NO. 100609-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 37662-1-III; Cons. No . 37689-3-III)

In the Matter of Confidential Consumer Protection Investigation

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KING FUJI RANCH, INC., KING FUJI RANCH, MT TRAGGARES, INC. DBA ARETE VINEYARDS BENCH ONE, INC., KING ORGANICS, INC.

Petitioners,

vs.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL

Respondent.

APPELLANTS' PETITION FOR REVIEW

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1. INTRODUCTION

The Attorney General (AG) served a Civil Investigative Demand (CID) on King Fuji. The stated purpose was to investigate possible "representations or omissions to obtain certification that there are insufficient U.S. workers for particular crop production and harvest in the area and [obtain] permission to hire foreign guest workers."

Only the U.S. Department of Labor has the authority to grant such certification and permission under the Immigration and Nationality Act (INA). When King Fuji asserted the matter was preempted and it was not the role of the AG to enforce the federal Act, the AG argued the purpose of the CID was not what was written in the CID and it changed the purpose and focus of the investigation several times to evade preemption. In all variations of the explanation, the AG stated that the representations, misrepresentations, or omissions it seeks to investigate were "made within the context of obtaining certification... to obtain permission to hire foreign gust workers

under the H-2A program." Despite the changing justifications, the AG never amended the CID.

The Court of Appeals' Opinion did not address whether the CID is preempted as written, instead, the Court addressed whether the AG's subjective intent was preempted. The Court of Appeals inappropriately accepted the AG's claim that the purpose of the CID was something other than the purpose explicitly stated in the CID. Statements and arguments of counsel are not evidence, and the subjective intent of a party cannot vary the terms of a written document. Even if the Court were to accept the AG's varying explanations, the CID is still preempted by the INA.

This is a case of first impression which addresses the constitutional limitations on the authority of the Washington Attorney General.

2. IDENTITY OF THE PETITIONER

Petitioners are the Appellants, King Fuji Ranch, Inc., King Fuji Ranch, ML Taggares, Inc. dba Arete Vineyards, Bench One, Inc., and King Organics, Inc. (collectively King Fuji).

3. COURT OF APPEALS DECISION

In re Confidential Consumer Protection Investigation, King Fuji, et. al. v Washington Office of the Attorney General, No. 37663-I-III, 2021 WL 5813794 (December 7, 2021).

4. ISSUES PRESENTED ON REVIEW

1. Is the Attorney General's attempt to investigate statements made for the purpose of obtaining certification and permission to hire foreign guest workers preempted by the Immigration and Nationality Act?
2. Is it proper for a court to allow the Attorney General to vary the stated written purpose of a Civil Investigative Demand?
3. If the Attorney General is permitted to vary the stated written purpose of the Civil Investigative Demand through

argument, is the investigation of alleged false and misleading statements to domestic workers preempted by the INA because such statements are required to be referred to the United States Department of Justice?

4. Did the Attorney General violate Article 1 Section 7 of the Washington Constitution by issuing a civil investigative demand that lacked "authority of law"?

5. Did the Civil Investigative Demand violate the Fourth Amendment of the United States Constitution because the inquiry was not within the scope of the authority of the Attorney General, the demand was too indefinite, and the information sought was not reasonably relevant?

5. STATEMENT OF THE CASE

The Attorney General determined that it would investigate King Fuji's application to the federal government to obtain foreign guest workers under the H-2A program. The CID stated the AG would investigate:

> unfair or deceptive representations or omissions to obtain certification that there are insufficient U.S.

> workers for particular crop production and harvest in the area in order to obtain permission to hire foreign guestworkers under the H-2A program. (CP 00016)[1]

On September 19, 2019, the AG filed a Petition in Thurston County Superior Court to Prohibit Disclosure of the CID and a Motion to Seal the Court File, so the file is "not made accessible to the public." (CP 00006) and requested the Thurston County court retain jurisdiction (CP 00006). The AG obtained *ex-parte* orders from the Thurston County Superior Court (1) prohibiting disclosure of the Civil Investigative Demand (CP 00078), (2) retaining jurisdiction (CP 00078), and (3) sealing the file (CP 00080). The AG was aware King Fuji did not have offices or do business in Thurston County. The AG did not ask the court to authorize the CID to be issued.

A CID dated September 23, 2019, copies of the Thurston County Orders, and a letter from the AG (CP 0204) were served

[1] CP references Clerk's Papers in case number 376621. CP1 references Clerk's Papers in case number 376893.

on King Fuji at its offices in Richland, Washington. (CP 0083). The CID had not been authorized be a judge.

In response to the CID, and as authorized by RCW 19.86.110(8), King Fuji filed a Petition to Set Aside or Modify the CID in Grant County Superior Court on October 11, 2019 (CP1 0001). The Petition was amended on October 21, 2019 (CP1 00060).

On December 4, 2019, King Fuji filed motions in Thurston Superior Court to vacate the ex-parte orders (CP 0121). King Fuji had previously filed a motion to change venue (CP 0096) and release the sealed court records to counsel (CP 00113). The AG opposed those motions asserting King Fuji violated the non-disclosure order by filing the statutorily authorized Petition to Set Aside in Grant County. (CP 00156). The court ordered venue to be transferred to Grant County but did not rule on the other King Fuji motions, passing the decision to the Grant County judge. (CP 00002).

On March 10, 2020, the Grant County Superior Court held a hearing on King Fuji's motions. The AG opposed those motions and simultaneously motioned to uphold and enforce the *ex-parte* Thurston County orders. (CP 00363). The judge vacated the order sealing the file and prohibiting disclosure. (CP 00429).

Argument was held on the King Fuji's Petition to Vacate and the AG's Motion to Enforce the CID on June 12, 2020. The judge denied King Fuji's Motion to Vacate (CP1 00071) and granted the AG's Petition to Enforce. (CP 00430).

King Fuji timely appealed. (CP 00434) and (CP1 00153). The cases were consolidated. On December 7, 2021, Division III of the Court of Appeals issued an opinion upholding the trial court's order enforcing the CID.

The Court of Appeals acknowledged that the AG initially represented to the Thurston County Superior Court that it believed King Fuji may be abusing the H-2A program and broadly identified the false representations King Fuji allegedly made to federal and state agencies. *In re Confidential Consumer*

Protection Act Investigation. King Fuji et. al. v. Washington State Office of the Attorney General, 2021 WL 5813794, at *4 (Wash. Ct. App. Dec. 7, 2021). However, the Court of Appeals accepted that AG's argument that "it is interested in misrepresentations made to U.S. farmworkers" and discounted the explicit language of the CID and that the alleged misrepresentations were made in the context of "obtain[ing] certification that there are insufficient U.S. workers for particular crop production and harvest in the area in order to obtain permission to hire foreign guestworkers under the H-2A program." *Id.* (internal quotations omitted); CP 00016. Based on this characterization of the purpose of the CID, the Court of Appeals held that the CID is not preempted.

Regulating the federal H-2A program is not within the AG's authority. Even if the AG's characterization of the CID is accepted, the AG seeks to investigate alleged preferential treatment of alien workers. The authority to investigate such conduct was specifically delegated by Congress to the U.S. DOL.

8 U.S.C. 1188(a)(1); *Overdevest Nurseries, L.P. v. Scalia*, 454 F.Supp.3d 46, 56-57 (D.D.C. 2020), *aff'd sub nom. Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977 (D.C. Cir. 2021).

6. ARGUMENT

a. The Standard for Accepting a Petition for Review

A petition for review will be accepted by this Court:

...

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

This Court should accept review because the Court of Appeals' ruling is contrary to law, involves a significant question of law under the United States Constitution, and involves issues of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals' decision does not just affect King Fuji or this lawsuit. The decision implicates all private individuals and business owners in this State, and begs the question: is there a limit to the AG's investigative authority under the Consumer Protection Act, or can the AG simply change the stated purpose of a Civil Investigative Demand after it is issued?

b. The Immigration and Nationality Act Preempts the Attorney General's Use of a Civil Investigative Demand to Investigate Matters of Federal Concern.

The Constitution vests the federal government with "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012) (*citing* U.S. Const. Art. I § 8 Cl. 4); *Chirac v. Chirac*, 15 U.S. 259, 268, 2 Wheat. 259 (1817) ("The power of naturalization is exclusively in Congress does not seem to be, and ought not to be controverted").

Under that power, in 1952 Congress enacted the Immigration and Nationality Act (INA) 8 U.S.C. § 1101 et seq.

which "set the terms and conditions of admission to the country and subsequent treatment of aliens lawfully in the country." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011). Congress amended the INA with the Immigration Reform Control Act of 1986 to permit employers to hire temporary non-immigrant agricultural workers (H-2A workers).[2] This provides the exclusive mechanism to obtain and use the services of these workers. (The process established by statute and regulation is attached as Appx 1).

State laws that "interfere with or are contrary to" the Constitution or federal law are invalid under the Supremacy Clause. Article VI of the U.S. Constitution dictates that federal law is "the supreme law of the land." "Federal regulations possess an equally preemptive effect as federal statutes." *Goodwin v. Bacon*, 127 Wn.2d 50, 57 (1995).

[2] A non-immigrant worker (alien) is one "having a residence in a foreign country which he has no intention of abandoning who is coming to the United States to perform agricultural labor or services . . . ." 8 U.S.C. § 1101(a)(15)(H)(ii)(A).

"The constitutional principles of pre-emption... are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Assn. of St. Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971).

"Policing fraud against federal agencies is hardly a 'field which the States have traditionally occupied.'" *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347 (2001). To the contrary, the relationship between a federal agency and what it regulates is inherently federal in character because the relationship originates from, is governed by and according to, federal law and regulations.

Under the Preemption Doctrine, federal law preempts state law if:

1. The federal law contains an express preemption clause. *Arizona*, 567 U.S. at 399.

2. The federal law impliedly preempts state law. *Arizona*, 567 U.S. 400-408.
3. The federal regulatory scheme is so pervasive as to "occupy the field" in an area of law. *Glade v. Nat'l Solid Waste Mgmt. Assn.*, 505 U.S. 88, 98 (1992).
4. The state law is an obstacle to the accomplishment and execution to the full purposes and objectives of Congress. *Arizona*, 567 U.S. at 406.
5. The conduct is "arguably prohibited or protected" by the Act. *San Diego Bld. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

See also: All Pure Chemical v. White, 127 Wn.2d 1,6 (1995).

c. The INA Expressly Preempts the CID.

When analyzing an express-preemption provision, courts "focus on the plain wording of the" statute, "which necessarily contains the best evidence of Congress' preemptive intent." *Whitling*, 563 U.S. at 594. Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its

structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The plain, clear, and express language of 8 U.S.C. § 1188 governs qualifications for admission of H-2A workers and treatment, and evidences Congress' clear preemptive intent. The statute provides:

> The provisions of subsections (a) and (c) of section 1184 of this title and the provisions of this section preempt any state or local law regarding the admissibility of non-immigrant workers.

8 U.S.C. § 1184, which governs the petition of an employer for the admission of nonimmigrants, provides:

> (c)(1) The question of importing any alien as a nonimmigrant under subparagraph . . . in any specific case or specific cases shall be determined by the Attorney General, …
>
> (2)(A) The Attorney General shall provide for a procedure [for employers to petition for nonimmigrant workers] …
>
> (C) The Attorney General shall provide a process for reviewing and acting upon petitions under this subsection …
>
> [and]

> (14)(A) If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition—[the Secretary may impose administrative remedies or deny petitions].
>
> 8 U.S.C. § 1184(c).

8 U.S.C. § 1184(c)(14)(A)-(D) prescribes the penalties for "willful misrepresentation of a material fact" and preempts state law.

The regulations address the exclusive means to report, investigate, and resolve what the AG seeks to investigate under the guise of the CPA. The regulations have the same preemptive effect as the statute. *Goodwin*, 127, Wn.2d at 57.

It does not matter whether the alleged false and misleading statements were made to the USDOL, SWA (ESD), or domestic workers the INA regulations' dictate the exclusive method to address the allegations. If the allegations involve "fraud or

misrepresentations" the complaint "must" be referred to the SWA (ESD) which "must" refer it to the USDOL for "appropriate handling and resolution". 20 C.F.R. § 655.185(a). If the allegations involve unfair or deceptive representations to U.S. workers, the same regulations apply with the addition that if such statements to U.S. workers "discouraged an eligible U.S. worker from applying . . . or otherwise discriminated against an eligible U.S. worker the complaint 'must' be referred to the USDOJ." 20 C.F.R. 655.185(b).

The regulations do not contemplate or authorize the state to conduct investigations into the allegations. There is no private right of action under the INA, including actions brought by states. *Chavez v. Freshpict Foods*, 456 F.2d 890, 893 (10th Cir. 1972); *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 641 (9th Cir. 1984). The plain reading of the text of the regulation requires the state to refer allegations to the USDOL and USDOJ.

The AG acknowledged that any alleged false or misleading statements made by King Fuji were made to comply

with 8 U.S.C. 1188(a)(1) and 20 CFR 655.100. *Attorney General's Response Brief*, at 5. However, the Court of Appeals accepted the AG's argument that, "The State is not investigating King Fuji's compliance with the requirements of the H-2A program: it is investigating King Fuji's unfair and deceptive practices toward U.S. workers and the state labor market." *Id.* at 10. The AG contended (and the Court of Appeals accepted) that the AG is investigating purported preferential treatment of alien workers.

However, the AG does not have the authority to investigate statements made as part of an application to hire workers under the H-2A guest worker program, or preferential treatment of alien workers. The INA provides a comprehensive and exclusive means for investigating the very conduct the AG intends to investigate.

"There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona*, 567 U.S. at 399. In

addition, Congress may preclude states from regulating conduct in an entire field, and the "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Congress indicated that 8 U.S.C. 1188(a) & (c) preempt state law: "The provisions of subsections (a) and (c) of section 1184 of this title and the provisions of this section [8 U.S.C. 1188] preempt any state or local law regarding the admissibility of non-immigrant workers." 8 U.S.C. 1188(h)(2).[3] As recognized by the D.C. Circuit,

> The clear intent of this provision [8 U.S.C. 1188(a)(1)] is to protect American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working

[3] 8 U.S.C. 1184(c)(14)(A)-(D) prescribes the penalties for "willful misrepresentation of a material fact."

> conditions. Congress was concerned about (1) the American workers who would otherwise perform the labor that might be given to foreign workers, and (2) American workers in similar employment whose wages and working conditions could be adversely affected by the employment of foreign laborers.

Mendoza v. Perez, 754 F.3d 1002, 1017 (D.C. Cir. 2014). Thus, Congress enacted 8 U.S.C. 1188(a)(1) to address the very dangers the AG contends that it has the authority to investigate, and explicitly preempted state or local law regarding the same.

With this intent to protect American workers, Congress explicitly delegated to the U.S. DOL the authority "to implement that mission through the creation of specific substantive provisions" and to determine "how to ensure that the importation of farmworkers met the statutory requirements." *Overdevest Nurseries, L.P.*, 454 F.Supp.3d at 56-57, *aff'd sub nom. Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977 (D.C. Cir. 2021). Congress delegated to the U.S. DOL the authority to determine how to ensure that the importation of H-2A workers "will not adversely affect" U.S. workers. Accordingly, Congress

delegated to the U.S. DOL the authority to determine how to protect the persons the AG contends that King Fuji harmed.

Pursuant to this authority, the U.S. DOL implemented 20 C.F.R. 655.122, which specifically prohibits "preferential treatment of aliens." Within the same Subpart, the U.S. DOL codified the methods for complaints and addressing such complaints, which require that complaints involving allegations of fraud or misrepresentations "must be referred" by the SWA to the Office of Foreign Labor Certification, and "complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same" will be referred to the US DOJ. 20 C.F.R. 655.185.

If the Court accepts the AG's characterization of the changes purpose of the CID at face value, the CID is still preempted. 8 U.S.C. 1188(a)(1) explicitly preempts state law regarding the admissibility of non-immigrant workers (pursuant

to 8 U.S.C. 1188(h)(2)). Congress enacted 8 U.S.C. 1188(a)(1) to protect U.S. workers, specifically granted the authority to adopt regulations to carry this purpose to the U.S. DOL, and the U.S. DOL has enacted a comprehensive scheme pursuant to that authority.

Thus, the AG's use of a CID under the CPA is expressly preempted.

d. Congress Intended to Occupy the Field.

Even without an express preemption provision, state law must yield to a congressional Act if Congress intends to "occupy the field." *California v. ARC Am. Corp*, 490 U.S. 93, 100 (1989). Field preemption occurs where Congress' "framework of regulation [is] 'so pervasive . . . that Congress left no room for states to supplement it'" or "where a 'federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 567 U.S. at 399 (*quoting Rice.*, 331 U.S. at 230) "Where Congress occupies an entire field . . . even complimentary state regulation

is impermissible." *Id.* at 401. This is because the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the INA. *Himes v. Davidowitz*, 312 U.S. 52, 67 (1941). "Field preemption reflects a Congressional decision to foreclose any state regulation in the area even if it is parallel to federal standards." *Id.* Even state regulation designed to protect vital state interests must give way to paramount federal legislation. *DeCanas v. BICA*, 424 U.S, 351, 357 (1976).

The INA statute and regulations provide a comprehensive and exclusive procedure for entry of non-immigrant H-2A workers, a procedure that involves federal investigation, and penalties for violations. An employer seeking H-2A workers making a false statement or concealing material facts are subject to civil and criminal penalties. 18 U.S.C. § 1001(a)(1-3); 18 U.S.C. § 1546(A) [fines and penalties]; 20 C.F.R. § 655.181(b)(3) [revocation of certification]; 20 C.F.R. § 655.182(a) [debarment]. The USDOL and U.S. DOJ, Civil

Rights Division, investigate and enforce the requirements of the INA—not the Washington Attorney General. C.F.R. § 655.185.

Congress intended that there be a uniform interpretation of the INA administered by the federal government. To achieve this objective, the USDOL, and USDOJ investigate and act when there are allegations of fraud, misrepresentations, or omissions. To allow the AG, to inquire and enforce the requirements of the INA would interfere with the exclusive federal scheme and create multiple interpretations and applications of the requirements of an Act which is exclusively within the province of the federal government. *See Kahn v. INS*, 36 F.3d 1412, 1414-15 (9th Cir. 1994) (interpretations of the INA that vary according to the forum are not permissible).

e. The AG's CID Undermines the Uniform Interpretation of the INA.

The Ninth Circuit has "repeatedly recognized that immigration laws should be applied uniformly across the country

without regard to the nuances of state law." *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000).

> The INA was designed to implement a uniform federal policy and the meaning of concepts important to its application are not to be determined according to the law of the forum, but rather require a uniform federal definition.
>
> *Kahn*, 36 F.3d at 1414.

Interpretations of the INA that vary according to forum or state law are not permissible. *Id.* at 1414-15. The Washington Supreme Court recognized:

> a concurrent power in the States would bring back all the evils and embarrassments which the uniform rules of the Constitution was designed to remedy . . . This power must necessarily be exclusive . . . because, if each state had the power to prescribe a distinct rule, there could be no uniform rule.
>
> *State v. Libby*, 47 Wash. 481, 483 (1907)

The real likelihood of varying interpretations of the INA precludes the AG's investigation under state law.

f. Separate Remedies

A state law is also preempted if it conflicts with a federal statute. *ARC Am. Corp.*, 490 U.S. at 100; *Davidowitz*, 312 U.S. at 66-67. The Court has held that "conflict is imminent whenever two separate remedies are brought to bear on the same activity." *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282, 286 (1986); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000) ("inconsistency of sanctions . . . undermines the congressional calibration of force.")

The INA provides specific penalties and sanctions for violating its requirements including for false statements or material omissions. 18 U.S.C. § 1001(a); 8 U.S.C. § 1188(b)(2)(A); 20 C.F.R. § 655.183(a); 20 C.F.R. § 655.184(a), (b); 8 U.S.C. § 1324c(a). The determination that a violation occurred and the penalty to be imposed is that of the federal government, considering established factors to determine whether a violation is substantial. 20 C.F.R. § 655.182(e)(f). The state CPA provides very different penalties including actual

damages, attorney fees, costs, and treble damages (RCW 19.86.090); civil penalties (RCW 19.86.140); and injunctive relief. (RCW 19.86.090).

The AG's assertion that it can use the CPA to investigate alleged misrepresentation occurring in the H-2A certification process creates a very real risk that penalties imposed by the state under the CPA will be inconsistent and dissimilar to those contemplated by Congress. Thus, the AG's action is preempted.

g. The Attorney General's attempt to change the purpose of the CID is not appropriate.

Perhaps the AG recognized the stated purpose of the CID was preempted. The AG initially represented to the Thurston County Superior Court that it was concerned about abuse of the H-2A program, but later argued that it was only interested in investigating misrepresentations to U.S. farmworkers. *See In re Conf. Cons. Prot. Act Inv.*, 2021 WL 5813794, at *4. This explanation was accepted by the Court of Appeals, despite the language of the CID itself.

The AG change the purpose three times. The first was to claim the AG was investigating "representations or omissions to the Washington Employment Security Department (ESD) and USDOL." (CP 00365-367) The second was to claim the purpose was to investigate "misrepresentations or omissions . . . about the actual criteria and qualifications for the job . . ." The third was to investigate "unfair or deceptive representations to U.S. agricultural workers . . ." (CP 00448:2, 0097:18) In all variations the AG asserted the representations, misrepresentations, or omissions it seeks to investigate were "made within the context of obtaining certification . . . to obtain permission to hire foreign guest workers under the H-2A program." (CP1 0097:18-21; 00448:2-4; 00016). Despite the changing justifications, the AG never amended the CID.

Like contract interpretation or statutory construction, the unexpressed subjective intent of a party cannot vary the plain meaning of a document. Courts impute an intention corresponding to the words used. The subjective intent of a party

is irrelevant when the intent can be derived from the plain meaning of the words used. *Hurst Communications Inc. v. Seattle Times Co.* 154 Wn2d 493, 503-504 (2005). There is no reason that rule should not apply here.

Courts make decisions based upon admissible evidence. Argument of counsel is not evidence, and unsworn statements are not competent evidence. *Johnson v Smith*, 181 Wn. 146, 151 (1921). "Bare assertions in appellate briefs do not constitute evidence." *Hill v. BTI Income Fund-I*, 144 Wn.2d 172, 193 n.20 (2001) (*citing Major Products Co. v. N.W. Harvest Products Inc.*, 96 Wa. App 405, 410-11 (2001)). An attorney cannot make unsworn statements of fact which the court may consider as establishing facts; judges cannot rely upon unsworn statements as basis for making factual determinations, *Leon Shaffer Advertising Inc v Cedar*, 423 So.2d 1015, 1016-17 (Fla. Dist. Ct. App. 1982).

The Court of Appeals improperly accepted the AG's varying subjective purpose because there was no evidence to support the assertion. The only evidence was the CID.

h. If the Attorney General is permitted to change the focus of the CID investigation to unfair or deceptive statements to domestic workers, the matter is still preempted.

If the AG is investigating false and misleading statements to domestic workers, the matter is preempted. The regulations provide:

> If the complaint alleges "an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same," the SWA (ESD) **must** refer it to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. 20 C.F.R. § 655.185(b). (emphasis added).

The regulations provide penalties for violation of the INA and regulations. 20 C.F.R. § 655.181(a) (fraud and misrepresentation); 20 C.F.R. § 655.181(a) (improperly rejected domestic workers); 20 C.F.R. § 655.182(e)-(f) (assessment of penalties).

The attempt to investigate alleged false and misleading statements to domestic workers is preempted because it violates the principle of uniformity and allows two separate remedies are brought to bear on the same activity. The inconsistency of sanctions undermines the congressional calibration of force. (*See* pages 19-20 *supra*).

i. Constitutional Issues

In *State v. Butterworth*, 48 Wn. App. 152 (1987) the Court of Appeals recognized:

> The Legislature may not confer upon the Utilities and Transportation Commission the judicial power to determine the constitutional rights of citizens. If citizens have a constitutionally protected privacy interest in their unpublished telephone listings, then the Commission cannot render warrantless disclosure of those listings lawful by the simple expedient of adopting a rule to that effect.
>
> *Butterworth*, 48 Wash.App. at 158.

The CID was based solely on claimed statutory authority without court approval.

The Legislature cannot circumvent the Washington Constitution and grant the AG the power to determine the constitutional rights of citizens without court oversight.

An administrative subpoena or similar order that is unreasonable violates the Fourth Amendment. Washington courts apply the test set forth by the Unites States Supreme Court in *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946), and *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). *See Steele v. State ex rel. Gorton*, 85 Wn.2d 585, 594 (1975). The three-part test is: (1) the inquiry must be within the authority of the agency, (2) the demand must not be too indefinite, and (3) the information sought must be reasonably relevant. *Steele*, 85 Wn.2d at 594.

The CID fails this test. First, the inquiry is not within the scope of the agency's authority. Although under the guise of the CPA, the real inquiry is about alleged false statements to the federal government in the H-2A application. That subject is

preempted and within the exclusive purview of the federal government.

Second, the information must be reasonably relevant. Because the matter is preempted, the information cannot be relevant as the investigation is outside the authority of the AG.

7. Conclusion

The Petitioners request this court grant the Petition for Discretionary Review.

Certificate of Compliance: I hereby certify there are 4956 words contained in this Petition.

RESPECTFULLY SUBMITTED this 6th day of January, 2022.

s/*Gary E. Lofland, WSBA No. 12150*
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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that I caused a copy of this document to be sent to the attorneys of record listed below as follows:

For Respondent: Mr. Patricio A. Marquez Mr. Matthew Geyman Office of the Attorney General of Washington Consumer Protection Division 800 fifth Avenue, Suite 2000 Seattle, WA 98104-3188	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery

DATED this 6th day of January, 2022, at Yakima, Washington.

Sheri Jones, legal assistant
MEYER, FLUEGGE & TENNEY, P.S.

MEYER, FLUEGGE & TENNEY

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Appellate Court Case Title:	In re: Confidential Consumer Protection Investigation
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