No. 1024843

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION, UFCW 3000 and SEIU HEALTHCARE 1199NW, on behalf of certain of the employees they represent,

Respondent,

v.

MULTICARE HEALTH SYSTEMS,

Appellant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals, Division One, recognized that WAC 296-126-030 controls the issues in this case. That regulation permits adjustments to employees' future paychecks to recoup overpayments that were "infrequent" and "inadvertent." As a result of overpayments stemming from a criminal cyberhack that shut down its entire payroll system, MultiCare Health System ("MultiCare") undertook such adjustments to certain employees' paychecks in the spring of 2022. The Petitioner Unions[1] objected and brought this lawsuit. The trial court granted the Unions summary judgment, but the Court of Appeals found[2] that genuine issues of fact require a trial. At issue, the appellate court found, are disputed facts as to whether MultiCare's overpayments met the plain language

[1] The Washington State Nurses Association, UFCW Local No. 3000, and SEIU Healthcare 1199NW (hereinafter, the "Unions").
[2] *WSNA, UFCW 300, and SEIU Healthcare 1199NW v. MultiCare Health System,* __ Wn. App.2d __, 535 P.3d 480 (2023), attached to Petition for Review as Appendix A (hereinafter, the "Opinion," abbreviated "Op.")

definition of "inadvertent" and "infrequent," which must be resolved by a jury.

Now the Unions claim that the Opinion was wrong. But this Court does not take up petitions for review simply because a petitioner believes the result reached by the appellate court was incorrect. Instead, the Unions must show a reason under RAP 13.4(b) why the Court should accept review. The Unions have failed to make that showing.

Moreover, the decision reached by the Court of Appeals was correct. To the extent the Opinion erred at all, it was in not granting summary judgment to MultiCare. Therefore, because the Unions' briefing (1) fails to show a valid reason why this Court should accept review under RAP 13.4(b), and (2) fails to show error in the Opinion, the Court should deny the Unions' Petition for Review (hereinafter, the "Petition").

II. STATEMENT OF THE CASE

A. Background

MultiCare is a not-for-profit healthcare organization that serves patients throughout the state of Washington. CP 304. The Unions in this case represent many of the employees who received overpayments, and each of these employees' terms and conditions of employment is governed by provisions of their respective collective bargaining agreements ("CBA"). *Id.* These CBAs contain a myriad of job classifications, pay schedules with different rates of pay depending on years of service, pay differentials, premiums, incentives, and other payment provisions, some requiring payment to the employee of a flat amount, a percentage of the employee's pay, or other scheme. *See generally* CP 305. As a result, for any given hour of pay due to the thousands of employees represented by the Unions, there are literally *hundreds* of possible applicable pay rates, and many times there are multiple pay rates applicable to the same employee in any given pay period. *Id.*

MultiCare relies on a payroll system supplied by Ultimate Kronos Group, Inc. ("Kronos"). CP 310-15. Kronos is fully integrated into every aspect of MultiCare's payroll process. It records employee "punch clock" data and uses it, along with the complex system of formulaic pay variables described above, to calculate each employee's paycheck amount. CP 305-06. In this way, MultiCare, like many other large employers, is able to manage the dazzling array of bargained-for pay variables in each of the dozens of CBAs to pay its approximately 20,000 employees accurately. *Id.* Indeed, every two weeks, its payroll group issues more than 19,500 individual paychecks. *Id.*

B. The Kronos Hack and Pay Advances

From December 12, 2021, until late January 2022, MultiCare's Kronos payroll system was rendered inaccessible by a large-scale "ransomware" attack perpetrated by criminal

hackers. CP 306, 316-17. Based on the competent evidence[3] in the record, there existed no practical (or indeed, possible) way for MultiCare to calculate the payments owed in wages to each of its nearly 20,000 employees during that time. CP 306.

To ensure that its employees would ultimately be paid correctly, MultiCare directed them to record their time in a simple program called TimeStamp, a program incapable of performing the complex calculations of pay that Kronos performs. CP 306-07.

As a result, while Kronos remained down, MultiCare paid advances to its employees with the express admonition that it would later adjust these payments to account for any amounts—lower or higher—inadvertently paid during the outage period. CP 307. The specific amount of each advance was whatever the employee had been paid in the pay period prior to the hack, minus certain incentive payments that were

[3] Cf. CP 219–20, 263 (claims about what MultiCare 'could" have done offered by employees with no payroll processing experience).

not included in the employee's pay via Kronos. CP 522. This pay period was selected because it would include the most accurate roster of individuals employed with MultiCare at the time. *Id.*

In light of the constraints in infrastructure noted above, MultiCare supervisors and managers were given the ability to report the hours an employee worked in limited situations where the employee's hours were significantly different than the hours assumed in their advance (for example, "per diem" employees who typically do not work a set schedule). CP 522-23. MultiCare processed approximately 500 to 1,000 requests to manually change some employees' advance amounts. *Id.* It did so knowing that, like all the other advances, these payments would be reconciled at the end of the emergency when Kronos was restored, in a process known as a "true-up." *Id.*

MultiCare made substantial efforts to keep its employees updated about the Kronos outage and its true-up plans. CP 307-

08, 318-20. Immediately following the outage, MultiCare reimbursed underpaid employees with interest. *Id.*

For employees who were overpaid, MultiCare issued notices regarding the amounts owed and the plan to begin recoupments from the March 18, 2022, regular paycheck. CP 307-08. Notices were transmitted to each affected employee on February 17, 2022. *See, e.g.*, CP 321-23. MultiCare also reached out to affected employees to provide them with a variety of alternative payment plans that may be more amenable to their individual circumstances. CP 308, 324-27. Employees were given until March 9, 2022, to choose whichever terms were right for them. *Id.*

C. The Unions Object

The Unions objected to MultiCare's plan. CP 328-29, 331-454. MultiCare met and bargained with the Unions in an attempt to assuage their concerns. CP 328-329, 331-454. The parties were unable to reach an agreement. In advance of the first pay adjustment, the Unions filed complaints with the

National Labor Relations Board ("NLRB") alleging MultiCare had violated Section 8(a)(5) of the NLRA and requesting immediate injunctive relief. CP 329, 449-54; see 29 U.S.C. § 160(j). To date, these actions are still pending before the NLRB with no decision yet issued. *Id.*

On March 14, 2022, the Unions filed this case. MultiCare removed the case to federal court. *Id.* While there, MultiCare agreed to audit its reconciliation calculations in order to assuage the Unions' concerns. Additionally, the Unions dropped their cause of action under RCW 49.52.050(2), and drastically narrowed their remaining cause of action regarding WAC 296-126-030, arguing to the federal court that the matter should be remanded back to state court solely on the issue of whether MultiCare met the requirements of WAC 296-126-030.[4] *See* CP 476-86. The federal court remanded the case based on the representation that the Unions sought only for the Superior

[4] Seeking remand to the Court below, the Unions withdrew their claim under RCW 49.52.050 and assured the federal court that this "lawsuit does not concern disputes over individual deduction amounts." CP 531.

Court to rule on whether MultiCare's overpayments during the outage were "infrequent and inadvertent" under that rule. *Id.* Both parties filed for summary judgment.

The trial court made no finding on *Garmon* preemption; it denied summary judgment to MultiCare and granted summary judgment to the Unions. MultiCare appealed; the Court of Appeals reversed the trial court and remanded for trial upon finding that material issues of fact existed as to whether MultiCare met the definitions of "infrequent and inadvertent" under WAC 296-126-030. Opinion. The Unions petition for review.

III. ARGUMENT

A. Review is Not Justified Under RAP 13.4(b)(1) or (2)

The Unions would be indisputably wrong to assert this case is subject to review under RAP 13.4(b)(1) (appellate decision in conflict with Supreme Court decision) and (b)(2) (appellate decision in conflict with appellate decision). The Unions concede in the first sentence of their Petition that this

case is a "matter of first impression." Petition at 1. The parties agree that there is no preexisting case for the appellate court's decision to "conflict" with. There can be no conflict between the Opinion and a previous decision of some other court, as is addressed by RAP 13.4(b)(1) or (b)(2),[5] if there is no such previous decision.

B. No Grounds Exist for Review Under RAP 13.4(b)(4)

This Court may, in its discretion, grant review where a case "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Unions do not seriously argue that this case is one that is both of substantial interest to the public and one which merits Supreme Court review. Instead, they set forth reasons why they disagree with the Opinion. But this Court does not take up review simply because a petitioner is unhappy with the appellate court's opinion. *See, e.g.*, *In re Flippo*, 185 Wn. 2d

[5] The Unions do not assert grounds under 13.4(b)(3) (constitutional question) which is also not applicable in this case.

1032, (Mem)–414 (2016) ("To obtain discretionary review in this court, [petitioner] must demonstrate . . . an issue of substantial public interest.") (emphasis added); *In re Combs*, 182 Wn. 2d 1015 (2015).

The Unions only argument under RAP 13.4(b)(4) seems to be that this "case has the potential to have far-reaching consequences for employees because it is the only case in which a court has interpreted the regulation." Petition at 1. But the Unions do not explain why being a case of first impression automatically generates a substantial public interest. Without more, that status says nothing about the significance, or lack thereof, to the public. The Court of Appeals' analysis should not be second guessed, and this Court's resources invoked, simply because it is the "only decision" on the matter.

The Court of Appeals also issued the *right* decision. It interpreted WAC 296-126-030 using the plain text meanings of its language. While the Unions would prefer that the court had adopted their policy arguments to construe the regulation

instead, there is no reason for this Court to disturb the Court of Appeals' decision, which applies plain text interpretation of unambiguous language.

C. WAC 296-126-030 is Not Susceptible to the Unions' "Policy" Argument for a "Liberal Construction"

The Unions ask the Court to overrule the Opinion and adopt their policy arguments for a "liberal construction" of WAC 296-126-030. But the Court of Appeals was correct in its determination that the plain language of the regulation "means what it says." *See Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn. 2d 912, 919 (2009) ("Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language."); *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 186 Wn. 2d 336, 346 (2016) ("If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says."). As a matter of law, there is no need to resort to statutory rules of construction when the regulation's meaning is clear on its face.

See HomeStreet, Inc. v. State, Dep't of Revenue, 166 Wn. 2d 444, 451 (2009) ("If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction.").

Regulations are interpreted in the same way as statutes. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn. 2d 1, 8 (2018). The court "construes the act as a whole, giving effect to all of the language used. If a regulation is unambiguous, intent can be determined from the language alone, and the court will not look beyond the plain meaning of the words of the regulation." *Id.*

WAC 296-126-030 is "clear on its face" and thus it "is not subject to judicial construction." *State v. J.M.*, 144 Wn.2d 472, 480 (2001). The Unions themselves have argued for the court to interpret the regulation by its plain language. *See, e.g.*, CP 598–600 (arguing MultiCare did not meet plain language definitions under the regulation); CP 579 ("by its plain language, the regulation supersedes collective bargaining

agreements with terms related to overpayments."); CP 563 (arguing court should not permit "deflect[ion] from the plain language of the rule"). Now they ask the Court to adopt a liberal construction of the regulation because other unrelated statutes, they argue, have been "liberally enforced" by other courts. Petition at 10. They argue that "exceptions to these statutes must be narrowly confined." *Id.* at 12.

However, if it is the case that any liberal enforcement scheme relating to 49.48 RCW and 49.52 RCW exists for deductions from wages, it is not relevant to this dispute which regards adjustments for *overpayments* under 49.12 RCW, the sole chapter under which WAC 296-126-030 derives its authority. 49.12 RCW does not contain any language from the legislature instructing courts to enforce it "liberally."

Nonetheless, the Unions present to the Court a parade of horribles: if this Court endorses the Court of Appeals' interpretation, then employers would supposedly start routinely

paying employees inaccurately, with the attendant bad results.[6] Petition at 14.

The Unions neither cite record evidence nor persuasively explain why employers would engage in such illogical behavior. There is no rational motivation for an employer to knowingly pay an employee an inaccurate amount as part of a scheme to recoup it later. If anything, the sole reference the Unions supply to support such a concern—a claim in a Bill Report from 2003 that 1,200 state employees were overpaid that year, *id.*—proves the reverse. Notwithstanding the concerns over adjusting overpayments, the legislation adopted there *allows* the public employer to make wage adjustments to recover overpayments! Ch. 77 Laws 2003, codified at RCW 49.48.200 and .210.[7]

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[6] The Court must consider all of these supposedly "harsh" results with the skepticism mandated by the undisputed facts: *most* of the declarants offered by the Union in support of their motion admit that they *knew at the time* they were being overpaid. CP 228, 241, 262, 282, 292. There is nothing harsh about being expect to return money you know you have not earned.

[7] The Unions may not be heard to complain that those statutes provide for further review of potential wage adjustments. The decision to allow such

Moreover, a plan of intentionally paying inaccurately is equally likely to result to the employer's detriment if the inaccuracy results in an *underpayment*. Indeed, it is undisputed that was the result here; some MultiCare employees were underpaid by the advances, but MultiCare made those employees whole by promptly paying the correct amount as soon as possible, along with interest at the otherwise usurious pre-judgment rate. CP 307–08.

Next, the Unions cite *Schilling*'s comment that RCW 49.52.050 protects against, in part, "false showing of overpayment of any part of such wages." *Schilling v. Radio Holdings*, *Inc.*, 136 Wn.2d 152, 159 (1998); Petition at 10–11. But the Unions have repeatedly argued on remand from the federal court that the sole issue in this case is the method that

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additional procedure for the employees of public employers but not of private employers was a conscious choice. WAC 296-126-030(10). The determination of the appropriate standards, conditions and hours of labor under the Industrial Welfare Act is for the Director of the Department of Labor & Industries, not for the Unions nor this Court. RCW 49.12.091. The Union's disagreement with the policy decisions of the Department certainly does not establish a substantial public interest in overriding that policy determination.

MultiCare used to recoup payments, not whether it "falsely" claimed overpayments were due.[8] Indeed, the entire case is based on the fact that both parties agree MultiCare *did* make overpayments. If a false showing was at issue in this case, then the Unions would apparently be arguing instead that there were no overpayments. That would present a fundamentally different case than the one here.

The Unions' attempts to draw authority from *Brandt v. Impero*, Wn. App. 678, 681, (1969), *Washington State Nurses Association v. Sacred Heart Medical Center*, 175 Wn.2d 822, 832 (2012), and *Birklid v. Boeing Co.*, 127 Wn.2d 853, 860 (1995), are also not persuasive. Those cases each dealt with *deductions*, not *overpayments*. The Unions fail to acknowledge that an underpayment or unlawful deduction fails to pay an

[8] Nor did the Unions argue that MultiCare failed to satisfy the notice requirements of WAC 296-126-030. Rather, they expressly conceded that it did. CP 559 fn. 1. Further, the Unions and the courts below have been adamant that this case is not about disputed *amounts* of the overpayments, but the overpayments themselves. If the public interest in this case is derived from disputed *amounts* of pay, then as MultiCare has argued all along, this case is federally preempted under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

employee for the full wage they lawfully earned, while an adjustment for an overpayment **does not** reduce the employee's total pay below the amount they lawfully earned. WAC 296-126-030. Regardless, even if the Court of Appeals had erred by considering a "liberal construction" of the regulation as the Unions argued it should, it would have no cause to adopt an argument based on cases where workers were underpaid. That is not the situation here, where employees were overpaid, and there is—according to the Unions—no dispute as to the accuracy of the overpayment amounts recorded by MultiCare. *See* Opinion, 535 P.3d at 483 fn. 3 ("specific questions about MultiCare's calculation of individual employee's paychecks (e.g., whether, how much, or how frequently it made overpayments) are unrelated to the issue of whether MultiCare complied with, or may avail itself of, WAC 296-126-030."). Regardless, the holdings in these cases have no application here.

For example, in *Brandt*, the court found that an employer's underpayments were caused by its having made "no genuine effort" to keep proper records or "determine by audit the correct amount of wages." 1 Wn. App. at 680–81. Citing *Brandt*, the Unions raise for the first time the argument that MultiCare should not be "rewarded by being allowed to make overpayment recoupments" when it violated a "duty" to "maintain records that allow an employee to be paid correctly." Petition at 20.

But *Brandt* is inapposite here. The employer there underpaid an employee for nearly three years. 1 Wn. App. at 680. It kept no records of the employee's payroll account for those years and even went so far as to file false tax records overstating the employees' wages for the majority of that time. *Id.* at 680–81. Conversely, the undisputed facts show MultiCare made a significant effort to keep its nearly 20,000 employees paid correctly every two weeks, and that it used TimeStamp during the Kronos hack to create *accurate payroll records* for

all of its employees to be reconciled after the outage. CP 306–07, 522.

The issue here is not about the accuracy of payroll records; thus, *Brandt* is inapplicable because MultiCare was *incapable* of calculating employees' pay even with the TimeStamp records. As the Court of Appeals correctly found, "MultiCare adduced evidence that, due to its sheer size, it was not feasible to . . . manually compute each employee's complicated pay schedule for each employee for each period." *WSNA v. MultiCare*, 535 P.3d at 488. From this, it wrote, "a reasonable juror could find that MultiCare did not know what the actual correct pay for any employee was, particularly with respect to a category of casual employees." *Id.*

Furthermore, the Unions beg the question by asserting that MultiCare's use of WAC 296-126-030 will excuse it from its duties under other statutes, such as the one at issue in *Brandt*—49.52 RCW. The Unions have not articulated how MultiCare's use of WAC 296-126-030 will undermine any

employees' rights under 49.52 RCW, beyond their repeated legal conclusion that an overpayment adjustment is an unlawful deduction. But as the Unions have also conceded multiple times, an adjustment for an overpayment is not an unlawful deduction unless the overpayments were not infrequent and not inadvertent. *See, e.g.*, CP 559. The Opinion held that a material issue of facts exists as to whether MultiCare met those requirements. 535 P.3d at 487–88. The Unions cannot jump to the conclusion that MultiCare's use of WAC 296-126-030 violates the statutory rights of its employees before it has been determined whether its recoupments met the requirements of the regulation. The Unions take this tact so that they may inaccurately portray this case as one about *deductions* under 49.52 RCW, when it is about *adjustments* under 49.12 RCW.

To the extent the Unions' assertion in this regard is part of its newly raised argument that "given the strict prohibition on unauthorized wage deductions, it is unclear whether the Department's adoption of WAC 296-126-030 is permissible at

all," the court should not entertain it. Petition 12–13 fn. 1. The Unions never argued below that WAC 296-126-030 is an invalid regulation.[9] *See, e.g.*, CP 559. This argument fails regardless, as RCW 49.12.091 specifically grants the Director of Labor and Industries broad authority under that chapter (wherefrom WAC 296-126-030 draws its sole authority) "to prescribe rules and regulations fixing standards, conditions and hours of labor. . ." that have the force of law. WAC 296-126-030 is a valid regulation controlling this dispute and the Unions cannot now, for the first time, raise the argument that its promulgation was "impermissible." Parties may not advance entirely new issues before this Court. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn. 2d 841, 853 (2002).

In that vein the Unions also resurrect *Cameron v. Neon Sky, Inc.* again, a case the Court of Appeals aptly ignored as it is irrelevant to this dispute and abrogated by the promulgation of

[9] One will search in vain, through all of the Unions' briefing below, for a single reference to any argument that WAC 296-126-030 is invalid. They half-heartedly raise it now in the form of a footnote.

WAC 296.126.030. *Cameron* dealt with claims under 49.48 RCW and 49.52 RCW. 41 Wn. App. 219, 219 (1985). Though the case spoke of "overpayments," the analysis was focused on fraudulent excessive paychecks that a restaurant manager, who also controlled payroll, had been making out to himself. *Id.* at 221. Both the facts and the statutory background of that case are inapplicable here, and the opinion itself predates the promulgation of WAC 296-126-030 by some 20 years.

D. The Opinion's Interpretation of "Inadvertent" Is Correct.

Disagreeing with the appellate court's interpretation of "inadvertent" under WAC 296-126-030(4), the Unions offer *Birklid*, where this Court found that RCW 51.24.020 provides a workplace injury cause of action when an employer acts with "deliberate intention to produce [an] injury." 127 Wn.2d at 860. That language, the Unions assert, imparted a "plain text" requirement of finding "specific intent" on the part of the employer in order for an employee to avail themselves of statute. The Unions then apparently attempt to contrast the

instant case, arguing that "[n]o such language exists in WAC 296-126-030 to suggest that the Department intended to create a requirement that an employer must have *intended* to overpay particular employees by particular amounts." Petition at 18 (emphasis in original).

This argument is meritless, given that the definition of inadvertent in WAC 296-126-030(4) explains that the overpayments must be either "accidental, unintentional, or not deliberately done." (emphasis added). Thus, deliberation *and* intentionality are *expressly* included in the definition of inadvertent in the regulation. Furthermore, the Court of Appeals, in applying the plain dictionary definition, found that "deliberate" meant "*full awareness* of what one is doing : in a way that is *intended* or planned." Opinion, 535 P.3d at 488 (emphasis added). Intentionality is clearly one dispositive factor in determining inadvertence under the regulation.

The Unions attempt to isolate intentionality from the remaining language of WAC 296-126-030. They also

misrepresent the case by asserting "MultiCare's state of mind and the likelihood of overpayments are undisputed: MultiCare knew that overpayments would result from its plan, even if it did not generally know which particular employees would be overpaid during any given pay period." Petition at 25. That is the Unions' argument, not an "undisputed fact."[10] MultiCare, did not "know" overpayments would result from its plan, and the evidence does not support that assertion. The evidence does not even establish that a single payroll employee at MultiCare knew that overpayments would result for any given paycheck. Opinion, 535 P.3d at 488 ("there is evidence in both directions as to whether MultiCare knew or merely suspected some overpayments may occur").

Regardless, even if the Unions' bald assumptions were correct, they defy the plain language interpretation of the

[10] The Unions' recitation that "MultiCare repeatedly announced that employees would receive overpayments" overtly misrepresents the evidence in the record; the documents only show MultiCare announcing, for example, that "some staff may receive more or less pay." CP 140 (emphasis added).

regulation, which permits adjustments where the overpayments were "accidental, unintentional, or not deliberately done." WAC 296-126-030(4). Ultimately, even if knowledge was found to be under one of these definitions, the parties agree (and the Court of Appeals found) that MultiCare need meet only one of the definitions to succeed on summary judgment. MultiCare plainly met the definition of unintentional, or at least (as the Opinion held) showed a dispute of material fact as to its meeting that definition.

The Unions footnote argument that "it would make no difference at all whether MultiCare's business continuity plan was the best amongst an array of options, or even whether there was any option at all" fails for the same reason—the Unions insist that "knowing that overpayments would result" is the end of the analysis. Petition at 26 fn. 3. But MultiCare neither knew whether any given advance would result in an overpayment (by its "sheer size" and limited time in which to act, it simply could not feasibly make such a determination), nor did it intend to

make its already complicated payroll schedule *more* complicated and costly by specifically intending to overpay any of its employees. CP 306.

E. The Opinion's Interpretation of "Infrequent" Is Correct.

The Unions' arguments for construction of "infrequent" under WAC 296-126-030(4) also errs. They argue that a "single (and rare) causal stimulus, i.e., the one-time ransom attack on Kronos," cannot be what makes the overpayments "infrequent." Petition at 22. This interpretation is irrational. The Unions apparently argue that, in order to be infrequent, each overpayment must result from a different reason (or "causal stimulus"). They state that because WAC 296-126-030(4) uses the phrase "provided the *overpayment* was infrequent and inadvertent" (not plural), that infrequency "must be defined by each paycheck." Petition. 23. The appellate court properly rejected these arguments as they fail to give effect to the remaining language of the regulation which provides for

adjustments for *overpayments* (plural). Opinion, 535 P.3d at 486–87.

The Court of Appeals correctly pointed out that the Unions were unduly focused on the "numerosity" of the overpayments, which "emphasizes the sheer number or breadth of the overpayments, a large number due to the large number of employees." *Id.* at 487. That focus "does not capture the plain language of the full definition of "infrequent." *Id.* (emphasis added). A juror can simply utilize the plain language definition of "infrequent," which includes "'rare' in the temporal sense," and may look at the payments "either as one set, or as four overpayments per employee, over a two-month time period." *Id.*

Furthermore, the appellate court *did not* interpret infrequency based on the Kronos event as the Unions suggest. It found that the dictionary definition of "rarely" included an event that occurs "not often," and "seldomly." *Id.* at 486. Thus, the plain meaning is "something that is uncommon over time in

the ordinary course of events." *Id.* In other words, regardless of the cause, in MultiCare's long history it had never issued such overpayments ordinarily.

Taken to its logical conclusion, the Unions' argument breaks down. They argue that the Court cannot relate the Kronos event as the cause of the overpayments to the overpayments themselves. Petition at 22. In the next breath, they insist the Court must relate MultiCare's alleged "implementation of a plan that foreseeably led to overpayments" to the overpayments. *Id.* at 26. The Unions do not explain why their proffered "cause" of the overpayments should be considered, while the Kronos event should be excluded.

F. The Court of Appeals Did Not Improperly Shift the Burden of Proof to the Unions

The Unions assert that the Opinion improperly shifted the burden to them to show the overpayments were infrequent and inadvertent. Their argument rests in part on their erroneous

conclusion that no material fact dispute exists as to these two issues.

Regardless, the Unions confuse their burden on summary judgment with MultiCare's trial burden of proving the overpayments meet the regulation's requirements. The appellate court properly found the Unions had the burden on their motion for summary judgment to show no genuine issue exists for trial and that it was entitled to summary judgment as a matter of law. Opinion, 535 P.3d at 484. The Unions failed to show the absence of a material fact dispute, and their legal arguments were erroneous and failed to establish an entitlement to judgment. The Court of Appeals applied the correct burden to the Unions; they simply failed to meet it. The decision to remand for trial to resolve the outstanding fact disputes and to apply the appropriate, plain language interpretation of WAC 296-126-030, was correct.

G. Several Laws Already Protect Employees from the Harm of Allegedly Inaccurate Adjustment Amounts

The reality in this matter is that no additional "harsh consequences" will result from MultiCare's use of WAC 296-126-030. MultiCare satisfied each prong of the requirements therein which the Department determined were sufficient to protect employees; and Washington law already provides multiple methods for an employee to dispute the amount of their pay if they disagree with their employer's calculation. These protections apply to adjustments for overpayments the same way they apply to pay in the first instance, belying the Unions' manufactured fears that the Court of Appeals' interpretation will result in a wave of employers carelessly computing pay for their employees, or otherwise that employers will be incentivized "to undermine employees' statutory rights." Petition at 18. These protections include, among others: (1) notifying payroll that there is a discrepancy in the employee's pay; (2) filing a grievance under the grievance-arbitration provisions of the employee's respective CBA, (3)

filing an administrative complaint with the Department of Labor & industries, RCW 49.48.083–.087; and (4) filing a civil action against the employer under either Chapters 49.48 or 49.52 RCW. Contrary to the Unions' asserted theme throughout this case, WAC 296-126-030 does not excuse MultiCare from its statutory obligation to compensate employees for the full amount they have earned, and it has no bearing on disputes over the accuracy of payment amounts. This certainly must be true if this case is not preempted by *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *See also Idaho Bldg. & Const. Trades Council, AFL-CIO v. Inland Pac. Chapter of Associated Builders & Contractors, Inc.*, 801 F.3d 950, 956 (9th Cir. 2015) ("*Garmon* pre-emption forbids States to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits") (quoting *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008)).

IV. CONCLUSION

MultiCare comes before this Court as the victim of a crime, and the Unions nonetheless argue that their members should be allowed to keep monies most of them know they did not earn. The Unions continue to seek this windfall for their constituents by asserting an erroneous interpretation of WAC 296-126-030 applies in this case. However, they have failed to show a substantial public interest that would merit this Court's attention under RAP 13.4(b)(4), nor any reason why the Opinion was not correct. Respectfully, the Court should deny the Petition for Review.

I certify that this document contains 4946 words, pursuant to RAP 18.17.

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s/ Brie Carranza

Brie Carranza, Practice Assistant

STOEL RIVES LLP

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