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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent/Cross-Petitioner.

v.

PHILLIP SCOTT NUMRICH,

Petitioner/Cross-Respondent.

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PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF OF  
DEPARTMENT OF LABOR AND INDUSTRIES

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION ..... 1

II. SPECIFIC ISSUE ADDRESSED IN ANSWER TO BRIEF OF AMICUS CURIAE ..... 1

III. STATEMENT OF THE CASE..... 2

IV. DISCUSSION ..... 2

    A. The Historical Context Supports Petitioner’s Argument that RCW 49.17.190(3) is Washington’s Legislation to Criminalize the Death of an Employee Resulting from a Safety Violation..... 2

    B. L&I’s Reliance on Authority from “OSHA States” is Misplaced. Those Cases have Considered the Question of Federal Preemption, but Not a “General-Specific” Rule..... 8

    C. L&I Misapplies the “Absurd Results” Canon ..... 11

        1. The Canon Does Not Apply ..... 11

        2. L&I’s Hypotheticals Raise Issues that Should be Directed to the Legislature ..... 12

    D. Petitioner’s Case Does Not Involve the Interpretation of an Unclear Statute ..... 14

    E. L&I is Not Afforded Any Deference Regarding the Interpretation of a Statute ..... 16

    F. Manslaughter Convictions for Workplace Deaths will Sow Uncertainty and Disruption into the Economy .. 17

V. CONCLUSION..... 20

## TABLE OF AUTHORITIES

### State Cases

<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013) .....	4
<i>Duke v. Boyd</i> , 133 Wash.2d 80, 942 P.2d 351 (1997) .....	11
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	12, 13
<i>Frank Coluccio Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 181 Wn.App. 25, 329 P.3d 91 (2014).....	16, 17
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles</i> , 148 Wash.2d 224, 59 P.3d 655 (2002) .....	11
<i>In re Bale</i> , 63 Wn.2d 83, 385 P.2d 545 (1963).....	7
<i>Inlandboatmen's Union of the Pac. v. Dep't of Transp.</i> , 119 Wn.2d 697, 836 P.2d 823 (1992).....	4
<i>Matter of Sietz</i> , 124 Wn.2d 645, 880 P.2d 34 (1994) .....	16
<i>People v. Chicago Magnet Wire Corp.</i> , 126 Ill.2d 356, 534 N.E.2d 962 (1989).....	8
<i>People v. Hegedus</i> , 432 Mich. 598, 443 N.W.2d 127 (1989).....	9
<i>People v. Pymm</i> , 151 A.D.2d 133, 546 N.Y.S.2d 871 (N.Y. App. Div. 1989).....	8
<i>Point Roberts Fishing Co. v. George &amp; Barker Co.</i> , 28 Wash. 200, 68 P. 438 (1902).....	11
<i>Rest. Dev., Inc.</i> , 150 Wash.2d, 80 P.3d 598.....	11
<i>Rhoad v. McLean Trucking Co., Inc.</i> , 102 Wn.2d 422, 686 P.2d 483 (1984).....	6
<i>Sabine Consol., Inc. v. State</i> , 806 S.W.2d 553 (Tex. Crim. App. 1991) ....	8

<i>Spokane Cty. Health Dist. v. Brockett</i> , 120 Wn.2d 140, 839 P.2d 324 (1992).....	6
<i>State ex rel. Cornellier v. Black</i> , 144 Wis.2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988).....	8
<i>State v. Ervin</i> , 169 Wash.2d 815, 239 P.3d 354 (2010).....	12
<i>State v. Far West Water &amp; Sewer Inc.</i> , 224 Ariz. 173, 228 P.3d 909 (Ariz. Ct. App. 2010).....	9, 10
<i>State v. Gagnon</i> , 236 Ariz. 334, 340 P.3d 413 (Ariz. Ct. App. 2014).....	10
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015).....	15, 16
<i>State v. Shriner</i> , 101 Wn.2d 576, 681 P.2d 237 (1984).....	11
<i>State v. Weiner</i> , 126 Ariz. 454, 616 P.2d 914 (App.1980).....	10
<i>SuperValu, Inc. v. Dep't of Labor &amp; Indus. of State of Washington</i> , 158 Wn.2d 422, 144 P.3d 1160 (2006).....	3
<i>Washington Cedar &amp; Supply Co., Inc. v. State, Dep't of Labor &amp; Indus.</i> , 137 Wn.App. 592, 154 P.3d 287 (2007).....	17, 18

**Federal Statutes**

29 U.S.C. 15.....	3
29 U.S.C. 651(b)(11) .....	3
29 U.S.C. § 666(e) .....	6
29 U.S.C. § 667.....	4

**State Statutes**

A.R.S. § 23-418(E).....	10
RCW 46.61.520 .....	14

RCW 49.17 .....	4
RCW 49.17.020(4).....	18
RCW 49.17.190 .....	7
RCW 49.17.190(3).....	<i>passim</i>
RCW 9A.56.360(1)(b) .....	15
RCW 51.04 .....	13
Wash. Const. Art. II, Sec. 35 .....	2

**Other Authorities**

S.B. 4721.....	6
S.B. 5168.....	6
S.Rep.No. 91-1282.....	5
<i>The Washington Industrial Safety and Health Act: Wisha's Twentieth Anniversary, 1973-1993, 17 U. Puget Sound L. Rev. 259 (1994).....</i>	5, 6

## **I. INTRODUCTION**

In 1973, Washington passed a specific statute that provided criminal penalties for employers who caused the death of an employee due to a safety or health violation. The criminal statute is clear and unambiguous. The legislature provided no indication that it intended any other criminal consequences for such conduct.

Petitioner submits this Answer to the Amicus Curiae Brief of the Department of Labor and Industries in support of Petitioner's argument that Washington's general-specific rule prohibits the State from prosecuting him under the general manslaughter statutes where there is a more specific criminal statute that applies.<sup>1</sup>

## **II. SPECIFIC ISSUE ADDRESSED IN ANSWER TO BRIEF OF AMICUS CURIAE**

Did the legislature intend for an employer to face felony manslaughter charges – including years in prison and a maximum of life in prison – when it passed a statute specifically outlining different criminal penalties for safety and health violations that result in the death of an employee?

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<sup>1</sup> Petitioner separately objected to the Department of Labor and Industries' ("L&I") Motion to File Amicus Curiae Brief. L&I was the investigating agency in this case. At the prosecutor's direction, L&I investigated potential criminal violations; the Certification for Determination of Probable Cause – which constituted the sole basis for the criminal charges – was drafted by an L&I officer. The Washington State Department of Labor and Industries is an agent of the prosecutor who filed the criminal case on behalf of the State of Washington. L&I is not a proper amicus. The Court granted L&I's motion to file the amicus brief, without prejudice to file a motion to strike. Contemporaneous with the filing of this Answer, Petitioner also files a Motion to Strike the amicus brief.

### **III. STATEMENT OF THE CASE**

Petitioner incorporates by reference the Statements of the Case set forth in his Brief of Petitioner and Reply Brief of Petitioner/Cross-Respondent.

### **IV. DISCUSSION**

#### **A. The Historical Context Supports Petitioner's Argument that RCW 49.17.190(3) is Washington's Legislation to Criminalize the Death of an Employee Resulting from a Safety Violation**

L&I argues that nothing in the Washington Industrial Safety and Health Act took away the power to convict an employer for manslaughter. Amicus Brief at 1. But the overwhelming legislative and historical context demonstrates that RCW 49.17.190(3) is precisely the crime the legislature intended for these types of violations.

Washington became a state in 1889. Section 35 of Washington's original Constitution specifically delegated to the legislature the directive to pass laws to protect worker safety:

**PROTECTION OF EMPLOYEES** The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.

Wash. Const. Art. II, Sec. 35. *See also* Amicus Brief at 1 (acknowledging that the framers of Washington's constitution delegated the creation of laws to protect workers).

Over the next 81 years, no Washington employer was criminally prosecuted for the health or safety related workplace death of an employee. *See* CP 30. As far as the parties can determine, there were no criminal statutes directed at punishing employers for such workplace deaths.

Then, in 1970, Congress passed the Occupational Health and Safety Act, otherwise known as OSHA. *See* 29 U.S.C. 15, *et. seq.* One of OSHA's purposes was "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." 29 U.S.C. 651(b)(11); *SuperValu, Inc. v. Dep't of Labor & Indus. of State of Washington*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006)("[OSHA encouraged states to develop their own worker safety plans and submit them to the federal agency for approval").

Accordingly, as an alternative to implementing the OSHA regulations, individual states were given the option to assume control of their own standards by submitting their state-specific plan for development and enforcement of safety and health standards to preempt applicable federal standards:

**(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards**

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety

or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667. *See also Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013) (“OSHA requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety”).

Washington did not adopt the federal OSHA regulatory scheme. Rather, it submitted its own carefully-tailored plan – the Washington Industrial Safety and Health Act (“WISHA”) – which was approved by the federal government in 1973. *See RCW 49.17, et. seq.* This Court has clarified that Washington’s regulatory scheme operates to *remove* federal preemption, allocating sole authority to the state to regulate safety and health matters:

The ferry system argues that WISHA is simply a derivative of OSHA and hence if OSHA yields to the Coast Guard, WISHA must also do so. We disagree.

OSHA does not confer federal power on a state which has adopted a federally approved plan, it merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health. In fact, WISHA was adopted pursuant to the exercise of the state police power and in keeping with the mandates of article 2, section 35 of the state Constitution.

*Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.*, 119 Wn.2d 697, 704, 836 P.2d 823 (1992).

One of the stated legislative reasons for OSHA was to ensure that there was a “standard applicable” in the event that an “employee [was] killed or seriously injured on the job.” S.Rep.No. 91-1282, at 9 (1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92<sup>ND</sup> CONG., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971). The applicable criminal standard for an employer whose safety or health violations caused the death of an employee was set forth in RCW 49.17.190(3). This was Washington’s legislation enacted to set the “standard.” *See also* Alan S. Paja, *The Washington Industrial Safety and Health Act: Wisha's Twentieth Anniversary, 1973-1993*, 17 U. Puget Sound L. Rev. 259, 265–66 (1994)(“WISHA is Washington’s worker safety regulatory framework”; “[t]he Act establishes criminal violations, both misdemeanors and gross misdemeanors, for designated actions”). RCW 49.17.190(3) was Washington’s first law to impose criminal penalties against an employer for the death of an employee due to a safety or health violation.

Over the years, the legislature has revised and updated the criminal penalties in RCW 49.17.190(3). For example, in 1986, the legislature significantly increased the financial penalties from \$10,000 for a first violation and \$20,000 for a second violation, to \$100,000 and \$200,000, respectively.

S.B. 4721, 49th Leg. Reg. Sess. (Wa. 1986).<sup>2</sup> Then, in 2011, the legislature revised the maximum term of imprisonment for a second violation from “one year” to 364 days. S.B. 5168, 62<sup>nd</sup> Leg., Reg. Sess. (Wa. 2011) (reducing maximum sentence by one day to cure the inequities of automatic deportation caused by a suspended sentence of “one year”).

Presently, Washington’s criminal sanctions are significantly stiffer than the federal OSHA penalties, which have never been updated. *Compare* RCW 49.17.190(3)(fine up to \$100,000 and six months imprisonment for first violation and fine of up to \$200,000 and 364 days of imprisonment for second violation) *with* 29 U.S.C. § 666(e)(fine of up to \$10,000 and six months imprisonment for first violation and fine of up to \$20,000 and one year imprisonment for second violation).

That the legislature twice amended the criminal penalties since the original enactment of RCW 49.17.190(3) – but elected ***not*** to amend the charge to a felony homicide crime – reaffirms the legislative intent regarding the criminal penalties for this conduct. “The Legislature is presumed not to pass meaningless legislation, and in enacting an amending statute, a presumption exists that a change was intended.” *Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992). *See also Rhoad v.*

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<sup>2</sup> The legislature also revised other language in RCW 49.17.190(3) to permit prosecution for violation of a health *or* safety violation. *Id.*

*McLean Trucking Co., Inc.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) (“a change in legislative intent is presumed when a material change is made in a statute”); *In re Bale*, 63 Wn.2d 83, 89, 385 P.2d 545 (1963) (“[i]n construing statutes which reenact, with certain changes, or repeal other statutes, or which contain revisions or codification of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance in ascertaining the intention of the legislature, *for, where a material change is made in the wording of a statute, a change in legislative purpose must be presumed*”)(emphasis in original).

The passage of RCW 49.17.190 in 1973 was a clear and unequivocal statement from the legislature regarding how employers should be punished for fatal workplace accidents. Over the years, the legislature twice revisited the criminal penalties. These efforts demonstrate that the legislature actively evaluated the severity of the criminal penalties. The legislative history of RCW 49.17.190(3) makes clear that the criminal penalties therein constitute Washington’s intended punishment for employers whose safety and health violations cause the death of workers on the job. Simply put, there is nothing to suggest that the legislature intended that these very same employers would face additional (and significantly harsher) punishment under the Washington manslaughter statutes.

**B. L&I's Reliance on Authority from "OSHA States" is Misplaced. Those Cases have Considered the Question of Federal Preemption, but Not a "General-Specific" Rule**

In support of its argument that WISHA does not preclude prosecution under Washington's manslaughter statutes, L&I points to cases from other states. *See* Amicus Brief at 6-8. But nearly all of these cases consider only the question of federal preemption in OSHA regulated states without addressing a general-specific rule similar to Washington's rule. *See, e.g., People v. Chicago Magnet Wire Corp.* 126 Ill.2d 356, 534 N.E.2d 962 (1989) (addressing question of federal preemption in Illinois, an OSHA regulated state; no mention of general-specific rule); *Sabine Consol., Inc. v. State*, 806 S.W.2d 553 (Tex. Crim. App. 1991)(addressing question of federal preemption in Texas, an OSHA regulated state; no mention of general-specific rule); *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (N.Y. App. Div. 1989)(addressing question of federal preemption in New York, an OSHA regulated state; no mention of general-specific rule); *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988) (addressing question of federal preemption in Wisconsin, an OSHA regulated state; no mention of general-specific rule).

As noted above, Washington is not an OSHA state. Nor has Petitioner raised any challenge regarding federal preemption. Accordingly, these foreign cases do not address the legal issue in Mr. Numrich's case, which is

the application of Washington’s “general-specific” rule to RCW 49.17.190(3) and the Washington manslaughter statutes.

Although two of the out of state cases cited by L&I are from states that implemented their own safety and health plans, those cases did not address a general-specific rule similar to Washington’s. In *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989), the defendant was charged with involuntary manslaughter and conspiracy to violate the Michigan Occupational Safety and Health Act. *Id.* at 602. The Supreme Court of Michigan held that the federal OSHA regulatory scheme did not preempt prosecution under state criminal laws. *Id.* at 623-25. Even though Michigan had its own state statute criminalizing certain health and safety violations, the decision focused exclusively on the question of whether the federal OSHA laws preempted enforcement of the state criminal laws. *See id.* at 603-22. There was no mention of a “general-specific” rule and there was no analysis regarding whether the state statutes were concurrent.

In *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 228 P.3d 909 (Ariz. Ct. App. 2010), *as amended* (May 4, 2010), the Court of Appeals of Arizona held that the criminal penalties in Arizona’s Occupational Safety and Health Act did not preclude prosecution under the state negligent homicide statute. *Id.* at 185. However, Arizona’s rule for resolving a claim of conflict

between two criminal statutes is quite different from Washington's general-specific rule. The court explained:

Further, the principle that the specific law controls over the general law “applies only where the specific conflicts with the general.” *State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App.1980). “This conflict arises only where the elements of proof essential to conviction under each statute are exactly the same [and] if the two statutes do not contain the same elements, the legislature is presumed not to have precluded the state from prosecuting under either at the state's option.” *Id.*

Here, the elements of proof essential to find guilt under A.R.S. § 23–418(E) are not identical to the elements of proof essential to find guilt under the relevant Title 13 offenses. Because there is no conflict between that specific statute and the general criminal statutes, we conclude that the legislature did not intend to preclude the state from prosecuting Far West under any other applicable statute.

*Far W. Water & Sewer Inc.*, 224 Ariz. at 184 (emphasis supplied). Therefore, Arizona applies a much different, stricter version of the general-specific rule: a conflict only exists if the elements of proof in the two statutes are “identical.” *See also State v. Gagnon*, 236 Ariz. 334, 336, 340 P.3d 413 (Ariz. Ct. App. 2014)(“[a] conflict arises when “the elements of proof essential to find guilt under [the specific statute] are ... identical to the elements of proof essential to find guilt under the [general statute]”)(quoting *Far W. Water & Sewer Inc.*, 224 Ariz. at 184)(emphasis supplied). The test applied by Washington courts when reviewing a challenge based on the general specific rule—whether the statutes are “concurrent”—is much different than Arizona's “identical

elements” rule. *See State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984)(in Washington, the test for the general specific rule is whether “the statutes are concurrent in the sense that the general statute will be violated in each instance where the special statute has been violated”).

### **C. L&I Misapplies the “Absurd Results” Canon**

#### **1. The Canon Does Not Apply**

L&I argues that “Numrich’s arguments also violate one of the basic canons of statutory construction, that no statute should be construed in a manner that leads to strained or absurd results.” Amicus Brief at 10.

This Court has emphasized that the “absurd results” canon should be applied sparingly:

It is true that we “will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002). However, this canon of construction must be applied sparingly. *See Duke v. Boyd*, 133 Wash.2d 80, 87, 942 P.2d 351 (1997) (“Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.” (citation omitted)). Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature. *See Rest. Dev., Inc.*, 150 Wash.2d at 682, 80 P.3d 598 (“[A] court must not add words where the legislature has chosen not to include them.”); *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 204, 68

P. 438 (1902). This raises separation of powers concerns. Thus, in *State v. Ervin*, 169 Wash.2d 815, 824, 239 P.3d 354 (2010), we held that if a result “is conceivable, the result is not absurd.”

*Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011)(emphasis supplied).

RCW 49.17.190(3) is a clear and unambiguous statement from the legislature regarding how employers should be criminally punished for employee deaths resulting from safety violations. There is no ambiguity. Permitting the State to prosecute Mr. Numrich with manslaughter subverts the legislature’s intent that employers be charged under RCW 49.17.190(3). Because it is conceivable that the 1973 Washington Legislature intended that employers be charged only with RCW 49.17.190(3) for causing the death of an employee due to a safety violation, the results of the legislature’s decision are not absurd and the Court need not reach L&I’s hypotheticals.

## **2. L&I’s Hypotheticals Raise Issues that Should be Directed to the Legislature**

To the extent that L&I’s highly unusual hypothetical scenarios create unfair outcomes, L&I should seek redress in the legislature.

First, in example A, L&I argues that application of the general-specific rule would lead to the “absurd” result that an employer “could be charged with [the felony of third-degree assault] if the violation led to a worker being severely injured and surviving, but could be charged only with a gross

misdemeanor if the violation led to the worker being killed.” Amicus Brief at 10. This hypothetical is not governed by the facts of the instant case and there is no need for the Court to decide whether an employer can be charged with felony assault based upon an accidental injury at work. The State has not pointed to – and Petitioner is not aware of – an employer in Washington ever being prosecuted for “assault” for causing an injury to an employee due to a health or safety violation. Rather, such injuries have been remedied through the worker’s compensation system. *See* RCW 51.04 *et. seq.* The legislature simply did not create a crime for an employer whose employee is injured as a result of a safety or health violation.

In example B a worker recklessly operates a crane near a crowded sidewalk “and an employee bystander is killed.” Amicus Brief at 10. L&I offers that this “would likely result in a manslaughter conviction.” *Id.* L&I contrasts that with an employer who “willfully and knowingly violated crane regulations to operate unsafely near employees and an employee was killed...there would only be a misdemeanor conviction under Numrich’s theory.” *Id.* at 11. But as with the assault example, so far, this scenario has never arisen in Washington’s history: L&I has not identified a prior criminal prosecution ever in Washington of an employee for *any* crime – misdemeanor or felony – for causing the death of a fellow employee on the job. If L&I

deems this outcome unfair, it should engage with the legislature to enact stiffer criminal penalties against employers.

In example C, L&I suggests that an employee driver with a farmer employee passenger crashes while operating a van at 90 miles an hour, killing the employee passenger and the driver of another car. Amicus Brief at 11. L&I suggests that because the employer violated WAC 296-307-07003, he could be charged with a misdemeanor under RCW 49.17.190(3) for the death of the employee, while the employer could be charged with a felony for the death of the other driver. L&I suggests that this outcome is unfair. But this argument seems to miss the point. The question is not one of fairness (although it is certainly remarkably unfair that the State is attempting to press this novel claim against Mr. Numrich). The fact is that WISHA was enacted to balance competing interests. Many employees are placed at risk by the nature of the job. Washington has enacted a comprehensive scheme – for both criminal and civil cases – that strikes a balance. Employers will not face lawsuits due to workplace injuries and deaths. And employers face limited criminal liability when safety violations result in death.<sup>3</sup>

#### **D. Petitioner’s Case Does Not Involve the Interpretation of an Unclear Statute**

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<sup>3</sup> In addition, WAC 296-307-07003 is an exceedingly general administrative regulation that advises: “[v]ehicles must be driven at safe operating speed.” In the case of this hypothetical traffic accident, the felony crime of Vehicular Homicide under RCW 46.61.520 may very well be the more specific statute as to both the deaths of the employee and the other driver.

In support of its argument regarding claimed “absurd results,” L&I cites *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015). In *Larson*, this Court analyzed the interpretation of former RCW 9A.56.360(1)(b), which elevated retail theft to a more serious offense if the defendant was in possession of a “device designed to overcome security systems including, but not limited to, lined bags or tag removers.” *Larson*, 184 Wn.2d at 848. The question before this Court was: “Are ordinary wire cutters ‘*designed to overcome security systems*’ within the context of retail theft?” *Id.* at 845 (emphasis in original). This Court conducted an exhaustive analysis of the statute, specifically considering the inclusion of “lined bags or tag removers” as illustrative examples. *Id.* at 849-50. Ultimately, this Court concluded that the statute covered only items created “with the specialized purpose of overcoming security systems. Ordinary tools, such as pliers or the wire cutters [used by the defendant]” did not fall within the scope of the statute. *Id.* at 855.

This Court observed the following regarding statutory interpretation:

We look first to the plain language of the statute as [t]he surest indication of legislative intent. [I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. We may determine a statute's plain language by looking to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.

*Larson*, 184 Wn.2d at 848 (internal citations and quotation marks omitted).

Here, the plain language of RCW 49.17.190(3) is clear. This is not a question of interpreting an ambiguous word or phrase.<sup>4</sup> L&I cites *Larson* for the proposition that “no statute should be *construed* in a manner that leads to strained or absurd results.” Amicus Brief at 10 (emphasis supplied). But what this Court actually said was that “we must interpret statutes to avoid absurd results.” *Larson*, 184 Wn.2d at 851. L&I conflates the task of interpreting an unclear statute with applying a long-standing common law rule. Understanding what the legislature intended by RCW 49.17.190(3) does not require any interpretation – it is clearly how the legislature intended these types of offenses to be prosecuted.<sup>5</sup>

**E. L&I is Not Afforded Any Deference Regarding the Interpretation of a Statute**

L & I asserts that “[t]he Court gives substantial weight to L&I’s interpretation of WISHA.” Amicus Brief at 2 (citing *Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181 Wn.App. 25, 36, 329 P.3d 91 (2014)). But *Frank Coluccio Constr. Co.* dealt specifically with the interpretation of

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<sup>4</sup> Of course, when a statute is ambiguous, the rule of lenity suggests that the Court should adopt an interpretation that is most favorable to the defendant. *Matter of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). So, assuming some ambiguity, this rule of construction would control.

<sup>5</sup> An “absurd result” should not be confused with an undesirable outcome following the application of a legal principle. The conclusion of legal proceedings frequently results in undesirable outcomes: the suppression of seized drugs or a defendant’s confession; the dismissal of charges; the exclusion of evidence due to discovery violations; or the exclusion of evidence pursuant to the rules of evidence. Many of these outcomes can be viewed as “absurd” to outside observers. If L&I’s hypotheticals produce a result that is deemed unfair, those concerns should be addressed to the legislature.

WAC 296–155–428(20)(a), which is an agency regulation *created by* L&I. The case involved the appeal of an administrative proceeding. *Frank Coluccio Constr. Co.*, 181 Wn.App. at 34-35. The holding uniquely applied to agency regulations. *See id.* at 36 (“accord[ing] substantial weight to an agency’s interpretation within its area of expertise”). *See also Washington Cedar & Supply Co., Inc. v. State, Dep’t of Labor & Indus.*, 137 Wn.App. 592, 599, 154 P.3d 287 (2007)(“deference to the Department’s interpretation of its own regulation is appropriate”).

Here, however, this Court is dealing with the application of Washington’s general specific rule to the State’s concurrent prosecution of Mr. Numrich for manslaughter and pursuant to RCW 49.17.190(3), statutes that were enacted by the legislature. This case does not involve the interpretation of any administrative regulations, and therefore the opinion of L&I – which is the investigating officer in this case – is not afforded deference. L&I’s suggestion that its opinion carry special weight is akin to arguing that this Court should defer to the Seattle Police Department when interpreting criminal statutes. There is no support in the law for such a contention.

#### **F. Manslaughter Convictions for Workplace Deaths will Sow Uncertainty and Disruption into the Economy**

WISHA is Washington’s comprehensive scheme to regulate workplace safety. Chapter 49.17 provides a broad scope of regulations that

address health and safety standards, inspection, enforcement, oversight, and penalties: WISHA is the source for employers to obtain information and guidance regarding workplace safety and health in Washington. The framework includes a clear and unambiguous statement regarding criminal penalties for violations of safety and health regulations that result in the death of an employee: RCW 49.17.190(3). This regulatory scheme provides needed safety, accountability, and predictability for Washington's employers.

Permitting the State – for the first time ever – to pursue manslaughter charges against an employer will spread confusion and uncertainty into Washington's economy. With such severe penalties, a critical question is: Who, exactly, will be punished? RCW 49.17.020(4) defines “employer” as:

(4) The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

RCW 49.17.020(4). Who is covered by this definition of “employer”? The CEO? The board of directors? Individual shareholders? Investors? The definition explicitly includes all branches of government. *See id.* (“the state,

counties, cities, and all municipal corporations, public corporations, political subdivisions of the state”).

In the midst of the COVID-19 pandemic, employers are navigating an extraordinarily complex web of safety and health regulations enacted by L&I with potentially dire consequences. *See, e.g.*, Washington State Phase 2 Professional Services COVID-19 Requirements, <https://www.governor.wa.gov/sites/default/files/COVID19Phase2ProfessionalServicesGuidance.pdf>. The current health crisis brings the specter of death due to workplace conditions – risks traditionally associated with inherently riskier industries such as construction, forestry, and mining – to the entire employment landscape. Is an accountant or architect liable for first-degree manslaughter because she failed to provide certain personal protective equipment (or violated one of the other myriad regulations for professional services), resulting in the death of an employee due to the coronavirus? What about the chief medical officer or an administrator at a hospital that violates a regulation, resulting in the death of a doctor who contracts the virus? Or the presiding judge or administrator of a county courthouse who fails follow regulations, resulting in the death of a courthouse employee? How about supervisors at a public transportation agency, or within the Department of Corrections? When the potential punishment involves a class A felony and punishment including years in prison and a maximum life sentence, a careful

vetting of the potential criminal liability must be undertaken through the normal legislative channels.

L&I points to an increased emphasis on enforcement of OSHA penalties. *See* Amicus Brief at 12-14 (citing secondary sources observing an increase in resources for OSHA investigations and prosecutions in some jurisdictions). But an increase in resources for OSHA prosecutions does not change the underlying legal landscape in Washington. If Washington's stakeholders believe that felony manslaughter charges are appropriate for employers, they should seek redress in the proper forum – the legislature.

## **V. CONCLUSION**

Washington's constitution delegates to the legislature the authority to enact laws protecting workers. In 1973, our legislature passed its first statute to hold employers criminally liable for the deaths of employees due to safety and health violations. Those criminal penalties have been revisited and revised over the years. If these criminal penalties are to be changed again, they should be changed by the legislature.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

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**PROOF OF SERVICE**

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 8<sup>th</sup> day of June, 2020, I filed the above Answer to Amicus Curiae Brief of Department of Labor and Industries via the Appellate Court E-File Portal through which counsel listed below will be served:

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DATED at Seattle, Washington this 8<sup>th</sup> day of June, 2020.

*Sarah Conger*  
Sarah Conger, Legal Assistant

**ALLEN, HANSEN, MAYBROWN, OFFENBECHER**

**June 08, 2020 - 3:33 PM**

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