IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 89723-9

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

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

Respondents/Cross-Appellants,

v.

CITY OF SEATAC,

Appellant/Cross-Respondent,

and

PORT OF SEATTLE,

Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,

Appellant/Cross-Respondent.

FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC, AND WASHINGTON RESTAURANT ASSOCIATION MOTION FOR RECONSIDERATION AND CLARIFICATION

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I. IDENTITY OF ENTITY FILING THE MOTION

Pursuant to RAP 12.4, Respondents/Cross-Appellants (Plaintiffs below) Filo Foods, LLC; BF Foods, LLC; Washington Restaurant Association; and Alaska Airlines move for reconsideration and clarification of *Filo Foods, LLC v. City of SeaTac*, No. 89723-9, 2015 WL 4943967 (Aug. 20, 2015) (the "Opinion").

II. STATEMENT OF RELIEF SOUGHT

Plaintiffs seek reconsideration of the Court's Opinion for the following reasons:

First, because the Court misapprehended the scope of the exclusive authority granted to municipal owners of airports in the Revised Airports Act, Chapter 14.08 RCW, and the practical consequences of changing a long-established and widely-understood allocation of municipal authority, the Court should reconsider the Opinion and hold that the Act prohibits the application and enforcement of Proposition 1 at the Seattle-Tacoma International Airport.

Second, the Court misapprehended federal labor law preemption analysis and, without conducting the broad inquiry required, found that Proposition 1 is not preempted. Specifically, the Court expressly declined to consider the cumulative effect of the ordinance's many provisions, as it is required to do under federal law. The Court also wrongly anticipated the

NLRB's holding in *GVS Properties, LLC and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447*, Case 29-CA-077359, 362 N.L.R.B. 194 (Aug. 27, 2015), which undercuts this Court's reasoning. The Court should, therefore, reconsider the Opinion, analyze both the aggregate effects of Proposition 1 on the bargaining process and the NLRB's recent holding in *GVS Properties*, and hold that Proposition 1 is preempted by federal labor law.

Third, the Court misapprehended two key aspects of federal law in its analysis of preemption under the Airline Deregulation Act. Specifically, the Court assumed incorrectly that laws governing the employer-employee relationship are not preempted as a matter of federal law. It also assessed the effect of Proposition 1 only on "fares," without assessing the effect on "services," which it was required to do. The Court should reconsider the Opinion and hold that Proposition 1 is preempted by the Airline Deregulation Act.

In the event the Court does not reconsider the Opinion, Plaintiffs seek clarification of the Court's Opinion for the following reasons:

First, the Court should clarify the nature of further proceedings. Specifically, the Court should make clear that on remand the parties have the opportunity to develop a factual record regarding whether

implementation of Proposition 1 would interfere with airport operations and affect airline prices, routes, or services.

Second, the related appeal regarding the sufficiency of the signatures offered in support of the initiative petition for Proposition 1 is still pending in this Court. If the Court determines that Proposition 1 is invalid because it was not supported by sufficient voter signatures, the rest of this appeal is moot. Until that appeal is decided, the trial court and the parties will be left with considerable uncertainty, including whether to conduct expensive and time consuming discovery and trial while a potentially dispositive issue remains on appeal. The Court should therefore clarify that the validity of Proposition 1 is still an open question and rule on that pending appeal expeditiously.

III. GROUNDS FOR RELIEF AND ARGUMENT

A. The Court Should Reconsider its Opinion Because it Misapprehended State and Federal Law and Overlooked the Practical Consequences of its Decision.

1. The Majority Misapprehended the "Exclusive Jurisdiction and Control" Granted By the Legislature to the Port of Seattle and Overlooked the Consequences of its New Case-By-Case Test.

Under the Revised Airports Act, "[e]very airport and other air navigation facility controlled and operated by any municipality [such as the Port of Seattle] . . . shall, subject to federal and state laws, rules, and regulations, be under the ***exclusive jurisdiction and control*** of the

municipality . . . controlling and operating it." RCW 14.08.330 (emphasis added). The Act deprives a city or county in which an airport sits of both "police power" (the power to regulate for the general health, safety, and welfare) and "police jurisdiction" (the power to exercise any extraterritorial jurisdiction), except with respect to the local fire code and those limited areas in which the Act expressly provides for "concurrent jurisdiction." *Id.* As the Port of Seattle explained in its brief, "[e]very sentence in RCW 14.08.330 confirms and reinforces the exclusive nature of the Port's jurisdiction at STIA." Br. of Resp't Port of Seattle, at 14. And so do this Court's earlier cases, the legislative history, and the treatment of grants of "exclusive jurisdiction" in other contexts. *Id.* at 14-22. With respect, the majority Opinion misapprehended the regulatory regime at the airport and the legal and practical consequences of its decision.

First, the majority Opinion reasoned that to interpret the Act "in the manner the Port of Seattle suggests, we would have to conclude that the legislature intended the Revised Airports Act, chapter 14.08 RCW, to deprive the city of SeaTac of all its police powers at the airport, even though the Port of Seattle lacks the authority to fill this regulatory gap through its normal rule-making authority." Opinion at * 6. But the Opinion's reliance on a "regulatory gap" is misplaced. The authority to

regulate for the general welfare, including wages and working conditions, resides where the legislature intended (and where it has resided statewide for 126 years)—with the state and federal governments, both of which heavily regulate wages, hours, and other working conditions at SeaTac International Airport and elsewhere in Washington. *See* RCW 14.08.330 (every airport is "subject to federal and state laws, rules, and regulations" but not to local rules or regulations); Opinion at *19 n.1 (J. Stephens, dissenting in part); Br. of Resp't Port of Seattle at 32-33.[1]

Second, the majority overlooks the consequences of its decision to devise a new test ("interferes with airport operations") that appears nowhere in the statute. By crafting this new test, the Court has created the public impression that it has substituted its judgment for that of the legislature to accomplish its desired result.[2] And by deviating from the understanding that has prevailed in Washington since the Act's adoption in 1945, the Opinion creates significant uncertainty and guarantees more litigation.

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[1] Subsequent to the argument in this case, the Port of Seattle adopted a "Quality Jobs Initiative" that imposes minimum wage and other working conditions on certain employers and employees at SeaTac International Airport. *See* Quality Jobs at the Port of Seattle, https://www.portseattle.org/About/Commission/Pages/Quality-Jobs.aspx (last visited Sept. 6, 2015).

[2] *See* Seattle Times, Aug. 4, 2015, Seattle Times Editorial Board, Hold the applause for the $15 minimum-wage experiment ("The Supreme Court flexed its ideological muscle to reach what appears to be a predetermined conclusion in favor of $15.").

The new test will require cities and municipal airport owners (and eventually courts) to decide whether a regulation crosses the line and intrudes on "airport operations" and whether the owner of the airport still has "exclusive" jurisdiction over the subject of the new rule. Further, this determination will have to be made on a case-by-case basis as cities and owners of airports will now have to confront innumerable questions about where the line belongs: Does an ordinance interfere with airport operations if it coerces airlines to abandon the use of contractors and to bring in-house services like passenger check-in, baggage handling, aircraft cleaning, aircraft fueling, etc.? Does an ordinance interfere with airport operations if it changes the mix of concession providers, driving out small local businesses in favor of large, national chains better able to absorb higher costs and negotiate with unions? What if the Ordinance makes it harder for the Port of Seattle of maintain the level playing field the FAA requires for women and minority owned business, like Filo Foods and BF Foods?[3] Does an ordinance interfere with airport operations if it forces the Port of Seattle to abandon its "street pricing" rule to allow businesses to charge substantially more at the airport than they charge outside to help

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[3] The U.S. Department of Transportation regulations, 49 CFR Part 23, require the Port of Seattle, as a recipient of DOT financial assistance, to ensure, nurture and facilitate nondiscriminatory participation of women and minority business owners in concessions at the airport, without the use of set-asides or quotas.

offset increased costs? Does an ordinance interfere with airport operations if, by restricting the use of part-time employees, it reduces the flexibility of contractors to accommodate airlines' preferred flight schedules (e.g., peak morning schedule followed by a mid-morning lull)? What if the increase to contractors' labor costs caused by this inefficiency affects airlines' scheduling decisions? Does an ordinance interfere with airport operations if it causes airlines to consider moving operations to other airports (such as Everett or Portland)? What if airport tenants negotiate for substantially different lease terms as a result of the ordinance? What if the Ordinance reduces the Port's airport operating revenues?

Whether these kinds of changes in airport operations are good or not is debatable, but the Legislature gave the exclusive authority to make these decisions to the municipality that owns and operates the airport, not to a few thousand voters of a city like SeaTac. With respect, this is not what the legislature intended. *See* Opinion at *21 (J. Stephens, dissenting in part). It is more likely that the legislature intended the opposite—to prevent this unpredictable, piecemeal approach to regulating the airports—when it granted the municipalities that own and operate them "exclusive jurisdiction and control."

Similarly, and more concretely, the Opinion blurs previously settled boundaries between the Port of Seattle and the City of SeaTac over

the SeaTac International Airport. The relationship between the City and the Port is governed in large part by an Interlocal Agreement that allocates responsibility for regulating land use issues (including building permitting, building code enforcement, and economic development), surface water management, transportation, and material hauling, among other things. CP 1753-62.[4] The agreement was negotiated based on the understanding that "the city codes and ordinances do not govern these matters" during the term of the agreement. Going forward, as a result of the Opinion, the city is certain to assert its new-found authority to regulate in many of these areas (without needing the consent of the Port) and any other area it can claim does not "interfere with airport operations." The Opinion upends the balance of power that has governed this relationship for many years and will require an overhaul of the allocation of responsibilities and authority between the Port and the city, with unpredictable consequences for airport operations. This is contrary to the legislature's intent and to its grant of "exclusive jurisdiction and control" to the municipality that owns and operates the airport. *See* Opinion at *21 (J. Stephens, dissenting in part).

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[4] The Interlocal Agreement is also available at http://www.ci.seatac.wa.us/index.aspx?page=109 (last visited Sept. 6, 2015).

2. The Opinion Misapprehended the Significance of Proposition 1 for Employers' and Employees' Rights Under Federal Labor Law.

Plaintiffs argued that Proposition 1 was preempted in its entirety by both the National Labor Relations Act, 29 U.S.C. §§ 151-59, and the Railway Labor Act, 45 U.S.C. §§ 151–88, under the *Machinists* preemption doctrine. *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976). The Court rejected this argument after refusing to consider the cumulative effect of the ordinance's many provisions on collective bargaining and union organizing. This approach was contrary to the analysis required by established federal law.

Plaintiffs argued that while some of the individual provisions of Proposition 1 were similar to provisions that had withstood preemption challenges in other cases, the cumulative effect of so many provisions drafted by and for the benefit of organized labor was to put a "thumb on the scale" in favor of unions in both bargaining and organizing.[5] Plaintiffs

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[5] As explained in the briefing, *see, e.g.,* Filo Foods, LLC, et al.'s Reply Br. on Cross Appeal at 12-17, by design Proposition 1 affected the respective bargaining power of employers and unions by providing for dramatically higher minimum wages, paid time off, required retention of workers in the event of an acquisition, restrictions on use of part-time staffing, etc. These provisions are normally the subject of negotiations in the course of bargaining for a collective bargaining agreement. *See* The Developing Labor Law 1341, 1378-1446 (6th ed. 2012). The right to make such core entrepreneurial decisions is a key economic weapon taken from employers by Proposition 1. On top of all of that, the ordinance allows a union to waive all of these provisions on behalf of

argued that such local interference with the bargaining process in favor of one side was therefore preempted by the NLRA and the RLA.[6]

This Court expressly declined to consider this cumulative effect, stating in a footnote that there was "no authority" for the proposition that individual provisions could "work together in cumulative effect to become preempted." Opinion at *11 n.6. The Court held that "[w]ithout such authority, *Fort Halifax Packing Co.* [*v. Coyne*, 482 U.S. 1 (1987)] and *Metropolitan Life Insurance Co.* [*v. Mass.*, 471 U.S. 724 (1985)] require us to hold that the NLRA does not preempt minimum labor standards, even when several such standards appear in one ordinance." *Id.* But such authority exists and should have been controlling. Under established federal law, a court evaluating whether a state or local rule is preempted by federal law must consider the "aggregate potential effect of a type of regulation" as a whole. *C.F. & I Steel, L.P. v. Bay Area Rapid Transit Dist.*, No. C00-00529 WHA, 2000 WL 1375277, at *11 (N. D. Cal. Sept. 19, 2000), citing *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986).

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employees (without even requiring alternative terms) to induce an employer to reach agreement.

[6] It is not a surprise that the ordinance is so one-sided (as many initiatives are): it was an initiative drafted and supported by activists and it did not benefit from any of the back and forth and compromise of the normal legislative process.

As the U.S. Supreme Court instructed in *Gould*, when a court considers the potential effect that a collection of provisions could have on federal labor law, it must look at the cumulative effect of all of them. The court explained that because "[e]ach additional statute incrementally diminishe[d] the Board's control over enforcement of the NLRA and thus further detract[ed] from the integrated scheme of regulation created by Congress," the state law was preempted under the NLRA. *Gould*, 475 U.S. at 288-89 (internal quotations omitted). *See also Massachusetts Delivery Ass'n. v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014) (when evaluating preemption "[t]he court must engage with the ***real and logical effects of the state statute,*** rather than simply assigning it a label" like "background" or "labor law") (emphasis added); *Brown v. United Airlines, Inc.,* 720 F.3d 60, 66-67 (1st Cir. 2013) ("It defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry.").

Here, Proposition 1 imposes onerous substantive requirements on nearly every aspect of the employment relationship, and the only way for an employer to avoid application of the Ordinance is to enter into a collective bargaining relationship with a union and negotiate a waiver. *See* Am. Answer Br. and Opening Cross-Appeal Br. of Filo Foods, LLC, et al. ("Br.") at 33-34. The Ordinance also compels employers to make

concessions to unions without allowing employers to bargain for any tradeoff. Thus, even if the individual components of the Ordinance are not sufficiently onerous (standing alone) to interfere with the balance between labor and management to trigger preemption, the aggregate effect of all of the provisions (taken together) severely restricts bargaining freedom. The Court's decision here not to consider the effect of these provisions in the aggregate was based on a misapprehension of federal law.

The Opinion also incorrectly analyzed Proposition 1's effect on federal labor rights with respect to one of its central provisions: the employee retention requirement in SMC 7.45.060. That provision requires a company that takes over a business to employ the predecessor's employees for an initial period of 90 days. Plaintiffs argued that this provision meant the measure was preempted under *Machinists* because it inhibits the free play of economic forces by requiring employers to retain employees it would otherwise have no obligation to retain, which makes it substantially more likely that the employer will be deemed a "successor" with a duty to recognize the employees' union and bargain with it. *See* Br. at 39-43. The Opinion rejected this argument, reasoning that, because the employer's retention of employees under Proposition 1 would not be voluntary, it would not trigger successor status and an obligation to recognize the union and bargain with it. Opinion at *12 n.8. But as

demonstrated by a recent decision of the National Labor Relations Board, this is an incorrect understanding of federal labor law.

In *GVS Properties, LLC and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447*, Case 29-CA-077359, 362 N.L.R.B. 194 (Aug. 27, 2015), the NLRB considered whether a new employer becomes a successor when, pursuant to a local worker retention statute, it is required to employ the predecessor's employees for a specific period of time after assuming control of the business. The Board said "yes." *Id.* at 3 ("Respondent became a *Burns* successor with an obligation to recognize and bargain with the Union when it assumed control over the predecessor's business," not after the mandatory retention period expired). In so holding, the NLRB rejected the rationale offered by this Court for upholding the Ordinance against Plaintiff's preemption challenge. Specifically, the NLRB "[found] no merit in the argument . . . that the successorship determination could not be made until after the [statutory mandated] retention period had ended" because the successor employer did not voluntarily retain employees during the retention period. *Id.*[7]

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[7] This Court relied on *Rhode Island Hospitality Association v. City of Providence*, 667 F.3d 17 (1st Cir. 2011), which upheld a worker-retention ordinance substantially similar to Proposition 1. But the First Circuit did so because it made the same mistaken presumption that this Court made—that the *Burns* successorship obligation would not

Furthermore, the NLRB majority and the dissent observed that, as a result of the Board's holding, worker-retention provisions like those in Proposition 1 may be preempted by the NLRA. *Id.* at 6-7 (possible preemption is not a sufficient reason to delay successor determination), 9 (dissent noting that the decision "could prove the death knell for local worker retention statutes" because it "paves the way for these statutes to run headlong into the Supremacy Clause of the Constitution."). Because this is an evolving area of labor law, it is understandable that the Court applied the successorship doctrine incorrectly. Still, the fact remains that the Opinion misapprehended federal labor law.

Because the Court's Opinion did not properly evaluate the effect of a central provision of Proposition 1 or the cumulative effect of its numerous provisions (and for all the other reasons articulated in Plaintiffs' briefing), this Court should reconsider the Opinion and hold that Proposition 1 is preempted by federal labor law.

3. The Court's Opinion Adopted an Overly-Narrow View of Preemption Under the ADA and Focused Exclusively

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arise until after the mandatory retention period expired. *See GVS Properties* at 9 ("Several courts [included the First Circuit in *Rhode Island Hospitality,*] have rejected challenges to [local worker-retention statutes] on Federal preemption grounds, but they have entirely predicated their decision on the assumption that the Board would not take the position it does here."). The Board's decision in *GVS Properties* thus negates a central premise of *Rhode Island Hospitality*, and this Court's reliance on it is therefore misplaced.

on the Effect of Increased Labor Costs on Ticket Prices, Contrary to Federal Law.

Plaintiffs argued that Proposition 1 is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1), in part because one of the intended effects of the ordinance is to coerce airlines to change the way they do business, including their use of contractors to perform many airline services such as curbside passenger check-in, baggage handling, aircraft interior cleaning, aircraft fueling, etc. Br. at 43–51. The Opinion rejected this argument. The Court held that because the ordinance "regulates the employer-employee relationship" and does "not directly regulate airline prices and services," the imposition of increased labor costs and the resulting effect on fares "is inconsequential" and the ordinance is therefore not preempted. Opinion at *16. As explained below, the Court's holding is premised on a misunderstanding of two fundamental aspects of federal law.

First, this Court seemed to believe that if a local law regulates the employer-employee relationship, its effect "on airline prices and services is only indirect and tenuous" as a matter of law and, therefore, it will not be preempted by the ADA. *Id.* But that is a misreading the ADA. As the First Circuit recently explained, even generally applicable labor standards

may be preempted, and a reviewing court is required to look at the actual and logical effects of the local rules in deciding preemption issues.

In *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014), the court rejected the premise of this Court's Opinion that background labor laws are not preempted as a matter of law, explaining that such a rule "runs counter to Supreme Court precedent broadly interpreting the 'related to' language in the [Federal Aviation Administration Authorization Act (FAAAA)]."[8] *Id.* at 19. At issue was the Massachusetts Independent Contractor Statute, which defined who is and who is not an independent contractor. It required all workers who perform a service that was in the "usual course of business" of an employer to be classified as an employee. This classification triggered obligations under various wage and employment laws applicable to employees, which resulted in higher labor costs for the "employers." The trial court found no preemption, reasoning "[t]hat a regulation on wages has the potential to impact costs and therefore prices is insufficient to implicate preemption." The First Circuit reversed. *Id.* at 21-22 (internal quotations omitted).[9]

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[8] Courts, including this one, recognize that the FAAAA's broad preemption provision is identical to and construed in *pari materia* with the ADA's. *See* Opinion at *16.

[9] This Court's Opinion relies heavily on *DiFiore v. American Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), and cites it for the proposition that the ADA cannot preempt background

The holding and rationale of *Coakley* is consistent with other federal cases holding that ADA preemption applies to other minimum labor standards governing the employer-employee relationship. [10] *See, e.g., Tucker v. Hamilton Sundstrand Corp.,* 268 F. Supp. 2d 1360, 1362-64 (S.D. Fla. 2003) (ADA preempted Florida Whistleblowers Act claim of former employee of repair station that repaired generators used in commercial and military aircraft); *Marlow v. AMR Servs. Corp.,* 870 F. Supp. 295, 297-99 (D. Haw. 1994) (ADA preemption applied to claim of employee of jet bridge maintenance company). This Court's premise that wage and other labor legislation may not be preempted, like the district court's similar misunderstanding in *Coakely*, was a "critical error" in the preemption analysis, 769 F.3d at 21, that should be reconsidered.

Second, the Court's analysis of whether Proposition 1 was "related to" airline prices, routes, and services, as required by *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992), was too narrow. The

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labor legislation that only indirectly affected fares or services. The First Circuit's subsequent *Coakley* decision rejects this reading of *DiFiori* and clarifies that there is no rule against preemption of generally applicable local labor laws. *Coakley,* 769 F.3d. at 19-20.

[10] Plaintiff does not concede that Proposition 1 is a minimum labor standard. To be considered a minimum labor standard, the Ordinance must be, among other things, generally applicable. *See, e.g., 520 S. Mich. Ave. Assocs. Ltd. v. Shannon,* 549 F.3d 1119, 1130 (7th Cir. 2008). Proposition 1 is not a generally applicable law. It targets only transportation and hospitality employers (but not airlines) in and around SeaTac International Airport and expressly applies its provisions to employees performing airline services, such as baggage handling, aircraft fueling, etc. Br. at 45. Proposition 1, therefore, is not a minimum labor standard.

Opinion evaluates only the effect of Proposition 1, and the attendant increases in labor costs, on "fares." But the correct preemption analysis requires an assessment of the "real and logical effects" that the ordinance has on the delivery of services and the setting of fares. *See Coakley,* 769 F.3d at 21-22 (error for trial court to consider only the effect on prices instead of prices, routes, and services); *N.H. Motor Transp. Ass'n. v. Rowe*, 448 F.3d 66, 82 n.14 (1st Cir. 2006) (noting that courts examine "the logical effect that a particular scheme has on the delivery of services or the setting of rates").

Proposition 1 significantly affects the delivery of essential airline services. It ***expressly applies*** to providers of the following airline services: "curbside passenger check-in services; baggage check services; wheelchair escort services; baggage handling; cargo handling; rental luggage cart services"; "customer service"; "aircraft interior cleaning; aircraft carpet cleaning; aircraft washing and cleaning; . . . aviation ground support equipment washing and cleaning; aircraft water or lavatory services; aircraft fueling; ground transportation management"; and others. SMC 7.45.010. At the same time, the ordinance also ***expressly excludes*** from its coverage airlines performing these services for themselves. *Id.* (excluding airlines from the definition of "Transportation Employer"). The effect of this discrimination against airlines that rely on contractors

(such as Alaska) is to coerce airlines to stop using contractors and to bring the work in-house to avoid the application of the Ordinance (and the attendant increases in labor costs and the imposition of the other burdensome rules in Proposition 1). As noted in Plaintiffs' briefing, this interference with the way airlines perform some of their essential services was an intended consequence of Proposition 1 and a reaction to the perceived negative consequences of deregulation by the ADA. Br. at 50. The Opinion does not address these issues and focuses instead only on whether a risk of increased prices due to higher labor costs constitutes grounds for preemption.

This Court's narrow reading of the ADA's preemption provision disregards the U.S. Supreme Court's determination that ADA preemption is triggered by any laws or enforcement actions that "relate to" or have "a connection with, or reference to" airline prices, routes, or services. *Morales v. Trans World Airlines,* 504 U.S. at 384. Proposition 1 is "related to," has "a connection with," and makes explicit "reference to" airline services. The direct effect of the Ordinance will not just be higher prices. It will be to change the way some airlines provide essential services. The Court's failure to address the real-world consequences of Proposition 1—coercing airlines to change from a business model that relies on contractors to performing work in house—reflects a

misapprehension of controlling federal law. As the U.S. Supreme Court recently observed, "it defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry." *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422, 1429-33 (2014) (holding that common law claim for breach of implied covenant "relates to" airline prices, routes, or services).

B. The Court Should Clarify its Opinion to Address Further Proceedings on Remand and the Pending Signature Verification Appeal.

In the event the Court does not reconsider the Opinion as requested, Plaintiffs respectfully request that the Court clarify the issues remaining for remand and the pending signature verification appeal. Doing so will promote judicial economy and remove potential ambiguity concerning the Court's Opinion.

1. The Court Should Clarify that Plaintiffs Are Entitled to Present Evidence at Trial to Show That Proposition 1 Interferes With Airport Operations and Affects Airlines Prices, Routes, or Services.

The Opinion reversed a trial court's grant of summary judgment to Plaintiffs after expedited proceedings. The Court expressly concluded the trial court's decision "was a summary judgment disposition" and noted that the trial court "made clear it was . . . ***not resolving factual disputes as to the consequences of Proposition 1 on airport operations***." Opinion at

*2 n.3 (emphasis added). *See United Pac. Ins. Co. v. Boyd,* 34 Wn. App. 372, 377 (1983) (courts do not make factual findings in summary judgment proceedings). Normally, after reversal of a summary judgment, when no cross-motion for summary judgment is filed, the Court remands for further proceedings, including discovery and a possible trial. *See, e.g.*, *McCullough v. E. I. du Pont de Nemours & Co.*, 68 Wn.2d 127 (1966) (reversing summary dismissal and remanding for trial); *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824 (1966) (same). And Plaintiffs understand the Opinion to recognize they have the opportunity on remand to demonstrate Proposition 1 will interfere with airport operations and affect airline prices, routes, or services. Some language in the Opinion, however, has led to public speculation that this case has been fully resolved by the Court.

The Opinion said that "Proposition 1 can be enforced at the Seattle-Tacoma International Airport." Opinion at *18. But the Court qualified this conclusion and explained that it reached that result "because there has been no showing that this law would interfere with airport operations." *Id.* The same explanation and qualifier appears throughout the Opinion. *See* Opinion at *1 ("because there is no indication that it will interfere with airport operations"); *4 ("because the Port of Seattle does not show that Proposition 1 would interfere with airport operations"); *9

("[a]bsent a factual showing that Proposition 1 would interfere with airport operations").

These issues were not considered by the trial court previously because the Opinion articulated a new standard governing the state law question whether the city may impose regulations at the airport and because the trial court did not reach the issue of federal preemption under the ADA. *See* Opinion, at *15. Remand is appropriate in a case such as this where a more thorough examination of the facts is required because the facts were "thought unnecessary to be established" at trial. *City of Sumner v. First Baptist Church of Sumner*, 97 Wn.2d 1, 4 (1982). To avoid uncertainty and to promote judicial economy, Plaintiffs respectfully request that the Court clarify that the procedural posture of the case after remand will allow development of a factual record regarding whether Proposition 1 will interfere with airport operations and whether it will affect airline prices, routes, or services.

2. The Court Should Rule on the Pending Appeal Regarding the Sufficient of Signatures.

As the Court noted at footnote 1 of the Opinion, the Court stayed a petition for review in the related initiative petition signature case. *Filo Foods, LLC et al., v City of SeaTac*, No. 90113-9. The Court consolidated that appeal with this case. Order Deferring Review, *Filo Foods, LLC v.*

City of SeaTac, No. 90113–9 (Apr. 30, 2014). The Court, however, has not resolved the potentially dispositive issue in the consolidated appeal. As a result, the parties and trial court are in the uncertain position of spending further resources on discovery and additional proceedings, including trial, when the dispute may be fully resolved by the pending consolidated appeal.

In the interest of judicial economy, Plaintiffs respectfully request that the Court clarify that the validity of Proposition 1 remains undetermined pending resolution of the consolidated appeal. Moreover, Plaintiffs suggest the mandate should be stayed and issue only when the consolidated appeal is resolved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request the Court to reconsider its Opinion, affirm the decision of the trial court that under state law Proposition 1 cannot be enforced at the SeaTac International Airport, reverse the decision of the trial court regarding federal preemption, and hold that Proposition 1 is preempted by federal law. If the Court is not willing to reconsider the Opinion as requested, at a minimum the Court should clarify its Opinion (a) to indicate that the Plaintiffs will have an opportunity to present evidence at trial that Proposition 1 does, in fact, interfere with airport operations and affect airline prices, routes, or

services and (b) to resolve the pending appeal regarding the sufficiency of signatures submitted in the attempt to qualify Proposition 1 for the ballot.

RESPECTFULLY SUBMITTED this 9th day of September, 2015.

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CERTIFICATE OF SERVICE

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

On this date I caused to be served in the manner noted below a copy of FILO FOODS, LLC, BF FOODS, LLC, ALASKA AIRLINES, INC, AND WASHINGTON RESTAURANT ASSOCIATION MOTION FOR RECONSIDERATION AND CLARIFICATION on the following:

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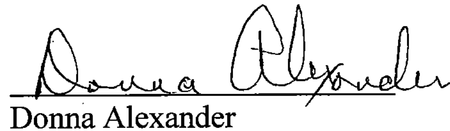
Dated this 9th day of September 9, 2015.



Donna Alexander