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No. 89723-9

(On appeal from King County Superior Court Case # 13-2-25352-6 KNT)

FILO FOODS, LLC, BF Foods, LLC, ALASKA AIRLINES, INC., and
WASHINGTON RESTAURANT ASSOCIATION,

Respondents/Cross-Appellants,

v.

CITY OF SEATAC,

Appellant/Cross-Respondent,

and

PORT OF SEATTLE,

Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,

Appellant/Cross-Respondent.

**FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC.,
AND WASHINGTON RESTAURANT ASSOCIATION'S
REPLY BRIEF ON CROSS APPEAL**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	1
A.	The Superior Court’s Rulings were Properly Based on CR 56.	1
1.	Judge Darvas Entered Summary Judgment Invalidating the Ordinance in Part.	1
2.	The Superior Courts’ Decision was Supported by Unrebutted Evidence.	3
B.	The Severability Clause Does Not Save the Ordinance.	6
C.	The Ordinance Violates the Single Subject Rule Because it Combines Unrelated Subjects into a Single Law.	9
D.	The Ordinance Is Preempted By Federal Labor Law.	12
1.	The Ordinance Interferes with the Collective Bargaining Process Because it is Not Neutral in its Application or Effect.	12
2.	The Worker Retention Provision of the Ordinance is Preempted Because it Improperly Intrudes on an Employer’s Ability to Select its Workforce.	17
E.	The Ordinance Is Invalid Because It Lacked Sufficient Signatures.	19
1.	The Election did not Cure the Signature Sufficiency Issue.	19
2.	The Enrolled Bill Rule does not Apply to Local Initiatives.	21

3.	Further Supplemental Briefing is Unnecessary.....	22
F.	The Ordinance Also Violates the Dormant Commerce Clause.....	23
III.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>520 S. Mich. Ave. Assocs., Ltd v. Shannon</i> , 549 F.3d 1119 (7th Cir. 2008)	16
<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	2, 6, 9, 11
<i>Bhd. of R.R. Trainmen v. Jacksonville Terminal</i> , 394 U.S. 369 (1969).....	13
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	21
<i>Brown v. Pro Football, Inc.</i> , 50 F.3d 1041 (D.C. Cir. 1995), <i>aff'd</i> 518 U.S. 231 (1996).....	13
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548 (1986).....	3
<i>Chamber of Commerce of the United States v. Brown</i> , 554 U.S. 60 (2008).....	12, 19
<i>Chamber of Commerce v. Bragdon</i> , 64 F.3d 497 (9th Cir. 1995)	16
<i>City of Burien v. Kiga</i> , 144 Wn.2d 819, 31 P.3d 659 (2001).....	10
<i>Colorado-Ute Elec. Ass'n. v. NLRB</i> , 939 F.2d 1392 (10th Cir. 1991), <i>cert. den.</i> 504 U.S. 955 (1992).....	14
<i>Dunn v. Airline Pilots Ass'n</i> , 836 F.Supp. 1574, 178-80 (S.D. Fla. 1993); <i>aff'd</i> 193 F.3d 1185 (11th Cir. 1999)	13

<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	16
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	18
<i>First Nat'l Maint. Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	14, 18
<i>Fort Halifax Packing Co., Inc. v. Coyne</i> , 482 U.S. 1 (1987).....	15
<i>Fortuna Enters., L.P. v. City of Los Angeles</i> , 673 F. Supp. 2d 1000 (C.D. Cal. 2008)	16
<i>Futurewise v. Reed</i> , 161 Wn.2d 407, 166 P.3d 708 (2007).....	21
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005).....	24
<i>Groom v. City of Bellingham</i> , 189 Wash. 445, 65 P.2d 1060 (1937).....	19, 20
<i>Hall v. Niemer</i> , 97 Wn.2d 574, 649 P.2d 98 (1982).....	8
<i>Howard Johnson Co. v. Hotel Emps.</i> , 417 U.S. 249 (1974).....	17, 18
<i>Kadoranian by Peach v. Bellingham Police Dep't</i> , 119 Wn.2d 178, 829 P.2d 1061 (1992).....	23
<i>Karlberg v. Otten</i> , 167 Wn. App. 522, 280 P.3d 1123 (2012).....	4
<i>Leonard v. City of Spokane</i> , 127 Wn.2d 194, 897 P.2d 358 (1995).....	6, 8
<i>Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Emp't Relations Comm'n</i> , 427 U.S. 132 (1976).....	12, 13, 18, 19

<i>Lynden Trans., Inc. v. State</i> , 112 Wn.2d 115, 768 P.2d 475 (1989).....	6, 9
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985).....	13, 14, 15
<i>Montanans for Equal Application of Initiative Laws v. State</i> <i>ex. rel. Johnson</i> , 336 Mont. 450, 154 P.3d 1202 (2007).....	20
<i>NLRB v. Burns Int'l Sec. Servs., Inc.</i> , 406 U.S. 272 (1972).....	17, 18
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937).....	17
<i>Power, Inc. v. Huntley</i> , 39 Wn.2d 191, 235 P.2d 173 (1951).....	11
<i>Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC</i> , 171 Wn.2d 736, 257 P.3d 586 (2011).....	10, 11
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	11
<i>Torgerson v. North Pacific Ins. Co.</i> , 109 Wn. App. 131, 34 P.3d 830 (2001).....	6
<i>United Pac. Ins. Co. v. Boyd</i> , 34 Wn. App. 372, 661 P.2d 987 (1983).....	2
<i>Viceroy Gold Corp. v. Aubry</i> , 75 F.3d 482 (9th Cir. 1996).....	15
<i>Vickers v. Schultz</i> , 195 Wash. 651, 81 P.2d 808 (1938).....	19, 20
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	23
<i>Washington State Grange v. Locke</i> , 153 Wn.2d 475, 105 P.3d 9 (2005).....	22

<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	3
--	---

Statutes

Industrial Welfare Act of 1913	12
Montana Constitution.....	20
National Labor Relations Act	<i>passim</i>
Railway Labor Act.....	13
RCW 35A.01.040(7).....	22, 23
RCW 49.12	12
SeaTac Municipal Code 1.10.220.....	22

Rules

CR 56	1, 2, 3, 5
RAP 2.5.....	4
RAP 10.3.....	5

I. INTRODUCTION

The superior court correctly concluded that SeaTac voters lack the power to regulate employment terms and conditions at the Airport. This Court should invalidate the remaining provisions of the Ordinance, which apply only to a few hundred transportation and hotel workers employed at a handful of businesses near the Airport.

Appellants' primary defense—that the Ordinance “is wholly unrelated to airport operations,” Committee Reply at 12—is simply untenable. Moreover, the remaining portions of the Ordinance do not merely raise the minimum wage for (some) workers in SeaTac. To the contrary, the Ordinance targets multiple aspects of labor relations in the airline industry and related businesses, including job retention and other disparate employment terms. Even outside the Airport, these provisions conflict with longstanding authorities governing both preemption and the local initiative power. This Court should reverse and remand for entry of summary judgment in favor of Plaintiffs.

II. ARGUMENT

A. **The Superior Court's Rulings were Properly Based on CR 56.**

1. **Judge Darvas Entered Summary Judgment Invalidating the Ordinance in Part.**

Plaintiffs have cross-appealed from the superior court's refusal to

summarily invalidate the entire Ordinance, while entering summary judgment invalidating the Ordinance's application to employers at the Airport itself.

Both the City and the Committee take the disingenuous (and completely new) position on appeal that Plaintiffs did not file "motions for summary judgment." Committee's Reply at 15, City's Reply at 4. The City goes so far as to baldly claim the December 13, 2013 hearing was a "trial," City's Reply at 5, and the Committee contends that the "first reference to 'summary judgment' or CR 56 . . . was during oral argument." Committee's Reply at 16. However, declaratory judgment actions are routinely resolved by summary judgment. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 198, 11 P.3d 762 (2000). Courts do not make factual findings in summary judgment proceedings conducted pursuant to CR 56. *United Pac. Ins. Co. v. Boyd*, 34 Wn. App. 372, 377, 661 P.2d 987 (1983); *see also* Plaintiffs' Answering Brief at 15 n.6. Where, as here, there are no genuine issues of material fact, claims may be resolved without a trial. *See* CR 56; *Amalgamated Transit Union Local 587*, 142 Wn.2d at 198. That is what happened here—as all parties and the court understood at the time. *See, e.g.*, Appx. A (string including 10/31/13 email from City's counsel confirming summary judgment status and discussing application of CR

56); Appx. B at 2-3 (11/21/13 email string from the Committee's counsel regarding scheduling under CR 56);¹ *see also* RP 8, 101.

2. The Superior Courts' Decision was Supported by Unrebutted Evidence.

Under CR 56, Plaintiffs bore the initial responsibility of informing the court of the basis of the motions, with or without supporting declarations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Alaska Airlines submitted evidence with Plaintiffs' motions that the Ordinance would result in an increase in costs for labor-heavy services such as baggage handling, aircraft cleaning, and aircraft fueling that are directly related to airport operations. *See, e.g.*, CP 932-35. Likewise, Filo

¹ In October 2013, with copies to all counsel, Plaintiffs requested a hearing date before the superior court, and proposed a briefing schedule pursuant to CR 56. *See* Appx. A at 3. The City admits that it never suggested below that summary judgment was inappropriate, even after it confirmed Plaintiffs' intention to bring motions for summary judgment. City's Reply at 5; *see also* Appx. A at 1. Despite this unequivocal record, the Committee now argues that it was not provided with the 28 days' notice required for summary judgment by CR 56. Committee's Reply at 16. This is simply not true. Plaintiffs filed and served their motions on November 15, 2013 (allowing for the 28 days notices provided under the rule and agreed on by the parties). At the time, the Committee had improperly removed the case to federal court, and the case was pending remand. Following remand, Plaintiffs re-filed the identical motions and declarations with the superior court clerk on November 22, 2013, pursuant to *the Committee's* proposed briefing and hearing schedule. *See* Appx. B at 1-2.

and BF submitted un rebutted evidence that the Ordinance would increase labor costs to the food industry at the Airport. *See, e.g.*, CP 936-41. The Port, in turn, relied on these declarations “that suggest that it will [interfere with airport operations] . . . [and] suggest that [the Ordinance] will cause them to have to renegotiate their contracts, it will cause them to have to reduce their services, and that will impact Port operations.” RP 37.

Appellants had the opportunity in the trial court to rebut any facts submitted or to submit contradictory evidence that might have created disputed issues of fact, but they chose not to do so. Appellants also did not identify any deficiencies in the declarations submitted on summary judgment. Instead, the Committee waited to argue for the first time on appeal that the superior court was required to make formal factual findings that the Ordinance interfered with airport operations, contending the superior court’s decision on the Port jurisdiction issue fails because it is not supported by such “substantial evidence or findings.” Committee Reply at 13-16. The Court should not consider new issues raised for the first time on appeal. RAP 2.5; *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012).

The Court should also disregard the Committee’s attempt to insert new discovery disputes into this appeal. After litigating the case for four months, and only after the parties had secured a hearing date and proposed

a briefing schedule pursuant to CR 56, the Committee propounded broad discovery requests on each of the Plaintiffs. CP 1246-86. These requests sought information on a wide swath of topics—from pricing policies and processes, gross revenues, net profits, future and internal business plans and assessments. CP 1246-86. Plaintiffs sought a protective order on the grounds that such discovery was not needed in a case that centers on purely legal issues. The Committee conceded as much: a week after serving discovery requests, the Committee argued in federal court that “[t]he issues in Plaintiffs’ attack on the [Ordinance] are almost purely legal in nature.” CP 1205, 1233. The Committee further admitted to the superior court that the state law claims “seem to be purely legal issues.” RP 7; *see also* CP 1233. The superior court properly granted a stay of discovery. RP 7-9.²

If, as the Committee now contends on appeal, it was prevented from obtaining relevant facts to dispute Plaintiffs’ claims, it should have assigned error to the superior court’s stay of discovery. *See* RAP 10.3. It

² The City never requested discovery in this matter. After Plaintiffs submitted declarations, the City determined that it did not need any additional information to respond to the motions, and instead went forward with the motion hearing. *See* Appx. A (“I am assuming that many, if not all the issues do not involved contested facts, but if any discovery is needed once the declarations are submitted, I do not consent to the December 13 date.”).

did not do so. *See* Committee Br. at 2. Nor has the Committee demonstrated that the trial court abused its discretion in its discovery and case management ruling. The un rebutted evidence presented by Plaintiffs and relied upon by the Port was more than sufficient to support the superior court's ruling on summary judgment. *Torgerson v. North Pacific Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

B. The Severability Clause Does Not Save the Ordinance.

Under this Court's severability test, the entire Ordinance must be invalidated if either (1) it cannot reasonably be believed that the act would have passed without the invalid portions, or (2) elimination of the invalid portion would render the remaining part useless to accomplish the legislative purpose. *Amalgamated Transit Union Local 587*, 142 Wn.2d at 227 28; *Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995). The superior court erred by not invalidating the entire Ordinance in light of its failure to achieve its primary legislative purpose.

Instead of determining whether enforcing the Ordinance only outside the Airport would satisfy this standard, the superior court relied on the severability clause in the legislation. CP 1946-47. But the mere existence of a severability clause is not dispositive. *Lynden Trans., Inc. v. State*, 112 Wn.2d 115, 124, 768 P.2d 475 (1989) (“[A] severability clause will not save other portions of the act if the court nonetheless decides that

the Legislature probably would not have passed the remaining portion of the act without the invalid part or if we believe the remaining valid enactment would not reasonably accomplish the legislative purpose.”).

Had the superior court properly applied the severability test, it would have found that the legislative purpose of the Ordinance was to regulate wages and employment terms *at the Airport*. CP 809; 952-55; 979-80; 985; 990-92. Rather than apply to “all people” in the city or even in the hospitality and transportation industry, Committee’s Reply at 67, the plain language of the Ordinance carefully defines both covered employers and employees to apply only to “certain” employees—the large majority of which work at the Airport itself, with a small number working near the Airport. SMC 7.45.010(D), (G), (M); CP 751-52. The Ordinance’s purpose also appears unequivocally in the campaign materials, voter’s pamphlet, and studies conducted about the purpose of the Ordinance. *See, e.g.*, CP 808-10; 952-55; 982-1017. The proponents touted that the “*vast majority of covered jobs (73%) are located at Sea-Tac Airport*, a unique, captured market operated by a large public authority, the Port of Seattle.” CP 985 (emphasis added).

The Committee ignores both the very legislative language it drafted and the additional materials promoting the Ordinance—all of which the Committee played a part in creating, and all of which state the

Ordinance is intended primarily to apply at the Airport. *See, e.g.*, CP 808-10; 952-55; 979-80; 985; 990-92. There is absolutely no support for the Committee's naked assertion that the "primary purpose of the Ordinance is to ensure that, to the extent reasonably practicable, *all people* employed in the hospitality and transportation industries in the City" have certain improved employment conditions. Committee's Reply at 67 (emphasis added).

The City does not even identify a primary purpose of the Ordinance, and instead merely argues that "while [the Ordinance is] certainly intended to apply" at the Airport, "the intent of the law was not limited to the Airport." City's Reply Brief at 27. But the test for severability is not whether a partially invalidated law continues to have some limited application beyond its intended purpose. *See Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982). With the severance of the offending portions of the Ordinance, *i.e.*, regulating employment at the Airport, the Ordinance cannot accomplish its legislative purpose.

Because the City has no authority to regulate the Airport, the legislative purpose of the Ordinance has not been accomplished, and the superior court erred by declining to invalidate the entire Ordinance. *Leonard*, 127 Wn.2d at 202 (finding statute invalid in its entirety because it would be virtually worthless without the offending provision); *Lynden*

Transport, 112 Wn.2d at 124-25 (invalidating statute because portions are “intimately and inseparably connected” and “[t]hus, they are not severable”). This Court may reverse the superior court’s partial denial of summary judgment without reaching the additional legal issues discussed below.

C. The Ordinance Violates the Single Subject Rule Because it Combines Unrelated Subjects into a Single Law.

The Ordinance violates the single subject rule because, at a minimum, it addresses three separate subjects: pay, benefits, and worker retention. In addition to increasing the minimum wage and providing employees with sick leave and other benefits, the Ordinance requires that employers offer full-time hours to part time employees before hiring additional workers and that successor employers retain certain employees of their predecessors. SMC 7.45.030; 7.45.060; CP 755; 756-57. The Committee and City highlight the first two subjects, pay and benefits, *but ignore the third*. The inclusion of worker retention provisions in the Ordinance violates the single subject rule in two separate and important ways.

First, the inclusion of the worker retention provisions in the Ordinance is the product of “logrolling.” *Amalgamated Transit Union Local 587*, 142 Wn.2d at 207. The Committee agrees that the primary

purpose of the single subject requirement is to prevent “logrolling,” but completely ignores the fact that both the Washington Legislature and the Port of Seattle Commissioners previously considered and rejected worker retention provisions for workers at the Airport that were nearly identical to those imposed by the Ordinance. Plaintiffs’ Brief at 24 n.12. Including these previously rejected retention provisions in the Ordinance, along with increased minimum wage and sick leave benefits, is a textbook example of logrolling. Throughout the campaign, the Committee promoted the Ordinance as a “living wage” law and, indeed, it continues to refer to the Ordinance as such in its briefing. Committee Reply at 21, 28, 67. As a result, it is impossible to determine whether an individual voter who favored a “living wage” voted for the Ordinance as a whole because of or in spite of the worker retention provisions. Because the intent of the voters cannot be determined, the Ordinance is invalid. *City of Burien v. Kiga*, 144 Wn.2d 819, 824-25, 31 P.3d 659 (2001).

Second, *there is no rational unity between pay and benefits, on the one hand, and worker retention, on the other.* The worker retention provisions are a direct attack on the common law rule of at-will employment. “Common law at-will employment has been the default employment rule in Washington since at least 1928.” *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 754, 257 P.3d 586

(2011). At-will employment is intended to permit employers to make personnel decisions without fear of liability. *Id.* at 755. While the minimum wage provisions grant a benefit to employees, the worker retention provisions strip an employer of its right to terminate an employee “for no cause, good cause or even cause morally wrong without fear of liability.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). Granting a benefit and stripping a right are two distinct concepts, and it is unnecessary to change the concept of at-will employment in order to increase the minimum wage or provide sick pay. *See Amalgamated Transit Union Local 587*, 142 Wn.2d at 209, 217 (no rational unity between subjects where one part is not necessary to implement the other). Tellingly, Appellants fail to explain how the worker retention provisions relate to the wage and benefit requirements. The inclusion of these distinct, unrelated provisions in a single piece of legislation violates the single subject rule.

Even within the “sub-categories” of pay and benefits, the Ordinance addresses disparate topics that should be addressed by separate legislation. For example, it is undisputed that sick leave and minimum wage are typically addressed in separate legislation. Appellants ignore those cases that hold that subjects that are traditionally addressed in separate legislation lack rational unity. *See Power, Inc. v. Huntley*, 39

Wn.2d 191, 235 P.2d 173 (1951). Instead, Appellants argue that legislation that combines different subjects can only be struck down if there is direct evidence of logrolling. This is not the standard; but as discussed above, there is indeed evidence of logrolling. *See supra* at 9-10. Moreover, Committee's citation to lone example of enabling legislation, the Industrial Welfare Act of 1913, does not evince a "well-established tradition of legislation in Washington" of addressing numerous aspects of labor standards in a single law. Committee Reply at 30-31. The Committee's reliance on the codification of RCW 49.12 in a lone chapter is equally misplaced. Even though many of the laws governing labor standards are included in the same chapter of the code, they nonetheless were enacted as separate legislation, with each law addressing a single subject. Because the Ordinance violates the single subject rule, the Court may bar its enforcement outside the Airport on this additional ground.

D. The Ordinance Is Preempted By Federal Labor Law.

1. The Ordinance Interferes with the Collective Bargaining Process Because it is Not Neutral in its Application or Effect.

Machinists preemption creates "a zone free from all regulations, whether state or federal." *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 74 (2008) (*quoting Bldg. & Constr. Trades Council v. Associated Builders & Contrs.*, 507 U.S. 218, 226 (1993)). State or

local legislation that interferes with the bargaining process, therefore, is pre-empted by the NLRA and RLA.³ *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) (“*Machinists*”).

Collective bargaining is a carefully defined *bilateral* process. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1051 (D.C. Cir. 1995), *aff'd* 518 U.S. 231 (1996). Federal labor policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices. *Id.* at 1052. While federal law does not necessarily require a level playing field, it does guarantee neutrality. State laws imposing substantive requirements that disrupt that neutrality are preempted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985) (“Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.”) (“*Metropolitan*”).

³ As stated in Plaintiffs’ opening brief, *Machinists* preemption applies in the context of the Railway Labor Act (“RLA”). See Plaintiffs’ Br. at 32; see also *Bhd. of R.R. Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 381 (1969); *Dunn v. Airline Pilots Ass’n*, 836 F.Supp. 1574, 178-80 (S.D. Fla. 1993); *aff’d* 193 F.3d 1185 (11th Cir. 1999).

The Ordinance interferes with the bargaining process because it is not neutral. By design, it affects the rights of self-organization and collective bargaining protected by the NLRA. *Metropolitan*, 471 U.S. at 758. It gives workers added bargaining capital in the form of dramatically higher wages, paid time off, job retention, and guaranteed full-time employment—all in a single piece of legislation—yet gives employers nothing. Instead, it restricts their right to make staffing and hiring decisions, and eliminates their ability to implement proposals during bargaining. The right to make such core entrepreneurial decisions is a key economic weapon that the Ordinance strips from employers. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981); *Colorado-Ute Elec. Ass'n. v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991), *cert. den.* 504 U.S. 955 (1992). The Ordinance also favors unions and unionization, because the only way for an employer to gain any ground is to agree to unionization. Even then, the employer is faced with an onerous starting position.

Respondents are not arguing, as the Committee incorrectly contends, that the presence of the opt-out provision alone is sufficient to preempt the Ordinance. Rather, the opt out provision “limit[s] the rights of self-organization or collective bargaining,” because employees lose their guaranteed rights under the Ordinance. *Metropolitan*, 471 U.S. at

758. Although the Ordinance's labor standards can be waived by entering into a collective bargaining agreement, it does not require that the parties bargain for substitute terms. As a result, the Ordinance excludes unionized workers and employers from its scope and gives "unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* at 755-56 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)); see also *id.* ("Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards"). This case, therefore, may be distinguished from cases cited by the Committee that limited the scope of a waiver. *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996) (parties could opt out of 8-hour work day provided that agreement expressly addressed work hours); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987) (party may waive statutory requirements provided that they agree to separately devise severance pay arrangements). Considering the opt-out provision in conjunction with the other onerous and one-sided provisions of the Ordinance confirms that, as a whole, the Ordinance is preempted.

The Ordinance also improperly replaces the bargaining process with the political process. Although the Committee characterizes Respondent's position as "elitist," it does not deny substantial union

involvement in the drafting of, campaigning for, and implementation of the Ordinance. *See, e.g.*, CP 1110-28 (PDC disclosures identifying union funding of Committee). This obvious union involvement is strong evidence that the Ordinance was specifically designed to interfere with the bargaining process to the advantage of organized labor. In *Eastex, Inc. v. NLRB*, relied upon by the Committee, the U.S. Supreme Court held that a union's political activities were protected by the NLRA; it did not discuss preemption, nor did it hold that any laws that were the product of a union's political activities were proper. When a union substitutes the bargaining process with the political process, its efforts may be scrutinized as part of the federal preemption analysis. *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995); *Fortuna Enters., L.P. v. City of Los Angeles*, 673 F. Supp. 2d 1000, 1010 (C.D. Cal. 2008).

Finally, the Ordinance interferes with the bargaining process because it is not a law of general application. *520 S. Mich. Ave. Assocs., Ltd v. Shannon*, 549 F.3d 1119, 1131 (7th Cir. 2008). The Ordinance does not apply to all employers in SeaTac, nor does it apply to employers in a single industry. Instead, the Ordinance applies only to select employers within select industries associated with air travel. For example, the Ordinance does not generally apply to restaurants; it applies only to restaurants that operate within a hotel or at the airport. The practical effect

of this is that a drink kiosk that operates in a hotel lobby is subject to the Ordinance while the same exact kiosk would be excluded if it operated in the hotel's parking lot. None of the decisions cited by Appellants support legislation that discriminates against particular businesses in this manner.

The breadth of the Ordinance, and its corresponding effect on the bargaining process, is unprecedented in state law. Read in its totality, the Ordinance imposes substantial restrictions and regulations on specific employers, far beyond what courts have considered proper "minimum labor standards." The Ordinance's resemblance to a complex, collective bargaining agreement is more than mere coincidence, and confirms that federal law preempts its enforcement.

2. The Worker Retention Provision of the Ordinance is Preempted Because it Improperly Intrudes on an Employer's Ability to Select its Workforce.

The United States Supreme Court has held on three separate occasions that the NLRA does not require that an employer hire any of the employees of its predecessor. *Howard Johnson Co. v. Hotel Emps.*, 417 U.S. 249, 261-62 (1974); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 280 n.5 (1972). The Court expressly has held that a successor employer must be free to "make changes in corporate structure, composition of the labor

force, work location, task assignment, and nature of supervision.” *Burns Int’l Sec. Servs., Inc.*, 406 U.S. at 287-88; *see also First Nat’l Maint. Corp. v. NLRB*, 452 U.S. at 686 (decision whether to withdraw from a contract should be left to the free play of economic forces). Similarly, whether a successor employer has duty to bargain with a predecessor’s employees’ union depends, in part, on whether the decision to retain the employees was voluntary. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40-46 (1987). Because the decision of whom to hire in a successorship situation has intentionally been left to the free play of economic forces, *Machinists* preemption protects that decision from state regulation.

Rather than address federal preemption of retention requirements, the Committee merely contends that the Ordinance is permissible because it does not necessarily create an obligation to bargain by the successor employer. Committee Reply at 48-49. However this is not accurate. The retention requirement creates the one condition an employer which purchases an ongoing enterprise must meet (and could otherwise avoid) in order for the bargaining obligation to attach. Furthermore, as the U.S. Supreme Court has held, the entire decision-making process surrounding successorship must be left unregulated. *See, e.g., Howard Johnson*, 417 U.S. at 261 (citing *Burns*, 406 U.S. at 287-88). The Committee

misconstrues this lack of federal regulation as authorizing local governments to impose restrictions of their own. But *Machinists* preemption bars “all regulations, whether state or federal.” *Brown*, 554 U.S. at 74.

E. The Ordinance Is Invalid Because It Lacked Sufficient Signatures.

1. The Election did not Cure the Signature Sufficiency Issue.

The Ordinance should have never been placed on the ballot in the first place. The initiative petition circulated in support of the Ordinance lacked the legally sufficient number of valid signatures to place the initiative on the ballot. Nevertheless, Appellants take the position that the November election “cured” any procedural defect. Committee’s Reply at 33-37; City’s Reply at 24. This is incorrect

The Committee erroneously relies on Washington cases addressing statutory notice requirements for special elections. *See* Committee Reply at 33-35 (citing *Vickers v. Schultz*, 195 Wash. 651, 81 P.2d 808 (1938) and *Groom v. City of Bellingham*, 189 Wash. 445, 65 P.2d 1060 (1937)). Those cases are inapposite, because the question of whether either resolution was eligible to appear on the ballot was not at issue (as it is here). Rather, *Vickers* and *Groom* addressed whether the lack of statutory notice deprived electors of the opportunity to vote. In each case, the court

determined voters had actual notice of the proposed issues, which were “matters of continued public discussion and controversy.” *Vickers*, 195 Wash. at 657; *Groom*, 189 Wash. at 446. The specific policy concerns underlying the election statute’s notice requirement were satisfied in the circumstances of those elections. In contrast, Plaintiffs’ challenge here goes to the merits of whether the Ordinance was properly before the voters at all.

Moreover, the challenges in *Vickers* and *Groom* were filed post-election. The court in *Vickers* specifically noted “[i]t may be added that the courts are more liberal in permitting a deviation from the statute where an attack is made after the election is held than where the attack is made prior to the election.” 195 Wash. at 658. In this case, Plaintiffs timely brought their signature validity challenge prior to the election.

Cases from other jurisdictions that limit the scope of post-election initiative challenges are inapposite. *See, e.g., Montanans for Equal Application of Initiative Laws v. State ex. rel. Johnson*, 336 Mont. 450, 154 P.3d 1202 (2007). For example, the Montana Constitution specifically provides that “[t]he sufficiency of the initiative petition *shall not be questioned* after the election is held.” 154 P.3d at 1207 (emphasis in original) (citing Mont. Constitution. Art. III, Sect. 4(3)). No such provision appears in the Washington Constitution. To the contrary, this

Court has recognized the prudence of generally deferring judicial consideration of initiatives until after an election. *See, e.g., Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007). Indeed, in this case the Court declined to review the Court of Appeal’s summary reversal of Judge Darvas’s signature sufficiency ruling without prejudice to subsequent review on the merits. CP 830-32.

Plaintiffs filed a successful pre-election challenge to the validity of signatures, obtaining a writ of prohibition barring the initiative from appearing on the ballot. The Court of Appeals summarily reversed. CP 825-28. Having made and preserved the signature argument pre-election, Plaintiffs are not prevented from making the argument now. This Court can and should consider the threshold validity of the initiative signatures, and may invalidate the Ordinance on this narrow ground without reaching the additional substantive issues presented by the parties’ appeals.

2. The Enrolled Bill Rule does not Apply to Local Initiatives.

Contrary to the City’s contention, case law does not support the judicial deference to a local initiative on the basis of the “enrolled bill doctrine.” *See* City Reply at 24. “The enrolled bill rule forbids an inquiry into the *legislative* procedures preceding the enactment of a statute that is ‘properly signed and fair upon its face.’” *Brown v. Owen*, 165 Wn.2d 706,

723, 206 P.3d 310 (2009) (emphasis added) (citation omitted). “The legal theory upon which the enrolled bill rule rests is that the *legislature* is a coordinate branch of government, in no way inferior to the judicial branch, and thus *its final record* on the enactment ‘imports absolute verity.’” *Washington State Grange v. Locke*, 153 Wn.2d 475, 500, 105 P.3d 9 (2005) (emphasis added) (citation omitted). Because the “legislature has plenary power to enact, amend, or repeal a statute,” judicial deference to the legislature’s internal process is justified, with its formal record and procedures to discuss, debate, and compromise on the language of a bill.

The same judicial concerns do not apply to the local initiative process. There was no discussion, debate, or compromise about what would be included in the proposed ordinance’s subjects, language, requirements, etc. Indeed, under the City’s initiative process, the City Council cannot repeal or even make any alterations to the Ordinance. SeaTac Municipal Code 1.10.220. This Court should not extend the “enrolled bill doctrine” to insulate local initiatives from judicial review.

3. Further Supplemental Briefing is Unnecessary.

Plaintiffs identified the plain language of former RCW 35A.01.040(7) as an alternative basis for invalidating the entire Ordinance. Plaintiffs’ Answering Br. at 3, 25-30. All parties have had the opportunity

to address the merits of the signature validity issue. *See, e.g.,* City Reply at 25-26.

Both the City and the Committee also argue that the election insulates the signatures from judicial scrutiny. *See* discussion *supra* at 19-21. The Committee chose not to further address the signature validity issue, and instead suggests that the Court call for “supplemental briefing” if it rules against Appellants on the post-election challenge issue. Committee Reply at 39-40. But the signature sufficiency issue already is properly before this Court. *See Washburn v. City of Federal Way*, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013) (Plaintiffs are entitled to argue for affirmance on any ground supported by the record). The Committee has waived any additional arguments it chose to not present to the Court. *Kadoranian by Peach v. Bellingham Police Dep’t*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (deeming waived an argument that party neither argued nor briefed). This Court may bar enforcement of the Ordinance outside the Airport on the independent ground that it lacked sufficient signatures under RCW 35A.01.040(7).

F. The Ordinance Also Violates the Dormant Commerce Clause.

Finally, this Court may invalidate the entire Ordinance on the separate and independent ground that it places an undue burden on

interstate commerce. One simple example demonstrates the Ordinance’s discriminatory effect: if Starbucks operates a coffee kiosk in the Airport, it is covered by the Ordinance; if it operates the identical kiosk in a grocery store three blocks away from the Airport, it is not. In contrast with grocery shoppers, customers who buy coffee at the Airport likely are traveling in interstate commerce. Indeed, as the Committee’s witness Howard Greenwich observed, “[t]he majority of revenues enjoyed by covered employers flows to the region from visitors,” the “bulk of the increased wage costs (\$33 million annually) will be absorbed by businesses operating at the airport” where visitor spending comprises 68% of revenues, and 90% of hotel and rental car customers are not local. CP 985.

The Committee specifically designed—and promoted—the Ordinance as shifting money from air travelers to local residents, while exempting virtually all local businesses. CP 984-85; 990. As a result, the Ordinance is *per se* invalid under the dormant commerce clause. *See Granholm v. Heald*, 544 U.S. 460, 476 (2005) (“State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

III. CONCLUSION

As with the Ordinance's primary target of employment at the Airport, applying the Ordinance to covered employers elsewhere in SeaTac would violate longstanding legal principles governing labor relations, preemption, and local initiatives. This Court should affirm the superior court's entry of partial summary judgment on the port jurisdiction and NLRA preemption issues, reverse the superior court's ruling upholding the remaining provisions of the Ordinance, and remand for entry of judgment in favor of Plaintiffs.

RESPECTFULLY SUBMITTED this 2nd day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the forgoing document on the following:

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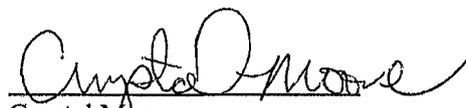
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Dated this 2nd day of June, 2014.


Crystal Moore

Appendix A

Appendix A and B to “Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc., and Washington Restaurant Association’s Reply Brief of Cross Appeal” were stricken; see Deputy Clerk’s ruling dated June 9, 2014.

Appendix B

Appendix A and B to “Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc., and Washington Restaurant Association’s Reply Brief of Cross Appeal” were stricken; see Deputy Clerk’s ruling dated June 9, 2014.

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Dear Clerk:

Attached for filing please find Filo Foods, LLC, BF Foods, LLC, Alaska Airlines, Inc., and Washington Restaurant Association's Reply Brief on Cross Appeal.

Thank you.

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