NO. 100609-8

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 37662-1-III
(Consolidated with No. 37689-3-III)

IN THE MATTER OF CONFIDENTIAL CONSUMER PROTECTION INVESTIGATION

KING FUJI RANCH, INC., KING FUJI RANCH, ML TAGGARES, INC. DBA ARETE VINEYARDS, BENCH ONE, INC., KING ORGANICS, INC.,

Petitioners,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Petitioner King Fuji[1] has now evaded the Attorney General's investigation for over two-and-a-half years. Seeking to further delay its compliance with a civil investigative demand that two courts have now upheld, King Fuji petitions this Court for discretionary review. The Court should decline because King Fuji fails to show a basis for this Court's review.

This case concerns a pre-suit civil investigative demand (CID) the Attorney General issued to King Fuji on September 23, 2019. The Attorney General is expressly authorized by statute to issue a CID when investigating possible Consumer Protection Act violations. RCW 19.86.110. The Attorney General is investigating King Fuji for possible violations of the Consumer Protection Act in connection with misrepresentations it made to U.S. farmworkers regarding agricultural job opportunities.

[1] Petitioner King Fuji Ranch, Inc., King Fuji Ranch, ML Taggares, Inc. dba Arete Vineyards, Bench One, Inc. and King Organics, Inc. (collectively, King Fuji).

Misrepresentations of the type the Attorney General is investigating pose a significant risk in one of the State's most important industries, because they can deceive Washington farmworkers and artificially depress the state labor market.

King Fuji has resisted responding to the CID at every turn. The trial court considered and rejected King Fuji's arguments for why it should not have to comply with the CID, including its false assertion that the Attorney General actually seeks to enforce the Immigration and Nationality Act. The Court of Appeals affirmed. King Fuji now seeks this Court's discretionary review on the purported grounds that the Court of Appeals' decision involves a significant question of law under the United States Constitution and an issue of substantial public interest that this Court should determine. To the contrary, the Court of Appeals easily rejected King Fuji's meritless constitutional attacks by applying well-established law, and the Court of Appeals' published decision adds to longstanding precedent confirming

the Attorney General's investigative tools and authority under the Consumer Protection Act.

The Court should deny review.

II. COURT OF APPEALS DECISION

King Fuji requests review of *In the Matter of Confidential Consumer Protection Investigation*, No. 37662-1-III, consolidated with *King Fuji Ranch, Inc., King Fuji Ranch, ML Taggares, Inc. dba Arete Vineyards, Bench One, Inc., King Organics, Inc. v. Washington State Office of the Attorney General*, No. 37689-3-III, 2021 WL 5813794 (Dec. 7, 2021). King Fuji did not seek reconsideration of the Court of Appeals' decision or oppose the motions to publish the decision that the Court of Appeals granted. *See In the Matter of Confidential Consumer Protection Investigation*, No. 37662-1-III, ---Wn. App. 2d---, ---P.3d--- (2022); Appendix 1, Order Granting Motion to Publish Opinion (May 12, 2022).

III. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals' decision correctly affirm the trial court's Orders (1) granting the State's Petition to Enforce the Civil Investigative Demand and (2) denying King Fuji's Motion to Vacate the CID, where:

a. The Court of Appeals applied well-settled law and analysis in determining that the Immigration and Nationality Act does not preempt the Attorney General's investigation of possible Consumer Protection Act violations?

b. Under *Steele v. State*, a CID complies with the Fourth Amendment if it is (1) "within the authority" of the Attorney General, (2) its demands for information and documents are not "too indefinite," and (3) the information and documents sought are "reasonably relevant," and the

Court of Appeals correctly decided that the CID meets the *Steele* test and comports with the Fourth Amendment? [2]

IV. STATEMENT OF THE CASE

The Consumer Protection Act, RCW 19.86 (CPA), broadly prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." RCW 19.86.020. Under Washington law, the Attorney General enforces the CPA. *See* RCW 19.86.080(1). The Attorney General has express authority to serve a CID on any person he believes may be in possession, custody, or control of documents, or may have knowledge of any information, "which the attorney general believes relevant to the subject matter" of an investigation. RCW 19.86.110(1).

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[2] King Fuji identifies as an issue for review whether the CID violated Article I Section 7 of the Washington Constitution, *see* Petition for Review at 4, issue 4, but fails to present any related argument. The Court should thus decline to consider the issue. *Cf.* RAP 10.3(a)(6) (brief should contain argument in support of issues presented for review); *State v. Brett*, 126 Wn.2d 136, 205, 892 P.2d 29 (1995) (court will not consider issues where arguments are only incorporated by reference).

On September 23, 2019, the Attorney General issued a CID to King Fuji based on information that King Fuji made misrepresentations or omissions to Washington farmworkers about job opportunities related, at minimum, to the 2018 growing and harvest seasons for King Fuji's apple orchards and/or wine vineyards in Central Washington. CP 00398-399 at ¶¶ 2-7; CP 00402-417; CP1 00025-48.[3]

King Fuji appears to have communicated significantly different hiring criteria to U.S. workers than the hiring criteria it actually used to hire Mexican guest workers. Specifically, King Fuji told U.S. farmworkers that "[t]hree (3) months tree fruit experience" were required to work in King Fuji's orchards. CP 00404 (box 16). But when hiring guest workers, King Fuji included no such experience requirement, instead recruiting "guys," who were "married," age "35 and under," from four

[3] In its Petition, King Fuji cites Clerk's Papers in Case No. 37662-1 using the prefix "CP," and Clerk's Papers in Case No. 37689-3 using the prefix "CP1." Petition at 5 n.1. The State does the same here.

specific Mexican states, and who were "new to the H2A program." CP 411. Thus, King Fuji's true hiring criteria, which were misrepresented to U.S. farmworkers, were both (1) less stringent in terms of required work experience, and (2) explicitly based on gender, marital status, age, and national origin. *Compare* CP 00404 (box 16) *with* CP 411.

In light of this information, the Attorney General sought information about King Fuji's unfair or deceptive practices in violation of the CPA, including but not limited to false or misleading representations to U.S. agricultural workers and others in the context of seeking H-2A certification. *See* CP1 00025-48; CP 00398-399 at ¶¶ 2-7; CP 00402-417. To capture all of this, the CID indicated that the Attorney General was investigating:

> [P]ossible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices in the conduct of any trade or commerce), including but not limited to representations or omissions to obtain certification that there are insufficient U.S. workers for particular crop production and harvest

> in the area and permission to hire foreign guest workers.[4]

CP1 00025.[5] The Attorney General issued just one CID, and the justification for it has never changed. *Id.* That CID was directed exclusively to King Fuji's business records and information. CP1 00025, 27 at ¶¶ 3.3, 3.5.

The CID focuses on obtaining documents and information that would identify and reflect King Fuji's representations to, and contacts and communications with, potential U.S. agricultural

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[4] King Fuji's Statement of the case mischaracterizes and misquotes the CID. Petition at 4-5.

[5] The information the Attorney General received also indicated that King Fuji is an enterprise with a labor recruiter in Mexico, CSI Visa Processing, SC, which may also be implicated in any unfair or deceptive business practices revealed by the State's investigation into King Fuji. CP 00400 at ¶ 10. The Attorney General was concerned that King Fuji would alert its business partner to the existence of the CID, and that information or documents stored in Mexico might be lost as a result. Thus, prior to issuing the CID, the Attorney General sought and obtained in Thurston County Superior Court an order prohibiting King Fuji from disclosing the existence or contents of the CID, as permitted by RCW 19.86.110(6) CP 00006-82 (*In Re Confidential Consumer Protection Investigation*). King Fuji did not appeal from that or the other interlocutory orders it references in its Petition.

workers about the job opportunities described in King Fuji's H-2A guest worker applications. For example, the CID requests documents and information about any efforts by King Fuji to recruit U.S. workers, advertise the jobs, contact former U.S. workers to solicit their return to the job, and contact interested U.S. workers referred by the Employment Security Department, a state agency, or WorkSource, a state employment service. *See e.g.*, CP1 00032-34, 37 (CID Interrogatories Nos. 5, 6, 7, 8 and 9; Requests for Production Nos. 5, 6, 7 and 8).

To determine whether King Fuji may have misrepresented or omitted information to potential U.S. workers, the CID also requests documents and information that would show what King Fuji and/or its agents told various other public and private entities, including the state Employment Security Department, the U.S. Department of Labor, and King Fuji's farm labor contractor(s) in Mexico, including CSI Visa Processing, S.C., about the same jobs. *See* CP1 00034-35, 36, 38-39 (CID Interrogatories Nos. 12 and 13; Requests for Production Nos. 3,

4, 11, 12, 13, and 14). Finally, to enable the State to determine whether King Fuji misrepresented or omitted material information to potential U.S. workers, the CID additionally requests documents and information about King Fuji's recruitment, selection, and hiring policies and practices; the actual job qualifications, experience, and criteria it used to hire workers; and whether the terms and conditions of the job were accurately represented to potential U.S. workers. *See* CP1 00033-35, 38-39 (CID Interrogatories Nos. 7, 10, 11, 14, 15 and 16; Requests for Production Nos. 9, 10, and 15).

King Fuji did not produce any documents or information in response to the CID. Instead, on October 11, 2019, King Fuji filed a Petition to (1) Extend Return Date and (2) Set Aside or Modify Attorney General's Civil Investigative Demand in Grant County Superior Court. CP1 00001-8.

On February 10, 2020, the State filed a petition to enforce the CID in Grant County. CP 00363-378. On February 18, 2020, King Fuji filed a motion to vacate the CID. CP1 00068-69;

CP1 00074-91. The State's petition to enforce the CID and King Fuji's motion to vacate it were heard together on June 12, 2020, and the Court granted the State's petition to enforce the CID and denied King Fuji's motion to vacate it. CP 00430-433; CP1 00071-73. On July 17, 2020, King Fuji filed notices appealing both orders. CP 00434-440; CP1 00153-159.

Following briefing by the parties and oral argument, the Court of Appeals issued its decision on December 7, 2021, affirming the trial court in full. The opinion was published by order, dated May 12, 2022. King Fuji now seeks discretionary review in this Court.

V. ARGUMENT

There is no reason for the Court to accept review of this matter. As relevant here:

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

RAP 13.4(b)(3)-(4) (emphasis added). King Fuji claims these factors support review here. They do not. Instead, King Fuji's petition is simply an attempt to re-litigate before this Court the same arguments that were properly disposed of below in accordance with well-settled law.

A. There Is No Significant Question of Law Under the United States Constitution

1. The Court of Appeals Applied Well-Settled Preemption Law and Analysis

In affirming the trial court's decision to enforce the CID, the Court of Appeals applied well-established case law and standard preemption analysis in concluding that the Attorney General's "authority to issue the CID is not preempted by federal law" under any theory of preemption. Slip Op. at 11-17 (citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981) and *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992))).

> There are three types of preemption:
>
> > (1) *express preemption* – where Congress explicitly defines the extent to which its enactments preempt state law; (2) *field preemption* – where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) *conflict preemption* – where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000) (internal quotation marks omitted); *see also Kansas v. Garcia*, ___U.S.___, 140 S. Ct. 791, 801, 206 L. Ed. 2d 146 (2020) (confirming three types of preemption).

Regardless of the type of preemption analysis, "[c]onsideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (internal quotation marks omitted) (internal citations omitted); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 78 (2008); *see also New York Tel. Co. v. New York State Dept. of*

Labor, 440 U.S. 519, 540, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979) ("in the absence of compelling congressional direction," courts will not infer that "Congress ha[s] deprived the States of the power to act"). This is especially true when the state law at issue involves a state's traditional police power, as it does here. *State v. LG Elec., Inc.*, 186 Wn.2d 1, 15, 375 P.3d 636 (2016) (enforcement of CPA "is well within the State's police power"). In such cases, courts "start[] with the assumption that the historic police power of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (citation omitted).

Regardless of the type of preemption—whether express, field, or conflict—there is a strong presumption against preemption, and congressional intent to preempt state law must be clear and manifest. *Arizona v. United States*, 567 U.S. 387, 400, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012); *Hickey v. Voxernet, LLC*, 887 F. Supp. 2d 1125, 1130 (W.D. Wash. 2012) ("Consumer protection is an area of traditional state authority

creating a presumption against federal preemption."). "Parties seeking to invalidate a state law based on preemption 'bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law.'" *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013) (en banc) (quoting *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997)). The Court of Appeals correctly concluded that King Fuji did not overcome this strong presumption against preemption of the Attorney General's authority under the CPA, and properly deemed each of its three preemption arguments without merit.

First, the Court of Appeals rightly concluded there was no express preemption where the only preemption provision King Fuji pointed to "preempt[s] any State or local law regulating admissibility of nonimmigrant workers," 8 U.S.C. § 1188(h)(2), and neither the CPA nor its CID provision has anything to do with the admissibility of nonimmigrant workers. *Compare* Slip Op. at 12-14 with *Chamber of Com. of the United States v.*

Whiting, 563 U.S. 582, 594, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (when a federal law contains an express preemption clause, courts "focus on the plain wording of the clause, which necessarily contains the best evidence" of the scope of Congress' pre-emptive intent"); *Altria*, 555 U.S. at 77 (citations omitted) (even "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption'"). Since the CPA in no way regulates which nonimmigrant workers may enter the United States, the Court of Appeals correctly held that 8 U.S.C. § 1184 "[p]lainly" does not preempt the CPA. Slip Op. at 13.[6]

Second, the Court of Appeals correctly determined there was no field preemption where the only field King Fuji claimed Congress intended to occupy, to the exclusion of state laws, is the field of immigration regulation under the Immigration and

[6] Neither do 20 C.F.R. § 655.185(a) or (b)—which do not even contain a preemption clause—give rise to express preemption. *See* Petition for Review at 15-16; Slip. Op. at 13.

Nationality Act. But the Attorney General seeks to enforce the CPA and investigate possible unfair and deceptive statements to U.S. farmworkers about job opportunities, not to enforce the Immigration and Nationality Act or prosecute alleged fraud on the federal government. *Compare* Slip Op. 14-16 with *Hillsborough Cnty. v. Automated Med. Lab'y, Inc*., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (congressional intent to "pre-empt all state law in a particular area" will only be found "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"). Simply put, it is not enough for field preemption that the State's CID asks questions related to King Fuji's use of the H-2A program. *See Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (no field preemption just because state regulation may have "effects in the area of immigration"). It is the *state law implications* of King Fuji's conduct that the Attorney General is

investigating, and the Court of Appeals correctly concluded that "[f]ield preemption is not shown." Slip Op. at 16.

Third, the Court of Appeals' determination of no conflict preemption is uncontroversial where it concluded that "King Fuji does not demonstrate any respect in which a Washington employer is unable to provide accurate information about agricultural job opportunities to U.S. farmworkers at the same time it complies with federal law." *Compare* Slip. Op at 16-17 *with Arizona*, 567 U.S. at 399 (conflict preemption exists only in the rare instances where (1) "compliance with both state and federal regulation is a physical impossibility," or (2) the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal citations omitted); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009) ("For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict.").

King Fuji alleges two other bases for preemption, but the Court of Appeals properly rejected those arguments, too. As the Court of Appeals correctly explained, "[w]hen federal law expressly preempts some state legislation but not the state law at issue, an inference can be drawn that *implied preemption* is foreclosed." Petition for Review at 13; Slip. Op. at 14 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 385 (1995)) (emphasis added). And "[t]he *Garmon* doctrine"—which King Fuji refers to as "'arguably prohibited or protected'" preemption—"is a special type of conflict preemption that only applies when a state law regulates issues covered by the National Labor Relations Act," which has nothing to do with the CPA investigation in this case. Petition for Review at 13; Slip. Op. at 12 n.7.

2. The Court of Appeals Applied Settled Precedent in Its Fourth Amendment Analysis

Applying this Court's long-standing three-part test under *Steele v. State*, 85 Wn.2d 585, 594, 537 P.2d 782 (1975), the

Court of Appeals likewise concluded that "[c]ontrolling case law defeats [King Fuji's] arguments" that the CID constitutes an unreasonable search under the Fourth Amendment of the United States Constitution. Slip Op. at 17-19 (citing *Ameriquest Mortg. Co. v. Off. Of Att'y Gen.*, 177 Wn.2d 467, 498, 300 P.3d 799 (2013) (citing *Steele*, 85 Wn.2d at 594)).

As this Court held almost fifty years ago, a CID does not violate the Fourth Amendment, and a court will enforce it, where (1) the inquiry is "within the authority" of the Attorney General, (2) the demand is not be "too indefinite," and (3) the information and documents sought are "reasonably relevant" to the investigation. *Steele*, 85 Wn.2d at 594. Here, the CPA expressly authorizes the Attorney General to issues CIDs, *see* RCW 19.86.110(1); King Fuji did not claim that the CID's detailed requests were too indefinite; and the Court of Appeals properly concluded that the requests "appear reasonably calculated to identify what U.S. workers were told about job openings, whether it was accurate, and the employees and

applicants who would have relevant information." Slip Op. at 18-19. King Fuji does not dispute that the three-part test in *Steele* is controlling, but simply disputes the Court of Appeals' factual application of the test, which is not a basis for this Court's review. Petition for Review at 31-32

Where, as here, the Court of Appeals applied well-settled law governing the constitutional questions at issue, its decision does not raise "a significant constitutional question that warrants review" under RAP 13.4(b)(3). *In re Dependency of P.H.V.S.*, 184 Wn.2d 1017, 389 P.3d 460, 461 (2015) (finding that petitioner failed to raise "a significant constitutional question" that warranted review where Court of Appeals' decision was consistent with established due process standards under state and federal case law). The Court of Appeals' decision presents no significant question of federal constitutional law that merits further review.

B. The Petition Does Not Involve an Issue of Substantial Public Interest That Should Be Determined by This Court

While the Attorney General agrees that judicial confirmation that agricultural employers like King Fuji must comply with the CPA is a matter of substantial public interest, Washington courts consistently have stated the constitutional factors that control whether a CID is reasonable and enforceable. *See Steele*, 85 Wn.2d at 593 (citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 204-06, 66 S. Ct. 494, 90 L. Ed. 614 (1946), and *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S. Ct. 357, 94 L. Ed. 401 (1950)); *Ameriquest Mortg. Co.*, 177 Wn.2d at 498 (citing *Steele*, 85 Wn.2d at 594); *State v. Brelvis Consulting LLC*, 7 Wn. App. 2d 207, 230, 436 P.3d 818 (2018) (same). Because the Court of Appeals reiterated those principles in its published decision, if other businesses like King Fuji have questions about the Attorney General's CID enforcement authority, the decision provides further published case law

guidance. There is nothing further for this Court to determine in that regard.

Together, this body of law answers the first question King Fuji poses: "is there a limit to the AG's investigative authority under the Consumer Protection Act?" Petition for Review at 10. As to King Fuji's second, red herring question premised on its "AG's varying explanations" contention—"can the AG simply change the stated purpose of a Civil Investigative Demand after it is issued?"—the Attorney General issued just one CID, and the justification for it has never changed. *See* Petition for Review at 2; Section IV *supra*. Furthermore, the Court of Appeals has already answered the question: "In evaluating a party's positions in an appeal, we consider *that party's* good faith argument, not a 'straw man' argument foisted on the party by its adversary." Slip Op. at 11 (emphasis in original).

Finally, while in some cases "[a] decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if

review will avoid unnecessary litigation and confusion on a common issue," that is not the case here. *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 413-414 (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)). Despite King Fuji's straw man arguments, the Court of Appeals' decision is clear and authoritative, and there is no risk or prospect of unnecessary litigation and confusion on common issues ensuing in the absence of the Court's review here.

VI. CONCLUSION

For the reasons above, the Court should deny King Fuji's petition for discretionary review so that the State may now enforce the CID against King Fuji without further delay.

This document contains 4,045 words, excluding the parts of the document exempted from the word count by RAP 18.17(b) and RAP 18.17(c)(10).

RESPECTFULLY SUBMITTED this 10th day of June 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Washington State Supreme Court. I further certify that I caused to be served a true and correct copy of the foregoing document by mail upon the following recipients:

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Attorneys for Petitioners

DATED this 10th day of June 2022.

s/ Anna M. Alfonso
Anna M. Alfonso
Legal Assistant

NO. 100609-8

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 37662-1-III
(Consolidated with No. 37689-3-III)

IN THE MATTER OF CONFIDENTIAL CONSUMER PROTECTION INVESTIGATION

KING FUJI RANCH, INC., KING FUJI RANCH, ML TAGGARES, INC. DBA ARETE VINEYARDS, BENCH ONE, INC., KING ORGANICS, INC.,

Petitioners,

v.

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,

Respondent.

RESPONDENT'S APPENDIX

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Index of Appendix

Appendix No.	Item
Appendix 1	Order Granting Motion to Publish Opinion

RESPECTFULLY SUBMITTED this 10th day of June 2022.

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Appendix 1

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of Confidential Consumer Protection Investigation. KING FUJI RANCH, INC., KING FUJI RANCH, MT TRAGGARES, INC. DBA ARETE VINYARDS, BENCH ONE, INC., KING ORGANICS, INC., Appellants, v. WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, Respondent.	)	No. 37662-1-III (Consolidated with No. 37689-3-III) ORDER GRANTING MOTION TO PUBLISH OPINION

THE COURT has considered the Respondent's motion and third party Columbia Legal Services' motion to publish the court's opinion of December 7, 2021, and the record and file herein, and is of the opinion the motions should be granted. Therefore,

IT IS ORDERED, the motion to publish is granted. The opinion filed by the court on December 7, 2021, shall be modified on page 1 to designate it is a published opinion and on page 23 by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

PANEL: Judges Siddoway, Pennell, Staab

FOR THE COURT:

Siddoway, C.J.

LAUREL H. SIDDOWAY
Chief Judge

FILED
DECEMBER 7, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of Confidential Consumer Protection Investigation.	)	No. 37662-1-III (Consolidated with No, 37689-3-III)
KING FUJI RANCH, INC., KING FUJI RANCH, MT TRAGGARES, INC. DBA ARETE VINYARDS, BENCH ONE, INC., KING ORGANICS, INC.	)	UNPUBLISHED OPINION
Appellants,	)	
v.	)	
WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL,	)	
Respondent.	)	

SIDDOWAY, J. — After King Fuji Ranch, Inc. and related entities (King Fuji) were served with a civil investigative demand by the Washington State Attorney General's Office (AGO), King Fuji petitioned the Grant County Superior Court to vacate the

demand.[1] It was unsuccessful and now appeals trial court orders denying its request to vacate the demand and granting the AGO's motion to enforce it.

The subject matter of the AGO's investigation falls within the scope of activity prohibited by the Consumer Protection Act, chapter 19.86 RCW (CPA), which the AGO is authorized to enforce. Conduct by King Fuji that may have violated the federal Immigration and Nationality Act (INA)[2] might be evidence that helps demonstrate a CPA violation, but contrary to King Fuji's arguments, that alone does not give rise to federal preemption. For that reason, and because the civil investigative demand was not an unreasonable search and did not invade King Fuji's private affairs without authority of law as alleged by King Fuji, we affirm.

FACTS AND PROCEDURAL BACKGROUND

King Fuji is an agricultural business that grows apples and wine grapes. It recruits some of its workers from other countries using the H-2A visa process provided by federal law. Eligibility for the visas requires demonstrating that the job openings cannot be filled with United States (U.S.) workers. As part of making that demonstration, King Fuji is required by federal law to submit a job order for approval by the state workforce agency designated by the state—in Washington, the Employment Security Department (ESD).

[1] The demand was addressed to King Fuji Ranch, Inc., King Fuji Ranch, ML Taggares, Inc. dba Arete Vineyards, Bench One, Inc., and King Organics, Inc. We use "King Fuji" to refer to King Fuji Ranch, Inc. and to the related entities collectively.

[2] 8 U.S.C. ch. 12 (as amended).

The job order must identify the positions available and their hours, pay, and qualifications. Once the ESD approves a job order submitted by King Fuji, it begins recruiting U.S. workers and refers each U.S. worker who applies for the job opportunity. 20 C.F.R. § 655.121(c), (d).

In 2019, the AGO received information that King Fuji might have provided misleading information in the process of hiring H-2A workers the year before. It learned that the president of King Fuji had submitted a job order to the ESD in May 2018 for 101 farmworker/laborer positions stating, as job requirements, that previous work experience was preferred and specifying "[t]hree (3) months tree fruit experience." Clerk's Papers (CP(A)) at 402, 404.[3] It learned that on the same day, King Fuji's operations manager had e-mailed CSI Visa Processing, S.C., a farm labor contractor in Mexico, about its need to hire 101 workers for the season, but had provided different job requirement information. In his e-mail to CSI, the operations manager explained that King Fuji's only recruiting criteria for this "next group of guys," based on its experience with workers in prior seasons, was

- *Age – 35 and under*
- *Married*
- *Experience – Must be new to H2A program*

[3] The orders challenged on appeal were entered in two Grant County actions that we consolidated. Clerk's papers designated in the "anchor" case on appeal (*In re Confidential Consumer Protection Investigation*, No. 37662-1-III) are cited as CP(A). Clerk's papers designated in the "secondary" case on appeal (*King Fuji Ranch, Inc. et al. v. Off. of Att'y Gen.*, No. 37689-3-III) are cited as CP(S).

- *Desired States/Regions:*
  - *1/3 of group from State of Jalisco*
  - *1/3 of group from State of Nayarit*
  - *1/3 of group from South regions of Mexico (Oaxoca/Veracruz)*

CP(A) at 411 (boldface omitted). King Fuji eventually received federal certification that there were not sufficient U.S. workers available for the 101 positions it had available in 2018 and that its employment of H-2A workers would not adversely affect the wages and working conditions of U.S. workers.

The foregoing information led the AGO to serve a civil investigative demand on King Fuji on September 23, 2019. A civil investigative demand, or CID, is an investigative tool authorized by the CPA. The CID stated,

> The Demand is made pursuant to RCW 19.86.110. The Attorney General believes you have knowledge relevant to the subject matter of an investigation now in progress. Said investigation involves possible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices in the conduct of any trade or commerce), including but not limited to representations or omissions to obtain certification that there are insufficient U.S. workers for particular crop production and harvest in the area and permission to hire foreign guest workers.

CP(A) at 207. The CID included 16 interrogatories and 15 requests for production and required a response within 30 days. It was accompanied by orders the Attorney General had obtained several days earlier, ex parte, in a Thurston County Superior Court action entitled *In re Confidential Consumer Protection Investigation*. The orders prohibited King Fuji from disclosing the existence or contents of the CID to anyone but its counsel, retained jurisdiction over subsequent proceedings, and sealed the case file.

King Fuji responded by filing an action in Grant County Superior Court prior to the CID's return date. It requested a declaratory judgment that the AGO lacked authority for its investigation since the regulation of immigration is exclusively vested in the federal government. It sought an extension of the return date for the CID until the AGO's authority to issue it could be resolved. On the same day, King Fuji filed a motion in the Thurston County action seeking an order changing venue of that action to Grant County.

Both parties filed motions in the Thurston County action thereafter, and in mid-December 2019, the Thurston County Superior Court entered an order transferring the case to Grant County. It provided that its earlier orders prohibiting disclosure and sealing the file "shall remain in force and effect for 45 days or until further order of Grant County Superior Court or this court." CP(A) at 332. The Grant County court later denied the AG's motion to maintain and enforce the nondisclosure order and order sealing the file.

In February 2020, the AGO filed a petition in the transferred action for enforcement of its CID. King Fuji responded by filing a motion to vacate the CID in the action it had commenced. King Fuji argued that the INA "permits employers to hire temporary non-immigrant agricultural workers (H-2A workers) and provides the exclusive process by which the services of these workers may be obtained and utilized." CP(S) at 75 (footnote omitted). Accordingly, it argued, state law was preempted. It also

argued that the CID was an unlawful search and invasion of its private affairs under the federal and Washington Constitutions.

In responding to the motion to vacate the CID, the AGO denied King Fuji's allegations that the "'real focus'" of its investigation was "'alleged false statements to the federal government in the H-2A application'" and that its investigation was a "'disguised attempt to bring a lawsuit to claim that fraud was perpetrated on the federal government.'" CP(S) at 102, 113 (quoting King Fuji's motion to vacate). Rather, the AGO argued, "the CID is focused on investigating King Fuji's possible false and misleading statements and omissions to *U.S. workers*, not the federal government." CP(S) at 102. It explained, "The CID only seeks information about King Fuji's communications and representations to [the U.S. Department of Labor] so the State may compare the representations made to U.S. workers and determine whether those representations were false or omitted material information about the job opportunities." *Id.*

The AGO argued that its CID met a three-part test for reasonableness under the United States Constitution's Fourth Amendment, which the Washington Supreme Court applied to CIDs in *Steele v. State*, 85 Wn.2d 585, 594, 537 P.2d 782 (1975): its inquiry was within the AGO's authority, the demand was not too indefinite, and the information sought was reasonably relevant. On the issue of its authority, the AGO argued that

actions of an employer that have the capacity to deceive the general labor pool, such as misleading job postings, violate the CPA.

In King Fuji's reply in support of its motion to vacate, it led by insisting that the superior court must "determine the purpose of the AG's investigation." CP(S) at 118. It argued that "[a]lthough the AG shifts the focus, the stated purpose remain[s] constant," emphasizing the language of the CID that the violations of RCW 19.86.020 under investigation include representations or omissions "to obtain certification that there are insufficient U.S. workers for particular crop production and harvest in the area and permission to hire foreign guest workers." CP(S) at 118 (boldface omitted).

After hearing argument of the cross motions, the trial court denied the motion to vacate and granted the State's motion to enforce the CID. Its order enforcing the CID required the AGO and King Fuji to meet and confer in good faith on the scope of documents and information to be produced by King Fuji and provided that if agreement could not be reached, the court would resolve whatever issues remained. King Fuji appeals both orders.

ANALYSIS

Among conduct that the CPA declares unlawful are "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. "Trade" and "commerce" are defined by the act to include "any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The act includes a

mandate that it be liberally construed to serve its beneficial purposes. RCW 19.86.920. The AGO "may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act . . . declared to be unlawful." RCW 19.86.080(1).

By statute, when the AGO believes a person has documentary materials or knowledge of any information the AGO believes is relevant to the subject matter of an investigation of a possible violation of the CPA, it may serve that person with a CID requiring the person to produce the documentary materials, answer written interrogatories, or give oral testimony. RCW 19.86.110(1). In serving a CID, the only identification of the AGO's investigation and purpose that is required is that the demand "[s]tate the statute and section or sections thereof, the alleged violation of which is under investigation" and that it "[s]tate . . . the general subject matter of the investigation." RCW 19.86.110(2)(a). The demand served on King Fuji identified the violations under investigation as "possible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices in the conduct of any trade or commerce)." CP(A) at 16. It identified the general subject matter as being such possible past or future violations "including but not limited to representations or omissions to obtain certification that there are insufficient U.S. workers for particular crop production and harvest in the area and permission to hire foreign guest workers." *Id.*

King Fuji challenges the CID on the basis that the INA preempts the state law on which the AGO relies and as an unconstitutional search and invasion of its private affairs. We turn to those arguments after first addressing King Fuji's contention that we must regard the AGO as engaged in an improper investigation into its compliance with the federal H-2A program.

I. THE CID WAS ISSUED IN CONNECTION WITH THE INVESTIGATION OF POSSIBLE MISREPRESENTATIONS TO U.S. FARMWORKERS REGARDING AGRICULTURAL JOB OPPORTUNITIES

In applying to the Thurston County Superior Court for an order prohibiting disclosure of its investigation, the AGO disclosed the information it had received suggesting that King Fuji might be abusing the H-2A program. It broadly identified representations as to which it sought information, including representations King Fuji had made to federal and state agencies. It attached newspaper articles reporting on strikes by King Fuji's H-2A workers complaining of untenable working conditions and retaliation. Seizing on the AGO's statements about suspected abuse of the H-2A program, King Fuji has emphasized below and on appeal that we should view the AGO as making an argument it has never made: that the target of its investigation is suspected violations by King Fuji of federal law and regulations. *See, e.g.*, Appellant's Opening Br. at 15 ("The Purpose of the Civil Investigative Demand is to Improperly Investigate Statements Made to the Federal Government to obtain H-2A Workers." (boldface omitted)).

In reviewing the AGO's presentation to the Thurston County court, we bear in mind the purpose of that presentation. The AGO did not need and was not seeking authorization for its CID. What it felt it *did* need, and was seeking, was court-ordered confidentiality for the CID, which it is entitled to request under RCW 19.86.110(6). The AGO evidently believed that demonstrating that its investigation might reveal violations of federal immigration law by King Fuji and its farm labor contractor in Mexico could help it persuade the court that disclosure would jeopardize its investigation.

The AGO has consistently claimed that it is interested in *misrepresentations made to U.S. farmworkers regarding agricultural job opportunities*, misrepresentations it contends violate the CPA and "have the potential to harm Washington farmworkers and the state labor market." Resp't's Br. at 1.[4] Even if we were to accept King Fuji's characterization of the original submissions to the Thurston County court as "overzealous," Appellant's Opening Br. at 13, the AGO has since made it clear in the trial court and on appeal that it is only misrepresentations made to U.S. farmworkers that it is investigating as violations of the CPA.

[4] For example, a declaration in support of the AGO's request for court-ordered confidentiality stated that its CID sought information about "representations made in, and concerning, advertisement and recruitment efforts that are supposed to be designed to fill agricultural labor needs with U.S. workers," and information about "whether interested U.S. workers were turned away by King Fuji Ranch and Affiliated Companies unfairly and/or deceptively." CP(A) at 9.

This is consistent with its investigation as described in the CID. King Fuji argues otherwise, emphasizing that the CID states the AGO is investigating "representations and omissions to obtain certification that there are insufficient workers." CP(A) at 16. While King Fuji's *direct* representations to obtain certification would be to the Department of Labor, "obtain[ing] certification" arguably depended in the first instance on representations and omissions *to U.S. farmworkers*, that would deter them from applying.[5] CP(A) at 16.

In evaluating a party's positions in an appeal, we consider *that party's* good faith argument, not a "straw man" argument foisted on the party by its adversary. We proceed on the basis of what we are satisfied is the AGO's good faith characterization of its investigation.[6]

II. PREEMPTION

Under the supremacy clause to the United States Constitution, United State law is the supreme law of the land, notwithstanding state law to the contrary. U.S. CONST., art. VI, cl. 2. "Accordingly, state law that conflicts with federal law is 'without effect.'"

[5] The CID also states that its investigation concerns misrepresentations "including but not limited to" representations and omissions to obtain certification. CP(A) at 16.

[6] Since the AGO is not engaged in an investigation of violations of the INA, we need not address King Fuji's discussion of case law holding that there is no private right to enforce the INA—a proposition with which the AGO agrees. We also need not address King Fuji's argument, citing RCW 19.86.170, that the CPA does not apply to "transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States."

Hue v. Farmboy Spray Co., 127 Wn.2d 67, 78, 896 P.2d 682 (1995) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)). Courts "do not presume that Congress relishes abrogating state authority," however. *Id.* at 78. "Congress is presumed to respect our system of 'dual governance.' Accordingly, any consideration of preemption issues 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (alterations in original) (footnote omitted) (internal quotation marks omitted) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

Congress may preempt state law in three ways: through express preemption, field preemption, and conflict preemption. *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 622, 387 P.3d 1066 (2017) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (plurality opinion)). King Fuji advances argument in support of each.[7]

Express preemption. The INA contains express preemption language. 8 U.S.C. § 1188 deals with the admission of temporary H-2A workers, and its subsection (h)(2) provides that "[t]he provisions of subsections (a) and (c) of section 1184 of this title and

[7] King Fuji also mentions *San Diego Buuilding Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), as the source of a preemption doctrine. The *Garmon* doctrine is a special type of conflict preemption that only applies when a state law regulates issues covered by the National Labor Relations Act (NLRA). This case has nothing to do with the NLRA.

the provisions of this section preempt any State or local law *regulating admissibility of nonimmigrant workers*." (Emphasis added.) RCW 19.86.110 is the only state law being applied in this case and it does not regulate the admissibility of nonimmigrant workers. Plainly, 8 U.S.C. §§ 1184(a), (c) and 1188(h)(2) do not preempt it.

King Fuji also cites a federal regulation, 20 CFR § 655.185, that it argues expressly preempts state regulation. The regulation appears in a subpart of federal labor regulations dealing with the labor certification process for H-2A workers. The language on which King Fuji relies provides that "[c]omplaints arising under this subpart" that involve fraud or misrepresentation "must be referred by the [state workforce agency] to the [certifying officer] for appropriate handling and resolution" and complaints alleging that an employer discouraged an eligible U.S. worker from applying, "will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices." 20 CFR § 655.185(a), (b). The regulation makes no reference to preemption, but King Fuji argues that it necessarily preempts state regulation because it "dictate[s] the exclusive method to address [such] allegations." Appellant's Opening Br. at 25. We disagree; the regulation makes the complaint process mandatory, but it includes no language making it exclusive. King Fuji has identified no court that has ever construed the regulatory complaint process as exclusive.

When federal law expressly preempts some state legislation but not the state law at issue, an inference can be drawn that implied preemption is foreclosed. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). From the narrow express preemption provided by 8 U.S.C. § 1188(h)(2), one might infer that Congress did not intend any broader preemption. King Fuji nonetheless advances alternative arguments for field and conflict preemption.

Field preemption. To effectuate field preemption, Congress must "occup[y] an entire field of regulation to the exclusion of any state laws." *Becker*, 187 Wn.2d at 622 (alteration in original) (citing *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 444, 327 P.3d 600 (2013)). King Fuji's argument for field preemption relies on its characterization of the AGO's investigation as an investigation of fraud on the federal government, which it likens to state "fraud-on-the-FDA"[8] claims that the United States Supreme Court found to be preempted by federal law in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001).

In *Buckman*, plaintiffs who suffered injuries from the implantation of FDA-approved orthopedic bone screws sued parties who allegedly misled the FDA in obtaining the screws' approval. The screws were given market clearance under a simplified approval process for a limited use that the plaintiffs claimed was bogus, and was not their intended use. *Id.* at 346-47. The plaintiffs alleged that the defendants'

[8] United States Food and Drug Administration.

misrepresentations were at least a "'but for'" cause of their injuries: had the representations not been made, the FDA would not have approved the bone screws, and the plaintiffs would not have been injured. *Id.* at 343. The Supreme Court found implied preemption because

> the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and . . . this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.

Id. at 348. The "delicate balance" was between safety, on the one hand, and on the other hand, the ability for devices to enter the market in a relatively short period of time and the accepted view that FDA regulations should not interfere with off-label use prescribed by health care professionals. *See id.* at 349-50.

Congressional intent that the FDA provisions in *Buckman* preempted state law was found in 21 U.S.C. § 337(a), which the Supreme Court stated provided "clear evidence that Congress intended that the [medical device amendments] be enforced exclusively by the Federal Government." *Id.* at 352. 21 U.S.C. § 337(a) provides that subject to exceptions not relevant in *Buckman*, "all . . . proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." The Supreme Court in *Buckman* also distinguished the plaintiffs' fraud-on-the-FDA claims from cases where a state claim relies on traditional state law, pointing out that the FDA

device approval provisions were a "critical element" of Buckman's and the other plaintiffs' cases. *Id*. at 353.

Here, by contrast, the AGO is investigating possible representations to U.S. farmworkers that job qualifications and requirements existed for positions when those qualifications and requirements were not, in fact, being applied. No provision of federal law akin to the provision in *Buckman* states that this sort of claim must be brought by and in the name of the United States. If the AGO's concerns are borne out by its investigation, its enforcement action will rely on state law—no violation of federal law serves as an element of those claims, let alone as a critical element. Conduct by King Fuji that may have violated the INA might be relevant to proving that job qualifications and requirements were misrepresented to U.S. farmworkers, but it is the *conduct* that will be relevant, not whether or not it violated the INA. Field preemption is not shown.

Conflict preemption. Finally, conflict preemption occurs when it is impossible to comply with both state and federal law. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 800, 225 P.3d 213 (2009). It can also occur when state law "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)). "'[T]he conflict must be an actual conflict, not merely a hypothetical or potential conflict.'"

Satomi, 167 Wn.2d at 800 (alteration in original) (quoting *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009)).

King Fuji relies on the fact that federal regulations establish remedies for employer misrepresentations in an H-2A application to the federal government that are different from remedies the AGO is able to seek in an action to enforce the CPA. But the AGO is not investigating fraud on the federal government, so there is no conflict. King Fuji does not demonstrate any respect in which a Washington employer is unable to provide accurate information about agricultural job opportunities to U.S. farmworkers at the same time it complies with federal law.

The AGO's authority to issue the CID is not preempted by federal law.

III. THE CID IS NOT AN UNCONSTITUTIONAL SEARCH OR INVASION OF PRIVATE AFFAIRS

King Fuji's remaining challenge to the CID is that it is an unreasonable and therefore unconstitutional search under the federal constitution or an invasion of King Fuji's private affairs without authority of law under the Washington Constitution. Controlling case law defeats its arguments.

A. Fourth Amendment

It is well settled that where "'(1) the inquiry is within the authority of the agency; (2) the demand is not too indefinite; and (3) the information sought is reasonably relevant,'" a CID issued by the AGO does not violate the Fourth Amendment.

Ameriquest Mortg. Co. v. Off. of Att'y Gen., 177 Wn.2d 467, 498, 300 P.3d 799 (2013) (quoting *Steele*, 85 Wn.2d at 594).

King Fuji contends that inquiring into false statements made to the federal government in an H-2A application is not within the scope of the AGO's authority, but that is not the focus of the AGO's inquiry. The AGO's inquiry is into misrepresentations to workers about agricultural employment opportunities. *Steele* itself involved the AGO's investigation of an employment agency, and the Supreme Court found "it is clear" that an inquiry into possible unfair or deceptive practices by an agency involved in employment was within the authority of the AGO. 85 Wn.2d at 594.

King Fuji does not contend that the CID is not reasonably clear. *See* Appellant's Opening Br. at 43-44. *Steele* held that a CID was not impermissibly indefinite where there was "no general or undiscriminating request for all business records" and the types of records sought were "explained with reasonable clarity," which is the case with the CID served on King Fuji. *Steele*, 85 Wn.2d at 594.

King Fuji does contend that the CID seeks information that is not reasonably relevant, but the only examples of insufficiently relevant information it cites are "information ranging from the identity of every worker hired since 2015 . . . , every advertisement placed . . . , steps to contact U.S. workers . . . , selection criteria . . . , persons who prepared the H-2A document . . . [,] and U.S. workers not rehired after a season was complete." Appellant's Opening Br. at 44. Requests for this information

appear reasonably calculated to identify what U.S. workers were told about job openings, whether it was accurate, and the employees and applicants who would have relevant information. If there is some information requested that King Fuji can demonstrate cannot conceivably lead to relevant information, the superior court's order provides for a meet and confer process and that it will resolve disputes consistent with its "discovery" related authority under RCW 19.86.110(8) and (9).

No Fourth Amendment violation is shown.

B. Article I, section 7

Under article I, section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The provision protects "'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.'" *State v. Reeder*, 184 Wn.2d 805, 814, 365 P.3d 1243 (2015) (quoting *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)). If a private affair is not disturbed, there is no violation of article I, section 7. *Reeder*, 184 Wn.2d at 814. The burden of proving that a private affair has been disturbed is borne by the person asserting the intrusion. *State v. Cheatam*, 112 Wn. App. 778, 787, 51 P.3d 138 (2002), *aff'd*, 150 Wn.2d 626, 81 P.3d 830 (2003).

"Private affairs are not determined according to a person's subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that

citizens have held or privacy rights that they are entitled to hold." *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). Instead, courts look at "'the nature and extent of the information which may be obtained as a result of the government conduct' and at the historical treatment of the interest asserted." *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (quoting *Miles*, 160 Wn.2d at 244).

Division Two of this court held in *State v. Brelvis Consulting LLC* that in determining whether information is a private affair under article I, section 7, "[a] corporation's business records . . . are distinct from personal records" and information that may be "the sort of thing that would be sensitive personal information for a natural person" is not sensitive information "for a legal abstraction like a corporation or LLC." 7 Wn. App. 2d 207, 229, 436 P.3d 818 (2018) (citing *State v. Chase*, 1 Wn. App. 2d 799, 804-05, 407 P.3d 1178 (2017)). In this respect, article I, section 7 is like the Fourth Amendment, under which it is a "well-established proposition that although corporations and business are protected by the Fourth Amendment, the privacy of their books and records is not as stringently protected as is that of the privacy of individuals." *Steele*, 85 Wn.2d at 592-93 (citations omitted).

King Fuji tries to distinguish *Brelvis* by arguing that the CID served on it will require it to reveal "'potentially sensitive personal information'" of individuals, such as their immigration status. Appellant's Opening Br. at 42. But the assertedly private

nature of that information is belied by the fact that it is information employers and state workforce agencies are required to collect, report, retain, and make available for audit. Employers are required to keep a recruitment report identifying its recruitment sources, the name and contact information of all U.S. workers who apply or are referred, confirm that the U.S. worker was contacted and specify by what means, and if not hired, explain the lawful reasons for not hiring the U.S. worker. 20 CFR § 655.156. Employers must certify that they have and will continue to retain records of all hires and rejections. 20 CFR § 655.135(a). Information received during the application process and during program integrity measures such as audits may be forwarded to the Office of Foreign Labor Certification to the Wage and Hour Division for enforcement purposes. 20 CFR § 655.130(e). This is manifestly *not* information King Fuji has held and should be entitled to hold "safe from government trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

Moreover, the required authority of law can exist in the form of "a valid (*i.e.*, constitutional) statute." *Reeder*, 184 Wn.2d at 817. King Fuji identifies no constitutional infirmity with RCW 19.86.110, which has authorized CIDs since 1961. LAWS OF 1961, ch. 216 § 11. King Fuji points out that a statutorily-authorized administrative subpoena was found unconstitutional in *Miles* because it was not judicially authorized. But that was because of several concerns not present here: the agency was seeking personal (not business) banking records, from a third party, without notice to the affected individual.

The Supreme Court observed that had it not been for those circumstances, the same agency *could have* obtained business information and documents: it "could have requested Miles to submit to an audit of his business records, could have issued the subpoena to Miles to deliver his business records, [and could have] required Miles to submit to a deposition." 160 Wn.2d at 249. Authority of law existed for this CID, which was issued to King Fuji and which King Fuji had the statutory right to challenge before responding.

No violation of article I, section 7 is shown.

IV. ATTORNEY FEES

The AGO requests an award of reasonable attorney fees and costs under RAP 18.1(b) and RCW 19.86.080(1), and cites *Brelvis*, in which Division Two awarded it fees in a CID enforcement action.

RAP 18.1 allows for attorney fees on appeal if provided for by applicable law. RCW 19.86.080(1) provides that the AGO may bring an action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." After giving respectful consideration to Division Two's award of fees and costs in *Brelvis*, we find that these consolidated actions are governed by RCW 19.86.110(8) and (9), not RCW 19.86.080(1). We deny the request for an award of fees and costs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, C.J.

Staab, J.

AGO CRU SEATTLE

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