates the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

**F. CONCLUSION**

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

Respectfully submitted this 29<sup>th</sup> day of August, 2013.

By:



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## CERTIFICATE OF SERVICE

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

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