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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PASADO'S SAFE HAVEN, et al.,

Appellants,

v.

STATE OF WASHINGTON and WASHINGTON STATE
DEPARTMENT OF AGRICULTURE,

Respondents/Cross-Appellants.

RESPONSE BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

Respondents, State of Washington and Washington State Department of Agriculture (State), request that the Court affirm the trial court's dismissal of this case but find that the trial court erred in finding standing to bring the claim. Defendant, Washington State Department of Agriculture, administers the Humane Slaughter of Livestock Act in chapter 16.50 RCW (the Act) and the rules adopted under the Act, chapter 16-24 WAC. RCW 16.50.120 states that "slaughters and packers" must use a "humane method" to slaughter livestock. RCW 16.50.110(3) defines two permissible human methods of slaughter including a humane method that accommodates the requirements of the Moslem and Jewish faiths.

Appellants, Pasado's Safe Haven, et al, (Pasado's), attack the constitutionality of the Act on various ill-defined grounds, in an apparent attempt to prevent packers and slaughters from slaughtering livestock in accordance with the method prescribed by a religious faith. CP at 442. Pasado's styled its claims as a facial challenge, alleging that packers and slaughterers receive "disparate treatment" under Washington law. CP at 443. The trial court erred in finding that Pasado's had taxpayer standing to bring a claim that merely raises political beliefs advocated by Pasado's. However, the trial court properly dismissed the case, finding that Pasado's

failed to show beyond a reasonable doubt that there was no set of circumstances under which the Act was constitutional.

II. STATEMENT OF THE ISSUES

1. Did the trial court err in finding that Pasado's had standing to bring a taxpayer derivative suit when Pasado's failed to challenge an illegal act of a public official?

2. Did the trial court correctly conclude that Pasado's failed to establish standing under the Uniform Declaratory Judgments Act by failing to show either a right affected by or a special injury caused by the challenged provisions of law?

3. Did the trial court correctly apply the "no set of circumstances" test to Pasado's facial challenge to the constitutionality of the Act?

4. Did the trial court correctly conclude that the Act was constitutional under the Establishment Clause of the First Amendment of the United States Constitution?

5. Did the trial court correctly conclude that the Act was constitutional under article I, section 11 of the Washington Constitution?

6. Did the trial court correctly conclude that the Act did not violate the Privileges and Immunities Clause or Equal Protection Clause of the state and federal constitutions?

7. Did the trial court correctly conclude that the Act was not in violation of the “nondelegation doctrine?”

8. Did the trial court correctly grant the State’s motion to strike Pasado’s inadmissible evidence for failure to conform to the requirements of CR 56?

9. Does Pasado’s fail to present recognized grounds for an award of attorney fees under RAP 18.1?

III. STATEMENT OF THE CASE

A. Procedural History

In December 2008 and March 2009, Pasado’s petitioned the Attorney General to bring an action to have the Act declared unconstitutional. *See* CP at 419. The Attorney General’s Office declined. CP at 428. In May 2009, Pasado’s filed a lawsuit which consisted of two claims: an action for declaratory judgment and injunctive relief under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (UDJA), and a “taxpayer derivative action” requesting the same relief. CP at 447-448. Neither the petition to the Attorney General nor the Complaint identified with specificity the factual basis or legal theory underlying the two claims.

Pasado’s filed a motion to strike the State’s affirmative defenses of lack of standing, lack of a justiciable controversy, lack of a ripe claim,

and lack of subject matter jurisdiction. *See* CP at 386. The State filed a cross-motion for judgment on the pleadings under CR 12(c). *See* CP at 333. The parties also filed cross motions for summary judgment. *See* CP at 79 and 249. The State then moved to strike as inadmissible the exhibits and declarations attached to Pasado's summary judgment motion and Pasado's response to the State's summary judgment motion. *See* CP at 72.

After oral argument on the motions, the trial court entered an order on November 2, 2009, striking Pasado's inadmissible evidence. CP at 21-23. On the same day, the trial court entered a second order granting most of Pasado's motions to strike the State's affirmative defenses but granting the State's motion for judgment on the pleadings for lack of standing under the UDJA. In that order, the trial court also granted the State's motion for summary judgment, finding the Act to be constitutional, and dismissed the case. CP at 15-20. Pasado's timely appealed both orders. CP at 4-14. The State cross-appealed solely on the issue of whether the trial court erred in finding Pasado's had standing to bring a taxpayer derivative action.

B. The Washington Humane Slaughter of Livestock Act

Pasado's challenged as facially invalid the constitutionality of the Act which sets forth the requirements for the humane slaughter of

livestock by packers and slaughterers. The Act was adopted in 1967 with the purpose of preventing needless suffering of livestock, providing safer working conditions, and improving the product to benefit both the industry and consumers. RCW 16.50.100. The Act was patterned after the 1958 federal Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901-1906, with the purpose that the authorized slaughter methods “conform generally to those authorized by” the federal act. RCW 16.50.100.

The Act at RCW 16.50.110(3) defines a “humane method” of slaughter to be either:

- (a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast or cut; or
- (b) a method in accordance with the ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

These sections parallel the defined humane methods of slaughter in the federal Humane Methods of Livestock Slaughter Act at 7 U.S.C. § 1902. The meaning and intent of the state and federal laws are consistent – that packers and slaughterers under either the state or federal statute may only perform slaughter by a humane method and each statute defines the same precise method of religious ritual slaughter as humane.

All meat products in interstate commerce – virtually all commercially available meat in the United States – is slaughtered, inspected, and handled under the jurisdiction of the United States Department of Agriculture (USDA) per the requirements of the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. Washington State currently has no state inspection program for meat. All meat sold in the state must comply with federal law including the federal Humane Methods of Livestock Slaughter Act. *See* 21 U.S.C. § 603(b). The state may not impose a requirement in addition to or different than that contained in the Federal Meat Inspection Act for facilities under federal inspection. *See* 21 U.S.C. § 678.

The breadth of the federal laws and the USDA inspection program means most slaughter in the state of Washington is conducted under federal law except when performed by “custom slaughterers” who are licensed under chapter 16.49 RCW. Custom slaughterers provide services to livestock owners by slaughtering livestock for personal consumption. Meat from custom slaughterers may not enter commerce and may only be prepared for the household use of the animal owner. RCW 16.49.055. The State is not aware of any federally-inspected slaughterer or packer or state-licensed custom slaughterer in the state who currently conducts slaughter by a religious ritual method. In fact,

Pasado's never alleged that any religious ritual slaughter occurs in the state of Washington.

Further, the regulatory aspects of chapter 16.50 RCW do not apply to private individuals. Chapter 16.50 RCW only regulates the conduct of persons meeting the definition of "packer" ("any person engaged in the business of slaughtering livestock") or "slaughterer" ("any person engaged in the commercial or custom slaughtering of livestock, including custom farm slaughterers"). See RCW 16.50.110(5) and (7). RCW 16.50.120 states that "no slaughterer or packer shall bleed or slaughter any livestock except by a humane method" (emphasis added).

Pasado's asserts, without any legal basis or support, that an individual may escape criminal prosecution for animal cruelty by claiming that the conduct is required by "his own idiosyncratic interpretation of what is required by his religion." Appellants Op. Brief at 5. RCW 16.50.150 states that:

Nothing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provisions of this chapter, ritual slaughter and the handling or other preparation of livestock for ritual slaughter is defined as humane.

RCW 16.50.150 is not a grant of authority to perform religious ritual slaughter or an immunization of acts of animal cruelty under the guise of

religion. This section merely recognizes that religious freedom is guaranteed by the state and federal constitutions and no state law can infringe upon that freedom. Pasado's asserts RCW 16.50.150 nullifies other state animal cruelty law, such as chapter 16.52 RCW, the Prevention of Cruelty to Animals Act. Appellants Op. Brief at 8. RCW 16.50.150 reflects the intent of the Legislature to define as humane the religious ritual slaughter and preparation method used by packers and slaughterers conducted in conformance with RCW 16.50.110(3)(b).

Pasado's asserts that chapter 16.50 RCW distinguishes between "ritual" and "non-ritual" packers and slaughterers. Appellants Op. Brief at 7. The law makes no such distinction. All packers and slaughterers may choose to slaughter by either or both of the humane methods defined in RCW 16.50.110(3). The trial court agreed and ruled that RCW 16.50.150 does not allow slaughter by packers and slaughterers to use a method other than that defined as humane in RCW 16.50.110(3). CP at 18.

IV. SUMMARY OF ARGUMENT

Pasado's sought to invalidate, on imprecise constitutional grounds, the Legislature's policy choices reflected in the Act. Other than baldly asserting in Paragraph 7 of its Complaint that the challenged provisions of the Act violate the "nondelegation doctrine"; Article I, Section X, and the First, Fifth, and Fourteenth Amendments to the United States Constitution;

and article I, sections 11, 12, and 23, of the Washington State Constitution. CP at 442.¹ However, Pasado's failed to allege how and in what context the challenged provisions of the Act facially violate these constitutional provisions.

The trial court properly found that Pasado's did not establish standing under the UDJA because Pasado's failed to show that it had a direct and substantial interest at stake or a right affected by the Act. CP at 16. However, the trial court erred in finding that Pasado's had established standing to bring a taxpayer derivative suit. The trial court erroneously relied on *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983), for the proposition that Pasado's need not challenge a particular allegedly illegal act of government to establish standing, when in fact, the *Farris* court did not address the criteria to establish taxpayer standing and further, the court expressed no intent to overturn established case law.

Pasado's brought a purely facial challenge to the Act, and therefore must prove beyond a reasonable doubt that in no set of circumstances are the challenged provisions of chapter 16.50 RCW and chapter 16-24 WAC constitutionally sound. This Court should uphold the trial court's ruling that Pasado's did not meet this heavy burden and that the state may

¹ Pasado's appears to raise issues related to search and seizure and due process for first time on appeal. Appellants Op. Brief at 34. As Pasado's neither pled nor briefed these issues below, they may not raise them now. RAP 2.5(a).

constitutionally allow the free exercise of religion through the slaughter of livestock by a method that conforms with RCW 16.50.110(3). CP at 19. Further, this Court should find that the trial court also correctly ruled that Pasado's declarations and exhibits submitted in conjunction with the summary judgment motions were inadmissible because they did not meet the requirements of CR 56. Finally, this Court should find that Pasado's cannot properly request attorney fees under the "common fund" theory as no common fund is at issue.

V. ARGUMENT

A. Standard Of Review

When reviewing summary judgment, the appellate court considers the matter de novo, "engaging in the same inquiry as the trial court." *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000), citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). "The appellate court considers the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party." *Id.*, citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Under CR 56(c), summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

This Court reviews a trial court's dismissal of a claim under CR 12(c) de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery. *Burton*, 153 Wn.2d at 422. In making this determination, a trial court must presume that the plaintiff's allegations are true. *Id.* In addition, whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are also reviewed de novo. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

The trial court's order striking Pasado's declarations and exhibits as inadmissible is reviewed for abuse of discretion. "A trial court's decision to exclude evidence will be reversed only where it has abused its discretion." *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009), citing *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). "An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons." *Id.*, referencing *State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007). As discussed below in Section V. I., the trial court's order granting the State's motion to strike evidence submitted by Pasado's was grounded on the requirements of CR 56, in particular as required under CR 56(e). CP at 21-23.

B. The Trial Court Erred In Finding That Pasado's Had Standing To Bring A Taxpayer Derivative Suit When Pasado's Failed To Challenge An Illegal Act Of A Public Official

As the State has pled in its Cross-Appeal, the trial court erred in finding that Pasado's had standing to bring a taxpayer derivative suit merely by bringing a facial challenge to the Act without recognizing that Pasado's failed to challenge a particular illegal or unauthorized act of government. CP at 17. Under Washington law, a taxpayer may bring a "taxpayer derivative suit" to challenge illegal or unauthorized acts of public officials or governmental bodies on behalf of himself or herself and as a representative of a class of similarly-situated taxpayers." *Wash. Public Trust Advocates v. City of Spokane*, 117 Wn. App. 178, 181, 69 P.3d 351 (2003).

Relying on *Farris v. Munro*, the trial court found that the only requirement for taxpayer standing is the taxpayer to request the Attorney General to file suit and for the Attorney General to decline to do so. *Farris*, 99 Wn.2d at 329-30. The trial court overlooked the requirement that, for standing, a taxpayer must also demonstrate that he or she is challenging the act of a public official. In fact, in *Farris*, the court held that "a taxpayer does not have standing to challenge the legality of the acts of public officers" unless he or she first requests the Attorney General file suit. *Id.* at 329 (emphasis added).

Other cases also hold that a taxpayer derivative suit is reserved solely for challenges to public officials' illegal acts. A taxpayer cannot establish standing by simply asserting that he or she disagrees with the governmental decision. *Petition by City of Bellingham*, 52 Wn.2d 497, 499, 326 P.2d 741 (1958). Washington courts recognize taxpayer derivative suits as a mechanism to challenge the actions of a public official. "A taxpayer's derivative lawsuit is an action brought by a taxpayer on behalf of himself or herself and as a representative of a class of similarly situated taxpayers to seek relief from illegal or unauthorized acts of public officials." *Wash. Public Trust Advocates*, 117 Wn. App. at 181 (emphasis added). "The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government." *State ex rel. Boyles v. Whatcom Cy. Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (emphasis added).

The case law shows that all taxpayer derivative suits involved allegations that specific government acts were illegal. For example, taxpayers challenged the City of Seattle's pre-employment urinalysis drug testing program in *Robinson v. City of Seattle*, 102 Wn. App. 795, 806, 10 P.3d 452 (2000); a PUD's appliance repair business in *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 508, 81 P.3d 876

(2003); Walla Walla's collection of gambling taxes in *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991); a proposed land transfer by the City of Bellingham in *Petition by City of Bellingham*, 52 Wn.2d at 499; a single work release program that required religious activities in *State ex rel. Boyles*, 103 Wn.2d at 614; a "Bible as Literature" class offered by the University of Washington in *Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of the Univ. of Wash.*, 72 Wn.2d 912, 436 P.2d 189 (1968); and, payment of funds under the provisions of various public works contracts providing for hardship payments in *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975).

Pasado's taxpayer derivative claim must fail because Pasado's did not challenge any specific illegal or unauthorized act of a public official. Paragraph 27 of Complaint states that Pasado's is challenging "illegal and unconstitutional" acts of government but only lists nonspecific duties and tasks of government including passage of laws by the Legislature, signing bills in to law by the Governor, and enforcement of laws by various law enforcement bodies and state agencies. CP at 445-446. Such vague allegations do not properly identify an illegal act that would support a taxpayer derivative action.

Pasado's Complaint is devoid of any challenge to illegal government action and did not contain any demand that illegal action by the public official cease. Further, Pasado's did not allege in their Complaint that any religious ritual slaughter by packers or slaughterers or custom slaughters is occurring in the state, thus cannot identify any action by government even related to the laws they challenge. Pasado's ignores the fact that all commercial packers and slaughters in the state operate under federal inspection and the enforcement or application of state law is not at issue. Rather, Pasado's brought a facial challenge to the various provisions of the Act and sought a declaratory judgment. Thus Pasado's taxpayer derivative claim should fail and this Court should reverse the trial court and find that Pasado's lacked standing to bring a taxpayer derivative suit.

C. The Trial Court Correctly Concluded That Pasado's Failed To Establish Standing Under The Uniform Declaratory Judgments Act

Pasado's requested a judgment under the UDJA declaring that the challenged provisions of the Act were unconstitutional. CP at 447. The trial court correctly concluded that Pasado's did not establish the requisite elements for standing to make that challenge. CP at 16. The UDJA provides that:

“[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020.

The purpose of a judgment under the UDJA is to settle rights, status, and other legal relations and afford relief from uncertainty and insecurity with respect to them. RCW 7.24.120. Washington courts apply the doctrine of standing “to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986); appeal dismissed, 479 U.S. 1073 (1987).

Under the UDJA, a person may not challenge a statute’s constitutionality unless it appears that he or she will be directly damaged in person or in property by its enforcement. *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (citation omitted). A plaintiff must demonstrate that the statute has operated to that party’s prejudice. *High Tide Seafoods*, 106 Wn.2d at 701-02. “The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity.” *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994).

Pasado’s presented only the barest of arguments that a taxpayer may bring suit under the UDJA without meeting the standing

requirements of RCW 7.24.020. Appellants Op. Brief at 14-15. No case law supports Pasado's standing under the UDJA. Pasado's mistakenly relies on *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 329 P.2d 841 (1958), in support of its erroneous contention that standing is not required to bring a UDJA action. However, unlike Pasado's case, the *Tattersall* court found taxpayer standing where a taxpayer was challenging a specific act as illegal (the sale of public property and the payment of a mandate by the State Treasurer). *Id.* at 858. Standing to bring a taxpayer derivative suit requires a separate analysis from standing to bring an action under the UDJA.

Rather than "abrogate" case law, as argued by Pasado's, *see* Appellants Op. Brief at 15, the State urges this Court to follow its own precedent. Under the UDJA, Pasado's must establish: 1) that it has suffered an actual and particularized injury; 2) that injury is causally connected to the Act; and 3) that injury would be redressible by a ruling of a court. *See High Tide Seafoods*, 106 Wn.2d at 702, *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-77, 101 P.3d 67 (2004), *State v. Cook*, 125 Wn. App. 709, 720-21, 106 P.3d 251 (2005).

Pasado's failed to allege any injury connected to the challenged laws. Pasado's must show that its alleged injury likely would be redressed by a favorable decision of a court. However, Pasado's has not

alleged any conduct that would cease by striking down the challenged provisions of the Act. Hence, this Court should uphold the trial court's dismissal of the UDJA claim because Pasado's did not articulate an injury sufficient to establish standing and cannot credibly assert that a favorable decision of a court will redress any grievance.

D. The Trial Court Correctly Applied The "No Set Of Circumstances" Test To Pasado's Facial Challenge To The Constitutionality Of The Act

Even if, for arguments sake, Pasado's had standing, their claims fail on the merits. Because Pasado's brought a facial challenge, they have the burden to show that "no set of circumstances" exists in which the humane slaughter statutes can be constitutionally applied. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). The genesis of the "no set of circumstances" test for facial challenges is the United States Supreme Court decision in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This standard makes perfect sense. If a law is facially unconstitutional, there can literally be "no set of circumstances" under which the law can be constitutionally applied. In contrast, a law cannot be facially unconstitutional if there is even one circumstance where the law can be constitutionally applied.

The Washington Supreme Court has consistently recognized that the "no set of circumstances" test applies in challenges to the facial

constitutionality of a statute. *See, e.g., State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005) (overruled on other grounds); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000); *State Republican Party v. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); and *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999). In addition, each division of the Court of Appeals has recognized that this standard applies for facial challenges. *See, e.g., Galvis v. State Dep't of Transportation*, 140 Wn. App. 693, 702, 167 P.3d 584 (2007); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 797, 158 P.3d 1251 (2007); *State v. Clinkenbeard*, 130 Wn. App. 552, 560, 123 P.3d 872 (2005).

The high “no set of circumstances” standard of review is coupled with the high burden on the plaintiff to prove that the challenged law is unconstitutional “beyond a reasonable doubt.” *Tunstall*, 141 Wn.2d at 220. The standard of review and the burden must be integrated when the court considers a facial challenge. For example, in *Tunstall* the Court considered a facial challenge to statutes providing for the education of juveniles incarcerated in adult prisons. There the plaintiffs alleged that certain statutes violated provisions under article IX of the Washington Constitution. The Court summarized how it would conduct its review: “. . . to effectuate the facial challenge analysis we need to first determine

what article IX requires, and then determine whether we are convinced beyond a reasonable doubt that there is no set of circumstances in which . . . [the challenged statute(s)] could satisfy article IX.” *Id.* at 221.

Pasado’s contends that the “nature of the challenge” test applied in *Robinson v. City of Seattle*, 102 Wn. App. at 806-807, should apply in this case. Appellants Op. Brief at 15-16. In *Robinson*, the Court of Appeals departed from the “no set of circumstances” test established by the United States and Washington Supreme Courts, mistakenly believing that Washington courts had yet to apply the test in a facial challenge. *Id.* at 806 n.15. In fact, when *Robinson* was decided, the Washington Supreme Court had already acknowledged that the “no set of circumstances” test applied in facial challenges. *See Tunstall*, 141 Wn.2d at 221 (citing *Turay*, 139 Wn.2d at 417 n.27). The amorphous “nature of the challenge” test of *Robinson* has been eclipsed by the subsequent Washington Supreme Court holdings that the “no set of circumstances” test applies in facial challenges. Therefore, the trial court correctly applied the “no set of circumstances” test and rightly concluded that Pasado’s failed to prove beyond a reasonable doubt that the Act was unconstitutional under that test.

E. The Trial Court Correctly Concluded That The Act Was Constitutional Under The First Amendment Of The United States Constitution

1. The Relief Requested By Pasado's Would Violate The Fundamental Right Of Free Exercise Of Religion

In this action, Pasado's appears to challenge the constitutionality of RCW 16.50.110(3) related to the ritual slaughter of livestock. However, as found by the trial court, the Act, far from being unconstitutional, actually accommodates the free exercise of religion guaranteed by the First Amendment. CP at 18-19. The free practice of religion is a fundamental right. *Johnson v. Robison*, 415 U.S. 361, 375 n.14, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974). "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

Religious ritual slaughter as an exercise of religious beliefs is protected by the federal Free Exercise Clause. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. Const. amend. I. The consumption of a religiously prescribed diet implicates the free exercise of religion. *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008). Religious ritual slaughter is

a fundamental aspect of Moslem and Jewish religious practice. *See, e.g., Jones v. Butz*, 374 F. Supp. 1284, 1291 (S.D.N.Y. 1974), judgment affirmed by *Jones v. Butz*, 419 U.S. 806, 95 S. Ct. 22, 42 L. Ed. 2d 36 (1974). Denying a person's access to animals slaughtered according to religious requirements would be a burden on the practice of religion.

Pasado's apparent goal in this lawsuit is to restrict religious practice in the form of religious ritual slaughter of livestock. However, the protections of the federal Free Exercise Clause apply if the law regulates or prohibits conduct that is undertaken for religious reasons. *Id.* at 532. The Free Exercise Clause requires that laws be neutral and of general applicability. *Id.* at 531. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. *Id.* at 542. Pasado's seeks to remake the law so that it is not neutral – they seek to specifically prohibit conduct motivated or mandated by religious beliefs. “Covert suppression of a particular religion” or “official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement for facial neutrality.” *Id.*

The Washington Constitution guarantees free exercise of religion more vigorously than the United States Constitution. Article I, section 11 of the Washington Constitution states that “[a]bsolute freedom of

conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual.” Wash. Const. art. I, §11. The Washington Supreme Court has stated that “[o]ur state constitutional and common law history support a broader reading of article I, section 11, than of the First Amendment” and “our State exhibits a long history of extending strong protection to the free exercise of religion.” *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 224-225, 840 P.2d 174 (1992). Our state provision ‘absolutely’ protects freedom of worship and bars conduct that merely ‘disturbs’ another on the basis of religion. Even an “indirect burden on the exercise of religion may violate Article I, Section 11.” *Id.* at 226.

Thus the relief that Pasado’s requests, an outlawing of religious ritual slaughter, would violate both the United States Constitution and the Washington Constitution.

2. The Act Does Not Violate The Establishment Clause Of The First Amendment

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion” U.S. Const. amend. I. The First Amendment is applicable to the individual states through the Equal Protection Clause of the Fourteenth Amendment. *Empl. Div., Dept. of Human Res. of Or. v. Smith*,

494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (superseded by statute on other grounds). A statute will pass muster under the federal Establishment Clause if it meets the three-part test laid down by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971): “(1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion.”

Under the first prong of the *Lemon* test, it is a valid secular purpose to alleviate governmental interference with religion. *Id.* “[A]ccommodating religious practices that does not amount to an endorsement is not a violation of the Establishment Clause.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). Since RCW 16.50.110(3) serves a valid secular purpose to accommodate religious practice, the Act does not violate the federal Establishment Clause.

Pasado’s argues, without support, that recognition and accommodation of religious practice is per se unconstitutional. Much of Pasado’s argument is based on the erroneous assumptions that, first, the Act creates an exemption in criminal law for free exercise of religion and

second, that such an exemption is a per se constitutional violation.² In passing chapter 16.50 RCW, the Legislature did not have to choose between the interest in preventing animal cruelty and protecting free exercise of religion for Washington citizens. Rather, the Legislature found, consistent with Congressional findings, that the method of religious ritual slaughter outlined in RCW 16.50.110(3) was humane.

The religious ritual slaughter provision in federal law, the Humane Methods of Livestock Slaughter Act, has withstood a similar constitutional challenge. *See Jones v. Butz*, 374 F. Supp. 1284. In *Jones v. Butz*, the court found that religious ritual slaughter was a fundamental aspect of Jewish religious practice. *Id.* at 1291. Further, the court found that Congress considered “ample and persuasive evidence” that supported its finding that the Jewish ritual method of slaughter was indeed humane. *Id.* The *Jones v. Butz* holding applies since chapter 16.50 RCW is similar to the federal act and should be construed consistently with the federal act. RCW 16.50.100.

The *Jones v. Butz* court did not characterize the section defining religious ritual slaughter as humane as an “exception” to the humane slaughter requirement but, even still, noted that accommodations of religious practices by granting exemptions from statutory obligations do

² RCW 16.50.170 makes violation of the Act a misdemeanor.

not violate the federal Establishment Clause. *Id.* at 1292. The court concluded “[b]y making it possible for those who wish to eat ritually acceptable meat to slaughter the animal in accordance with the tenets of their faith, Congress neither established the tenets of that faith nor interfered with the exercise of any other.” *Id.* at 1294.

Further, Pasado’s failed to show beyond a reasonable doubt that an exception to a criminal law to allow religious practice is unconstitutional under all sets of circumstances. Instead, courts have held that an exemption for religious practice in a criminal law may be constitutionally required. For example, the United States Supreme Court recognized that during Prohibition, an exemption from the criminalization of the manufacture, sale, and transportation of liquor for sacramental wine for use by the Roman Catholic Church for communion was constitutionally necessary. *See Smith*, 494 U.S. at 914 n.6, (Blackmun J., dissenting); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 561 n.2, (Souter J., concurring). In *Smith*, Justice Blackmun also noted another exception contained in federal criminal drug laws for use of peyote in religious ceremonies of the Native American Church. *Smith*, 494 U.S. at 913.

Pasado’s cited two cases where laws could not be argued to accommodate religious exercise because the law in question did not alleviate a burden on the free exercise of religion. In *Texas Monthly, Inc.*

v. Bullock, 489 U.S. 1, 18, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989), a tax exemption for religious periodicals was not necessary to accommodate free exercise of religion because the state presented no evidence why payment of a sales tax would inhibit religious activity. Similarly, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) the Supreme Court found that certain parts of a religiously themed holiday display violated the federal Establishment Clause. The Supreme Court rejected an argument that the holiday display was justified as an accommodation of religion stating that “[t]he display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity.” *Id.* at 601. Citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987), the Court went on to say that “[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion.” *Id.* Thus the cases cited by Pasado’s are not persuasive because, here, the Act *removes burdens* on the free exercise of religion.

Under the second prong of the *Lemon* test, the law in question must have a “primary effect [that] neither advances nor inhibits religion.” *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002), *cert.*

denied, 540 U.S. 815 (2002). For “a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.” *Amos*, 483 U.S. at 337. The Supreme Court held that “it has never indicated that statutes that give special consideration to religious groups are *per se* invalid.” *Id.* at 338. Pasado’s fails to show that government has advanced religion in any manner. Instead, the Act merely allows religious practice to occur.

The third prong of the *Lemon* test examines whether a law “foster[s] excessive government entanglement with religion.” *Mayweathers*, 314 F.3d at 1068. Chapter 16.50 RCW presents no entanglement issue as its purpose is to prevent government interference with the practice of religion. Pasado’s argues that enforcement of chapter 16.50 RCW would involve government in an impermissible policing of religious practice and asserts that the State would have to question the religious motives and piety of packers and slaughterers. Pasado’s cites to *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445 (E.D.N.Y. 2000), where the court struck down a New York law requiring food inspectors to determine if foods labeled “kosher” met religious standards. In that case, the “kosher” label laws violated the Establishment Clause because the state became “excessively entangled” in religion where the state had to interpret and enforce purely religious laws. However, the

court noted that the phrase “in accordance with the ritual requirements of the Jewish faith or any other religious faith” in the federal Humane Methods of Livestock Slaughter Act was a permissible accommodation of free exercise of religion. *Id.* at 456. Unlike the law at issue in *Commack*, a plain reading of RCW 16.50.110(3)(b) confirms that the statute only requires that the packer or slaughterer use a method that is described in the statute. Nothing in the statute suggests that the state has the authority to question the motives or religious piety of a slaughterer.

Thus a plain language reading of the Act meets the three-part test in *Lemon* and is constitutional under the federal Establishment Clause. *Lemon*, 403 U.S. at 612. In the context of a facial challenge, if a constitutional reading of the statute is possible, the statute should be upheld. *State v. Farmer*, 116 Wn.2d 414, 419-420, 805 P.2d 200 (1991). This Court should uphold the trial court’s determination that the Act did not violate the federal Establishment Clause.

F. The Trial Court Correctly Concluded That The Act Was Constitutional Under Article 1, Section 11 Of The Washington Constitution

The Washington Constitution’s Establishment Clause in article I, section 11 is analyzed independently from its federal counterpart. *Malyon v. Pierce Cy.*, 131 Wn.2d 779, 798, 935 P.2d 1272 (1997). Under this

independent analysis, this Court should affirm the trial court's conclusion that the Act does not violate the state constitution.

In evaluating a claim under the state Establishment Clause, the “task begins with a specific focus upon the following language: ‘No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment’ Wash. Const. art. I, § 11.” *Malyon*, 131 Wn.2d at 799. Courts must also analyze whether an expenditure of state resources had been made for an impermissible religious purpose. The Washington Supreme Court recently held that the terms ‘appropriated’ and ‘applied’ as used in article I, section 11 prohibit the state from purposefully making public money or property available for an impermissible religious objective. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 466, 48 P.3d 274 (2002). The analysis ends where the appropriation or application is for a non-religious purpose or hasn't occurred at all. “Without proceeding further it is at once apparent that the appropriation of money, or application of property, to effectuate any objective other than worship, exercise, instruction, or religious establishment is not within the prohibition.” *Malyon*, 131 Wn.2d at 799-800.

The Washington Constitution does not require that the state have no contact with religion or refuse to acknowledge the presence and

importance of religion in the life of its citizens. In *Malyon*, the Washington Supreme Court found that purchase of uniforms and provision of transportation for a volunteer chaplain program with the Pierce County Sheriff's Department was not a violation of article I, section 11 because the purchased items were secular in nature. *Id.* at 803. In *Bill of Rights Legal Found. v. Evergreen State Coll.*, 44 Wn. App. 690, 723 P.2d 483 (1986), the court found no excessive entanglement where a state college co-sponsored a lecture series with a church. Educational grants for "placebound" students enrolled in colleges and universities with religious affiliations are not an expenditure of state resources for an impermissible religious purpose. *Gallwey*, 146 Wn.2d at 468-469. The receipt of public funding by the Salvation Army for a secular drug treatment program does not violate article I, section 11. *Saucier v. Empl. Sec. Dept. of State of Wash.*, 90 Wn. App. 461, 466, 954 P.2d 285 (1998).

There is no violation of the state Establishment Clause in this case because any money that might be appropriated for the administration or enforcement of chapter 16.50 RCW and chapter 16-24 WAC is not spent on worship, exercise, instruction, or religious establishment. Pasado's argues that chapter 16.50 RCW and chapter 16-24 WAC violates the state Establishment Clause because the use of public funds to administer and enforce the Act is a coercion to support religion. *See* Appellants Op. Brief

at 17. However, the Washington Constitution only prohibits use of public funds only on “worship, exercise, instruction, or establishment” of religion. Wash. Const. art. I, § 11. Public funding spent by an agency on administration of its own programs and enforcement of statutes and rules does not constitute establishment of religion. Pasado’s fails to show any authority for their position, therefore this Court should affirm the trial court and uphold the Act as constitutional.

G. The Trial Court Correctly Concluded That The Act Did Not Violate Either The State Privileges And Immunities Clause Or The Federal Equal Protection Clause

Pasado’s has not pled a viable claim under the federal Equal Protection Clause or state Privileges and Immunities Clause at article I, section 12 of the Washington Constitution. The Fourteenth Amendment of the United States Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law.” U.S. Const. amend. XIV. Similarly, the Washington Constitution states that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Wash. Const. art. I, §12.

Generally, the state and federal clauses are considered to be substantively identical. However, in cases where “it becomes apparent

that the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens” the Washington Supreme Court has found the Washington Constitution requires an independent analysis. *Grant Cy. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806-807 and 811, 83 P.3d 419 (2004).

Because Pasado’s appears to allege in their Complaint that the Act is a grant of favoritism to a religious minority, an analysis under the Washington Constitution may be undertaken by the court. In *Andersen v. King County*, the Washington Supreme Court concluded that:

[t]he concern underlying the state privileges and immunities clause, unlike that of the federal equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class (‘a few’). Therefore, an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class. *Andersen v. King Cy.*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006) (plurality opinion).

Pasado’s briefing fails to demonstrate that the Act grants “undue favoritism” to a minority class.

1. The Act Does Not Violate Article I, Section 12 Of The Washington Constitution

For a violation of article I, section 12 to occur, a law must confer a special privilege to a class of citizens. *Grant Cy. Fire Prot. Dist. No. 5*, 150 Wn.2d at 812. “Not every statute authorizing a particular class to do or obtain something involves a ‘privilege’ subject to article I, section 12.” *Id.* The purpose of the Washington Equal Protection Clause is to secure “equality of treatment by prohibiting hostile discrimination.” *Andersen*, 158 Wn.2d at 15. The level of scrutiny given by the court depends on the classification created in the statute or whether fundamental rights are involved. *Id.* at 18. Suspect classifications including race, alienage, and national origin are subject to strict scrutiny. *Id.* at 19, (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). Strict scrutiny also applies to laws *burdening* fundamental rights or liberties. *Id.* at 24, *see also Am. Legion Post No. 149 v. Wash. State Dept. of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008). Under strict scrutiny, the court will not uphold a law unless the law furthers a compelling interest of the state. *Nielsen v. Wash. State Bar Ass’n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

The Act does not burden any fundamental right, but in fact recognizes and protects a fundamental right. Pasado’s appears to argue

that the “privilege” granted by the Act is the privilege to freely exercise one’s religion. *See* Appellants Op. Brief at 32. The state has a compelling interest in protecting the fundamental rights of its citizens and in fact the purpose of the Privileges and Immunities Clause is to prevent states from interfering with the fundamental rights of its citizens. Therefore it is difficult to apply a strict scrutiny test to the claims brought by Pasado’s. It would be more logical to apply strict scrutiny to the relief requested by Pasado’s because if that relief is granted, the free exercise of religion, a fundamental right, would be burdened. *See Am. Legion Post No.149*, 164 Wn.2d at 609. A strict scrutiny analysis in such a situation would dictate that the rights of a religious minority were suffering an unconstitutional infringement.

Pasado’s argument is based on the false premise that the Act creates two categories of packers and slaughterers (religious and non-religious) and treats each differently. Appellants Op. Brief at 32. Rather, the Act defines two *methods* of humane slaughter and allows any packer or slaughterer to employ either or both, but no other method is allowed. RCW 16.50.110(3). Contrary to Pasado’s unfounded assertions, the Act does not require the State to inquire into the religious sincerity of any person nor does Pasado’s allege that the State has ever actually done this. *See* Appellants Op. Brief at 10.

Pasado's argues that "non-religious" packers experience "reverse religious discrimination" under the challenged laws. *See* Appellants Op. Brief at 35. Pasado's cites no authority establishing a cause of action for "reverse religious discrimination" in an equal protection challenge, nor did Pasado's establish how they have standing to bring such a claim on behalf of "non-religious" packers. Pasado's fails to establish beyond a reasonable doubt and under every set of circumstances that the challenged laws violate the Privileges and Immunities Clause of article I, section 12 of the Washington Constitution.

2. The Act Does Not Violate The Equal Protection Clause Of The United States Constitution

Pasado's also fails to meet the required burden and standard of review under the analysis for the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to show that the challenged laws represent some form of "hostile discrimination" against Pasado's itself "as members of a minority class." *Andersen*, 158 Wn.2d at 18. "The level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or a semi-suspect classification has been drawn or a fundamental right has been implicated; if neither is involved, rational basis review is appropriate." *Id.* (citation omitted). In this case, chapter 16.50 RCW and chapter 16-24 WAC do not burden any

fundamental right, but protect a fundamental right of free exercise of religion. Therefore, strict scrutiny should not be applied as Pasado's fails to show a suspect or a semi-suspect class experiencing a *burden* upon a fundamental right. *Id.* at 24. The state had a rational basis for passing a statute, protecting the fundamental rights of its citizens to freely exercise their religious beliefs, thus the statutes should be upheld.

H. The Trial Court Correctly Found That The Act Did Not Violate The "Nondelegation Doctrine"

"[T]he Legislature is prohibited from delegating its purely legislative functions." *Diversified Inv. P'ship v. Dep't of Soc. and Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). Nondelegable legislative powers include the power to enact, suspend, and repeal laws, and the power to declare general public policy. *Id.* Pasado's did not identify the proper standard for analysis of a claim of unconstitutional delegation under state law. *See* Appellants Op. Brief at 38. First, federal cases identify the standard applicable to delegations of legislative authority by the United States Congress. Washington case law properly identifies the standard applicable to the Washington State Legislature. *Id.* at 26.³

³ The proper federal standard is found in *Mistretta v. U.S.*, 488 U.S. 361, 372-373, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (citation omitted), where the Supreme Court noted that *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935) was a deviation and stated that "[a]ccordingly, this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

Although purely legislative powers are nondelegable, the Legislature may delegate rulemaking authority to administrative agencies “to fill in the interstices of the law.” *Id.* Administrative rules adopted by a state agency are presumed valid if the rules are encompassed within the statutory framework and are consistent with the statutes implemented. *Hi-Starr, Inc. v. Wash. State Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). A party attacking the validity of an administrative rule must prove compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Edelman v. State ex rel. Public Disclosure Comm’n*, 152 Wn.2d 584, 599, 99 P.3d 386 (2004).

In support of its nondelegation argument, Pasado’s cites *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*, 196 N.J. 366, 955 A.2d 886 (2008). However, in that case, the New Jersey Supreme Court upheld most of the agency’s rules related to animal cruelty, but found that the New Jersey Department of Agriculture had failed to follow a Legislative mandate when promulgating its rules. *Id.* at 401-402. No similar delegation was made by the Legislature in the Act, thus this case does not support Pasado’s argument.

Pasado’s failed to identify any violation of the nondelegation doctrine in chapter 16.50 RCW or chapter 16-24 WAC. Pasado’s did not

challenge chapter 16-24 WAC as improperly delegating any legislative authority. Pasado's claim of unconstitutional delegation of legislative power appears to be based on an erroneous interpretation of RCW 16.50.150 as allowing private individuals complete immunity for any act by merely asserting it is based on religious practice. *See* Appellants Op. Brief at 40-42. First, the exercise of enforcement authority does not present a nondelegation doctrine issue. Second, RCW 16.50.150 cannot be interpreted as a delegation of authority to individuals to immunize any act. In that section, the Legislature states its intent not to interfere with constitutional freedoms and confirms that the specified methods in the statute *used by packers and slaughterers* are humane. Packers and slaughterers may only choose between the identified methods in RCW 16.50.110(3) so there is no delegation to these entities to make the rules applicable to them. Pasado's also fails to recognize that the factual determination of whether a packer or slaughterer has committed a violation of the Act and was guilty of a misdemeanor would be determined by a jury, and thus is not an issue of the delegation of the legislative function. *See* RCW 16.50.170.

I. The Trial Court Correctly Found That Pasado's Evidence Was Not Admissible Under The Provisions Of CR 56

Pasado's fails to acknowledge in its briefing that CR 56 controls the admissibility of affidavits in the context of a summary judgment motion. CR 56(e) states that "party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial" and "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e); *See Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002). The trial court correctly concluded that Pasado's declarations did not conform to this requirement. *See CP* at 22-23, 84-107, and 202-248. "Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

In support of the pleadings related to the cross-motions on summary judgment, Pasado's attorney, Adam Karp, submitted two

declarations with exhibits attached. CP at 84-107 and 202-248. The entire text of each declaration merely stated that the attached exhibits were “true and correct copies of what they are purported to be.” CP at 84 and 202. Mr. Karp was not the author of any of the exhibits attached to his declarations. The declarations neither identified nor listed the exhibits attached. The trial court also correctly ruled that “incorporations by reference” within the summary judgment briefing did not meet the requirements of CR 56(e). CP at 22-23. Facts that are presented only in a brief and not supported by admissible evidence may be disregarded. *Bravo v. Dolsen Companies*, 71 Wn. App. 769, 777, 862 P.2d 623 (1993) reversed on other grounds, 125 Wn.2d 745, 888 P.2d 147 (1995).

CR 56(e) requires that exhibits be attached to affidavits that properly authenticate them. *Burmeister v. State Farm Insurance*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Pasado’s argues that they need only make a prima facie showing of authenticity. Appellants Op. Brief at 43. However, Mr. Karp failed to authenticate any of the exhibits attached to his declaration nor were the exhibits self-authenticating under ER 902. This Court should reject Pasado’s argument that any content found on the internet is self-authenticating under ER 902. Appellants Op. Brief at 44. ER 901 states that the requirement of authentication is satisfied by “evidence sufficient to support a finding that the matter in question is what

its proponent claims.” ER 901(a). Pasado’s did not meet the requirement that a witness with knowledge testify that the document is what it claims to be. ER 901(b)(1).

Mr. Karp’s declarations were also properly rejected because they were not based on personal knowledge, as required by CR 56(e). A declaration from an attorney for a party can only be considered if it relates to a matter within the personal knowledge of the attorney. *See Meadows v. Grant’s Auto Brokers, Inc.*, 71 Wn.2d 874, 880, 431 P.2d 216 (1967); *McKinnon v. Republic National Life Ins.*, 25 Wn. App. 854, 855, 610 P.2d 944 (1980). Declarations from attorneys are only appropriate if related to procedural matters in the case and are not appropriate to introduce substantive evidence. In *Burmeister v. State Farm Insurance*, the court ruled a police report was inadmissible where the plaintiff’s attorney merely certified that the report was a true and correct copy of the original. *Burmeister*, 92 Wn. App. at 366-367. Pasado’s argues that copies of affidavits prepared for other cases and attached to the declarations should have been admitted. Appellants Op. Brief at 44. A court has no way to determine, based on the information provided by Pasado’s, whether the affidavits are correct copies or whether the content was supplemented, changed, or discredited in the litigation for which they were prepared.

The trial court properly rejected the exhibits to Mr. Karp's declarations because the content of those exhibits was inadmissible hearsay. Hearsay evidence in a declaration is not competent evidence under CR 56(e). *Charbonneau v. Wilber Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). A document, other than an affidavit or declaration based on personal knowledge, is objectionable as hearsay if offered to prove the truth of the matter asserted, and may be considered only if it falls within an exception to the hearsay rule. *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 122, 22 P.3d 818 (2001). An affidavit from an attorney where the attorney asserts to have read various exhibits is hearsay and does not meet the requirements of CR 56(e). *Melville v. State*, 115 Wn.2d 34, 35, 793 P.2d 952 (1990). Pasado's asks this Court to consider the *content* of those documents and exhibits. Appellants Op. Brief at 45-46. Because they are submitted for the trial court to consider the veracity of the content, they are inadmissible hearsay.

Pasado's also requests judicial notice of a list of various facts not subject to notice under ER 201. *See* Appellants Op. Brief at 46. The facts listed by Pasado's should have been established by affidavit meeting the requirements of CR 56(e). Under ER 201, a court may take notice of facts not reasonably subject to dispute. For a court to take notice, the fact must be generally well known within the jurisdiction of the court or capable of

accurate and ready determination by an unquestionably accurate source. ER 201(b). Such facts must be beyond controversy (e.g. Seattle is in King County, *see State v. Hardamon*, 29 Wn.2d 182, 189, 186 P.2d 634 (1948)). Further, judicial notice of the copies of affidavits prepared for other cases is not appropriate. A court should not “take judicial notice of records of other independent and separate judicial proceedings” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

The exhibits attached to Mr. Karp’s declarations are not “legislative facts” subject to judicial notice. Legislative facts typically comprise the legislative history of a statute and courts can take notice of “legislative facts, social, economic, and scientific facts that simply supply premises in the process of legal reasoning.” *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (citation omitted). A court may take notice of “assessments expressed in . . . case law” and other information considered in drafting a statute but facts beyond this context are not legislative facts. *State v. Balzer*, 91 Wn. App. 44, 59, 954 P.2d 931 (1998).

For the reasons above, the trial court did not abuse its discretion when it granted the State’s motion to strike Pasado’s inadmissible evidence and thus this Court should affirm the ruling.

J. Pasado's Established No Legal Basis For Its Request For Attorney Fees

Pasado's established no basis for an award of attorney fees under RAP 18.1. Washington follows the "American rule" concerning attorney fees; such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Pasado's requested that attorney fees be awarded under the "common fund" exception for protection of constitutional principles. Appellants Op. Brief at 48. The common fund exception is an equitable exception to the American rule and allows for recovery of attorney fees in two situations; first, where the litigant confers a benefit to an ascertainable class and a common fund is benefitted or preserved and, second, where the litigant confers benefit to a class in a suit challenging the unconstitutional expenditure of public funds. *Rustlewood Ass'n v. Mason County*, 96 Wn. App. 788, 801, 981 P.2d 7 (1999).

Pasado's may not be awarded attorney fees because it has not conferred a benefit to others through creating or preserving a common fund in litigation. Even where a litigant prevails and confers a substantial benefit to a class, attorney fees are not awarded unless the party protected, preserved, or created a common fund. *Seattle School Dist. No. 1 of King*

County v. State, 90 Wn.2d 476, 542 and 545, 585 P.2d 71 (1978). “As courts have repeatedly clarified, the common fund/substantial benefit doctrine is applicable only when the litigant preserves assets or creates a common fund, in addition to conferring a substantial benefit upon others.”

City of Sequim v. Malkasian, 157 Wn.2d 251, 271, 138 P.3d 943 (2006).

In this case, no common fund is at issue thereby barring Pasado’s request for attorney fees. Simple monetary benefit to a class of persons is not a basis for awarding attorney fees. For example, the Washington Supreme Court ruled that the common fund exception did not extend to a case where a party prevailed in a zoning decision thus allowing a class of property owners to remain free of city property taxes. *See Interlake Sporting Ass’n, Inc. v. Washington State Boundary Review Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006). In *Seattle School Dist. No. 1*, the court noted that preservation of the value of stocks and bonds or preservation of funds through a court ordered accounting may substitute for a monetary fund but “there must be an immediate Common fund from which attorneys’ fees may be drawn.” *Seattle School Dist. No. 1*, 90 Wn.2d at 544-45.

Further, Pasado’s may not request attorney fees since the litigation has not benefitted a class by a challenge to the unconstitutional expenditure of public funds. The four requirements of this variation of the

common fund exception are: “(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge.” *City of Seattle v. McCready*, 131 Wn.2d 266, 276, 931 P.2d 156 (1997), citing *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

In this case, Pasado’s did not challenge any expenditure of public funds. Pasado’s alleged only a facial challenge to the constitutionality of the Act under the UDJA, a situation where the common fund exception does not apply. *McCready*, 131 Wn.2d at 276, citing *Seattle School Dist. No. 1*, 90 Wn.2d at 544-545. Further, in no case has a Washington court held merely challenging the expenditure of tax funds in general is sufficient to create a common fund. Further, it should be noted that any theory supporting recovery of attorney fees requires that Pasado’s prevail. Therefore Pasado’s request for attorney fees should be denied.

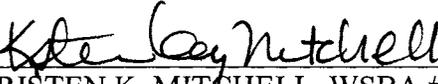
VI. CONCLUSION

The State urges this Court to reverse one aspect of the trial court’s Order and find that Pasado’s failed to establish standing for its taxpayer derivative action. However, this Court should affirm the remainder of the trial court’s rulings: that Pasado’s failed to establish standing under the

UDJA; that Pasado's declarations and exhibits were properly struck for failure to comply with CR 56; and that summary judgment was properly granted to the State; and dismissal of the case was appropriate.

RESPECTFULLY SUBMITTED this 9th day of March 2010.

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CERTIFICATE OF SERVICE

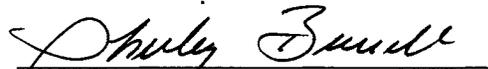
I certify that I served a copy of the *Response Brief* on all parties or their counsel of record on the date below as follows:

ADAM P. KARP, ESQ.
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- US Mail Postage Prepaid via Consolidated Mail Service
- Email: adam@animal-lawyer.com
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of March 2010, at Olympia, Washington.


SHIRLEY BURRELL

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Reed Jackson Watkins
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Memo

To: Eva
From: Bonnie Reed
Date: 3/10/2010
Re: Mongauzy 64499-8-1

Hi Eva.

Thank you so much for your help with this. Sorry about the typo.

Thanks -

Bonnie Reed

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THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Marriage of:)
KATHLEEN DIANE MONGAUZY,)
 Petitioner,) Cause No. 07-3-01206-4 SEA
and) Appeal No. 64499-8-I
PAUL HENRI MONGAUZY,)
 Respondent.)

MOTION HEARING

The Honorable Mariane Spearman Presiding

October 29, 2009

Transcribed by: Debra Kallgren, CETD
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