The Honorable Steve Rosen
Hearing Date: March 29, 2019 at 10:00am
With Oral Argument

STATE OF WASHINGTON

KING COUNTY SUPERIOR COURT

KEENA BEAN, JOHN B. HEIDERICH, GWENDOLYN A. LEE, MATTHEW BENTLEY, WESLEY WILLIAMS, JOSEPH BRIERE, SARAH PYNCHON, WILLIAM SHADBOLT, and BOAZ BROWN, as individuals and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF SEATTLE, a Washington municipal corporation, and the STATE OF WASHINGTON,

Defendants.

NO. 18-2-56192-2 SEA

DEFENDANT STATE OF WASHINGTON'S MOTION TO DISMISS

NOTING DATE: MARCH 29, 2019

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I. INTRODUCTION

Plaintiffs' sole claim against the State of Washington alleges that Washington's Residential Landlord–Tenant Act (the RLTA) "authorizes the City [of Seattle] to conduct warrantless rental inspections without the consent of tenants." Complaint ¶ 73 (citing RCW 59.18.125). It does not. Instead, as Plaintiffs admit, when a tenant and landlord refuse consent to a rental inspection, the RLTA "permits the City to seek a warrant to inspect the property pursuant to RCW 59.18.150." Compl. ¶ 38. This warrant provision is strict; it requires a municipality to demonstrate probable cause that there is a violation of housing codes that "endangers the health or safety of the tenant or adjoining neighbors," and is only available to municipalities *after* "consent to inspect [was] sought from the owner and the tenant." RCW 59.18.150(4)(b). Because the RLTA provides municipalities the means to seek a warrant for rental inspections, Plaintiffs' claim that the RLTA permits warrantless searches without consent must be dismissed.

Plaintiffs' claim also fails for at least three additional reasons. *First*, because Plaintiffs challenge the statute on its face, they bear the burden of showing it is constitutional under any conceivable set of facts. *City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007). Plaintiffs cannot come anywhere near meeting this burden. To the contrary, because the RLTA explicitly authorizes rental inspection warrants, unconstitutional searches under the RLTA are extremely avoidable. Moreover, because RCW 59.18.125 does not require municipalities to adopt any particular inspection scheme—let alone one that permits warrantless searches—any constitutional infirmities necessarily arise from the manner in which Section 125 is implemented by municipalities, not from the face of the statute itself.

Second, in *City of Pasco v. Shaw*, the Washington Supreme Court rejected essentially the same challenge Plaintiffs bring here on the ground that rental inspection regimes which permit landlords to hire private inspectors—such as RCW 59.18.125—do not require state action, and thus do not facially violate the Article 1, Section 7. *City of Pasco*, 161 Wn.2d at 458. *City of Pasco* is indistinguishable from this case; because RCW 59.18.125 permits landlords to hire non-

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state-actors to conduct rental inspections, Plaintiffs cannot allege a facial constitutional challenge to the statute.

Finally, to the extent Plaintiffs may try to salvage their claim by arguing that Washington's RLTA violates Article 1, Section 7 by permitting landlords to conduct searches using private inspectors without their tenants' consent, this argument too is foreclosed by *City of Pasco*. As that Court concluded, tenants do not have a reasonable expectation of privacy as against housing inspectors invited by their landlords, sufficient to give rise to a claim under Article 1, Section 7. *Id.* at 461. To the contrary, the Residential Landlord–Tenant Act has, since its inception, provided that tenants cannot unreasonably withhold their consent to their landlords to inspect the premises and permit contractors to enter as necessary. RCW 59.18.150(1). Because the RLTA "gives a landlord a limited right to invade the privacy of a tenant in his or her residence for limited purposes," the landlord's (or their contractor's) entrance into a tenant's apartment does not invade the tenant's reasonable expectation of privacy so long as "the scope of the entrance does not exceed [the RLTA's] purposes." *Kalmas v. Wagner*, 133 Wn.2d 210, 219–20, 943 P.2d 1369 (1997). Here, the landlord's right of entry under Section 125 does not exceed the scope of Section 150 of the RLTA, and therefore does not invade tenants' reasonable expectations of privacy.

For any and all of these reasons, Plaintiffs' claim against the State of Washington should be dismissed with prejudice.

II. BACKGROUND

A. The Washington Legislature Passes a Rental Inspection Act to Improve Substandard Housing.

In 2010, the Washington Legislature passed Substitute Senate Bill 6459, "[a]n act relating to the inspection of rental properties," to empower local governments to improve substandard housing throughout Washington. Laws of 2010, Ch. 148, §§ 1–4 (the "Rental Inspection Act"); *see also* Sub. S. B. R. (2010), available at

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http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/6459-S%20SBR%20HA%2010.pdf ("Senate Report"). The Rental Inspection Act reflects a careful balance between municipalities, landlords, and tenants. *See* Hearing on SSB 6459 Before the S. Comm. on Fin. Insts, Hous. & Ins., 61st. Leg. Reg. Sess. (Wash. 2010) (statement of Sen. Hobbs), available at https://www.tvw.org/watch/?eventID=2010011239; Hearing on SSB 6459 Before the H. Judiciary Comm., 61st. Leg. Reg. Sess. (2010), available at https://www.tvw.org/watch/?eventID=2010021141. Working together with representatives of these three groups, legislators sought a solution to improve the quality of rental housing while giving local governments flexibility to adopt their own ordinances, giving landlords predictability as to what might be required of them, and protecting the rights and privacy of tenants. Sub. H. B. R., at 4 (2010), available at http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/6459-S%20HBR%20APH%2010.pdf ("House Report").

Prior to the Rental Inspection Act, Washington's Residential Landlord–Tenant Act relied on a complaint-based system to address substandard housing. Senate Report at 2. Under that system, a tenant could request a government inspection of their unit for defective conditions, but only after first raising complaints with their landlord and giving the landlord an opportunity to remedy the condition. *Id.* These complaint-based systems, however, were inadequate to ensure the safety and habitability of rental properties because tenants were dissuaded from complaining to their landlords. *See City of Seattle v. McCready*, 123 Wn.2d 260, 263, 868 P.2d 134 (1994) (noting Seattle finding that "housing code enforcement on a complaint basis frequently delays City intervention until structures have become seriously deteriorated") (quoting Seattle City Ordinance 113531 (July 30, 1987)). For example, in *City of Pasco v. Shaw*, the Washington Supreme Court noted that when a tenant complained to the Petitioner of substandard conditions, including a lack of heat, leaking pipes, a collapsing wall, and rotting floors, "the apartment manager told [the tenant] that if she continued to complain, he would have her deported." 161

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Wn.2d 450, 454–55, 166 P.3d 1157 (2007). "This," the Court said, "provides a good example of why some tenants may hesitate to report housing code violations." *Id.* at 455 n. 1.

To address these problems, the Rental Inspection Act gives municipalities a tool to proactively investigate potentially substandard housing. The Act authorizes—but does not obligate—local governments to require landlords to "provide a certificate of inspection as a business license condition." Laws of 2010, Ch. 148, § 2, *codified at* RCW 59.18.125(1). These certificates, signed by public or private qualified building inspectors, confirm that a given unit is free from defects that:

> Endanger[] or impair[] the health or safety of a tenant, including (a) structural members that are of insufficient size or strength to carry imposed loads with safety, (b) exposure of the occupants to the weather, (c) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury, (d) not providing facilities adequate to supply heat and water and hot water as reasonably required by the tenant, (e) providing heating or ventilation systems that are not functional or are hazardous, (f) defective, hazardous, or missing electrical wiring or electrical service, (g) defective or hazardous exits that increase the risk of injury to occupants, and (h) conditions that increase the risk of fire.

Id. at § 1, *codified at* RCW 59.18.030(1).

While permitting municipalities to adopt inspection regimes, the Rental Inspection Act also limits that power in several important respects. For example, the Act provides that municipalities may only require a certificate of inspection for a given property once every three years. *Id.* at § 2(3), *codified at* RCW 59.18.125(3). Additionally, the Act provides that, for multi-unit properties, municipalities may only require certificates of inspection for a sample of units, unless those inspections (or tenant complaints) reveal conditions "that endanger or impair the health or safety of a tenant." *Id.* at § 2(6), *codified at* RCW 59.18.125(6).

B. The Rental Inspection Act Incorporates Washington Supreme Court Guidance on Constitutional Requirements for Rental Inspections.

The Rental Inspection Act also includes numerous safeguards for both landlords and tenants. The most significant of these, for purposes of this lawsuit, are the Act's detailed

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provisions governing the issuance of search warrants to conduct inspections. These provisions respond to and incorporate three prior Washington Supreme Court cases outlining the contours of a constitutionally permissible rental inspection scheme. *See* Senate Report at 2, 4 (referencing Supreme Court rulings).

1. McCready v. City of Seattle I

The Washington Supreme Court first ruled on the applicability of Article 1, Section 7 of the Washington Constitution to a rental inspection scheme in *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994) (*McCready I*). *McCready I* concerned a Seattle program in which the City used computer modeling to identify and inspect the apartments it deemed most likely to be substandard. *Id.* at 264. After the owners of four such units refused inspections, the City sought and obtained search warrants from the superior court. *Id.* at 266. The Supreme Court quashed the warrants under Article 1, Section 7 of the state Constitution, however, holding that nonconsensual inspections of rental units by the City disturbed the tenants in their private affairs and that there was no law permitting the superior court to issue warrants to search for housing violations in the absence of probable cause. *Id.* at 280. Although the Court concluded the warrants in question were not authorized by law, it indicated that properly issued warrants—supported by statute, common law, or court rule—would "provide the authority of law necessary to justify Seattle's intrusion into appellants' private affairs." *Id.* at 271.

2. McCready v. City of Seattle II

Several months later, in *McCready II*, the Supreme Court addressed additional issues with respect to the Seattle inspection program. *City of Seattle v. McCready*, 124 Wn.2d 300, 877 P.2d 686 (1994) (*McCready II*). First, the Court concluded that tenant consent was sufficient to authorize searches of rental units and common areas, even absent the landlord's consent. *Id.* at 306–07.[1] Second, following its holding in *McCready I*, the Court concluded that a municipal

[1] As the Court explained, some landlords had tried to stymie the inspection program by "urg[ing] their own and other tenants to refuse to consent to the inspections on the ground such inspections were

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court lacked the authority to issue administrative search warrants to identify housing code violations, even where the warrant was supported by probable cause. *Id.* at 309–10. The Court concluded there was simply no statute or court rule permitting courts to issue warrants to search for *civil* violations of the housing code, even with probable cause, and thus any such warrants failed to authorize a search under Article 1, Section 7 of the state Constitution. *Id*.[2]

3. City of Pasco v. Shaw

The Supreme Court addressed the constitutionality of rental inspection programs for the third time in *City of Pasco v. Shaw* in 2007. 161 Wn.2d 450, 166 P.3d 1157 (2007). That case concerned an ordinance by which the City of Pasco required landlords to provide certificates of inspection, signed by qualified private or public inspectors, ensuring that their rental properties did not include any of a number of dangerous or unsafe conditions. *Id.* at 455. Petitioners, including both landlords and tenants, challenged the ordinance, arguing that it violated Article 1, Section 7 and the Fourth Amendment to the U.S. Constitution "because it requires inspection of rental units even if the tenants do not consent," but the Supreme Court upheld the ordinance on two grounds. *Id.* at 456, 462. First, the Court held that because the ordinance permitted landlords to hire "*private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license," it did not require state action, and thus did not infringe on Article 1, Section 7 or the Fourth Amendment. *Id.* at 460–61 (emphasis in original). Second, the Court explained that the Pasco ordinance did not violate the tenants' reasonable expectation of privacy because the Residential Landlord–Tenant Act "already provides that a tenant cannot unreasonably withhold consent to the landlord to enter into the

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unconstitutional invasions of privacy and would significantly raise rents," resulting in a refusal rate of 75%. *McCready II*, 124 Wn.2d at 303. The mandatory inspection regime at issue in the *McCready* cases was meant to resolve the problem of landlords coercing their tenants to refuse inspections to ensure that their units were safe and habitable.

[2] In *Bosteder v. City of Renton*, 155 Wn. 2d 18, 117 P.3d 316, 323 (2005), the Court extended this analysis to the Fourth Amendment of the federal Constitution, holding an administrative search warrant void under that provision as well.

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rental unit in order to inspect the premises, and the act allows some third parties to accompany the landlord upon entrance." *Id.* at 461. Thus, the Court concluded, "if the scope of a landlord's entrance does not exceed the legitimate purposes contemplated by the [RLTA], no unreasonable search has occurred." *Id.*

4. The Rental Inspection Act Incorporates Supreme Court Guidance.

The Rental Inspection Act directly incorporates many of the holdings of these cases. Most obviously, the Act includes a detailed warrant requirement, providing municipalities and courts with the authority they were lacking in *McCready*. Laws of 2010, Ch. 148, § 3, *codified at* RCW 59.18.150(4).

Under Section 4(a), "[a] search warrant may be issued by a judge of a superior court or a court of limited jurisdiction . . . to a code enforcement official of the state or of any county, city, or other political subdivision for the purpose of allowing the inspection of any specified dwelling unit and premises to determine the presence of an unsafe building condition or a violation of any building regulation, statute, or ordinance." RCW 59.18.150(4)(a).

These warrants are subject to robust substantive and procedural provisions designed to protect the privacy interests of tenants as well as landlords. Applications for inspection warrants must be "supported by an affidavit or declaration made under oath or upon sworn testimony before the judge, establishing probable cause that a violation of a state or local law, regulation, or ordinance regarding rental housing exists and endangers the health or safety of the tenant or adjoining neighbors." *Id.* at 4(b). Absent justifiable excuse, code enforcement officials are permitted to seek warrants only after first seeking consent from both owner and tenant. *Id.* Before obtaining inspection warrants, enforcement officials must first provide notice of the warrant hearing to the landlord and, if the unit is occupied, the tenant. *Id.* at 4(d). Any landlord or tenant who appears in court is entitled to defend against (or argue in support of) the issuance of the warrant. *Id.* at 4(d). All searches conducted pursuant to a warrant must be made between 8 am and 7 pm, on Monday through Friday, unless the owner or tenant prefers an alternative time;

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owners, occupants, and their representatives are entitled to be present during the inspection; and, absent extenuating circumstances, the search must not be made by means of forcible entry. *Id.* at 4(g).

The Rental Inspection Act also responds to two issues raised by the Supreme Court's opinions with new provisions designed to protect tenants. First, the Act prohibits landlords from retaliating against tenants who give consent to code enforcement officials to inspect their units, including by raising rent or eviction. Laws of 2010, Ch. 148, § 3(4)(b), *codified at* RCW 59.18.150(4)(b), .240; *see also McCready II*, 124 Wn.2d at 303 (noting that some landlords threatened to raise rents if their tenants consented to inspections by the City of Seattle). Second, the Act closes a loophole in the City of Pasco ordinance which permitted landlords to bury failing inspection reports produced by private inspectors. *City of Pasco*, 161 Wn. 2d at 460 ("[I]f a private inspector finds code violations, the ordinance does not require the inspector to turn his or her findings over to the city."). To prevent unscrupulous landlords from gaming the inspection system to the detriment of their tenants, the Rental Inspection Act provides that "[i]f a rental property owner chooses to hire a qualified inspector other than a municipal housing code enforcement officer, and a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of inspection must be provided to the local municipality." Laws of 2010, Ch. 148, § 2(6)(e), *codified at* RCW 59.18.125(6)(e).

The Rental Inspection Act passed the Washington Senate with overwhelming support, passed the state House unanimously, and became effective on June 10, 2010. Chapter 148, Session Laws of 2010.

III. EVIDENCE RELIED UPON

This motion relies on the allegations in Plaintiffs' Complaint.

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IV. ARGUMENT

A. Standard of Review.

Under CR 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). Although the factual allegations in the complaint are presumed to be true, the Court need not accept the complaint's legal conclusions. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717–18, 189 P.3d 168 (2008). A motion to dismiss should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Yurtis*, 143 Wn. App. at 689 (quotation omitted). Dismissal is also appropriate if the complaint "includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (quotation omitted).

B. Plaintiffs' Challenge to the Constitutionality of RCW 59.18.125 Must Be Rejected Unless They Can Prove Beyond a Reasonable Doubt that the Statute is Unconstitutional under Any Set of Facts.

Plaintiffs challenge RCW 59.18.125 as unconstitutional on its face. "[A] statute is presumed to be constitutional unless its unconstitutionality appears beyond a reasonable doubt." *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). To succeed on their facial challenge, Plaintiffs bear a very heavy burden: "they must show that the [statute] is unconstitutional beyond a reasonable doubt and there are no factual circumstances under which the [statute] could be constitutional." *City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007) (citing *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) and *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000)). "A statute must be given a construction which preserves its constitutionality if at all possible." *Tellevik v. Real Prop. Known as 31641 W. Rutherford St., Located in City of Carnation, Wash., & All Appurtenances & Improvements Thereon*, 120 Wn.2d 68, 78, 838 P.2d 111, 116 (1992).

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The constitutionality of a statute is a question of law. *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

C. Plaintiffs Cannot Carry Their Heavy Burden of Proving that RCW 59.18.125 Necessarily Permits Warrantless Searches because RCW 59.18.125 Provides for Warrants.

Plaintiffs' Complaint alleges that "[t]hrough RCW 59.18.125, the State of Washington authorizes the City [of Seattle] to conduct warrantless rental inspections without the consent of tenants." Compl. ¶ 73. It does no such thing.

Instead, as Plaintiffs admit in their Complaint, "[i]f a tenant refuses entry, Washington law permits the City to seek a warrant to inspect the property pursuant to RCW 59.18.150." Compl. ¶ 38; *see also* ¶ 5 ("Washington state law permits municipalities to obtain warrants to conduct inspections without a tenant's consent when the government has probable cause."). This admission is fatal to Plaintiffs' case. Plaintiffs cannot maintain that Washington law necessarily "authorizes the City [of Seattle] to conduct warrantless rental inspections without the consent of tenants," Compl. ¶ 73, while simultaneously admitting—as they must—that Washington law in fact provides a mechanism for the City to obtain warrants. *See Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988) (holding dismissal is required where "plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.") (quoting 5 C. Wright & A. Miller, *Federal Practice* § 1357, at 604 (1969)).

Article 1, Section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." Because it prohibits only unauthorized searches, searches conducted pursuant to a valid warrant do not violate Article 1, Section 7. *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). While the Washington Supreme Court has previously quashed rental inspection warrants as invalid where no "statute or court rule . . . authorize[d] a superior court to issue the[] search warrants," *McCready I*, 123 Wn.2d at 280, the warrant provision of Section 150 now fixes that defect. That

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provision now explicitly authorizes municipalities to seek—and courts to issue—search warrants where the municipality can demonstrate probable cause that a property is unsafe for residents or neighbors. RCW 59.18.150(4)(b). Thus, unlike the warrants at issue in *McCready I*, these "warrants are . . . []valid, and any intrusion into [plaintiffs'] apartment buildings or disturbances of their private affairs on the basis of the warrants is with[] authority of law." *McCready I*, 123 Wn.2d at 280.[3]

Despite acknowledging the warrant provisions of the RLTA, Plaintiffs offer two theories to try to salvage their claim. Both fail.

First, Plaintiffs allege that "the City has a policy and practice of not seeking warrants." Compl. ¶ 38. Even were this true, it would not render the Washington statute facially unconstitutional. The statute plainly provides Seattle the authority to seek warrants—if Seattle opts not to follow the statute, that is not the statute's fault.[4]

Second, Plaintiffs' rest their claim in significant part on their view that "Washington's Residential Landlord–Tenant Act . . . permit[s] the City to conduct warrantless inspections using private inspectors who must then report the results of any failed inspection to the government." Compl. ¶ 39. By so alleging, Plaintiffs try to preemptively distinguish their case from *City of Pasco*, in which our Supreme Court held that Pasco's inspection ordinance did not require state action because it permitted landlords to rely on private inspectors to pursue their private goal of obtaining business licenses. *City of Pasco*, 161 Wn.2d at 460. As discussed more fully below, Plaintiffs' effort to distinguish *City of Pasco* is unsuccessful because the Rental Inspection Act does not, on its face, require state action. *See infra* at § IV(E); *see also infra* at § IV(F)

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[3] As the *McCleary I* Court noted, statutory authorizations to issue search warrants are quite common and permissible under Article 1, Section 7. *McCready I*, 123 Wn.2d at 272 n. 3, 278–79 (listing examples).

[4] To be clear, while the State assumes the truth of Plaintiffs' allegations for purposes of this Motion, the State takes no position on the factual question whether the City of Seattle does or does not have "a policy and practice of not seeking warrants," nor whether any of the City's policies or practices do or do not comply with the statute. Compl. ¶ 38.

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(explaining that, under *City of Pasco*, a tenant does not have a reasonable expectation of privacy as against a landlord inspecting a unit). But even assuming Plaintiffs were correct that, under Section 125, private inspectors are converted to state actors whom a tenant has a right to exclude from their unit, the warrant requirement makes this immaterial.

Under Sections 125 and 150, where a tenant refuses entry to their unit, any constitutional issues can be avoided by seeking a warrant. Regardless of whether a landlord initially engages a private inspector or a municipal code enforcement official, once the tenant refuses consent to search, Section 150(4) authorizes a municipality to seek a search warrant to conduct an inspection. The warrant provision serves as a backstop to ensure that rental inspection searches *never* need be conducted "without authority of law." Const. art. I, § 7. It thus undermines any claim by Plaintiffs that RCW 59.18.125 facially violates Article 1, Section 7 of the Washington Constitution.

D. Plaintiffs Cannot Prove Beyond a Reasonable Doubt that RCW 59.18.125 is Unconstitutional under Every Conceivable Set of Facts.

Plaintiffs' facial challenge also fails because it is entirely possible for municipalities to adopt and implement rental inspection programs that comply with *both* Section 125 and Article 1, Section 7. Most obviously, because the RLTA expressly authorizes municipalities to obtain warrants for rental inspections, there is no need for municipalities to conduct any searches which violate Article 1, Section 7.

Moreover, Section 125 does not in any sense *require* municipalities to conduct searches of rental units, let alone warrantless searches. Instead, Section 125 sets limits for what municipalities may require as a part of a rental inspection program, while also granting them the authority to seek warrants to enforce any programs they adopt. As such, any constitutional issues with rental inspections programs under Section 125 would necessarily arise from the manner in which cities adopt and execute programs under Section 125, and not from the statute itself.

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For those cities who do elect to adopt rental inspection programs, nothing in Section 125 requires those cities to violate the Washington Constitution. Indeed, Seattle's Rental Registration and Inspection Ordinance, adopted pursuant to Section 125, provides that municipal employees may enter a dwelling unit *only* "with the consent of the owner or occupant of a rental housing unit, or according to a lawfully-issued inspection warrant." Seattle Municipal Code Chapter 22.214.075(B). Thus, the Seattle Ordinance, on its face, expressly does not permit the warrantless searches Plaintiffs complain of in this suit.

Several features of Section 125 make it even more apparent just how far short Plaintiffs come of proving "there are no factual circumstances under which the [statute] could be constitutional." *City of Pasco*, 161 Wn.2d at 458. For example, because Section 125 generally only permits municipalities to require inspections of 20% of units, non-consenting tenants can generally be accommodated, except possibly in rare circumstance. RCW 59.18.125(6). Additionally, because "[a] local municipality may only require a certificate of inspection on a rental property once every three years," RCW 59.18.125(3), "at least some landlords will be able to conduct inspections between tenancies, thereby eliminating any tenant involvement at all." *City of Pasco*, 161 Wn.2d at 462 n. 3. In short, even if Plaintiffs were able to hypothesize a scenario in which RCW 59.18.125 posed a constitutional issue, there are many, many reasonably imaginable factual scenarios under which it does not. Plaintiffs' facial challenge to the statute should therefore be dismissed.

E. Plaintiffs' Facial Challenge Also Fails because Sections 125 Does Not Require State Action.

Rental inspections do not implicate Article 1, Section 7 "unless the person conducting the inspection is a state actor." *City of Pasco*, 161 Wn.2d at 459. "[T]he party asserting the unconstitutionality of an action . . . bears the burden of establishing that state action is involved." *Id*. at 460. This is a factual analysis that "depends on the circumstances of a given case." *Id.* But

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to succeed on their facial challenge, Plaintiffs would need to show that under every potential factual scenario, a search under Section 125 involves state action. They cannot meet this burden.

In *City of Pasco v. Shaw*, the Washington Supreme Court examined a rental inspection scheme very similar to that contemplated by Section 125 and concluded that it did not involve state action. *Id.* at 460–61. As the Court explained, determining whether an inspection constitutes state action requires an examination of "[1] whether the government knew of and acquiesced in the intrusive conduct *and* [2] whether the party performing the search intended to assist law enforcement efforts *or to further his [or her] own ends.*" *Id.* at 460 (quoting *State v. Swenson,* 104 Wn.App. 744, 754, 9 P.3d 933 (2000)) (alterations and emphasis in *City of Pasco*). Applying this two-pronged test, the Court held that the Pasco ordinance did not require state action because "a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license." *Id.* at 460 (emphasis in original). As the Court explained, there was no state action because "[l]andlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance." *Id.* at 461 (emphasis in original).

The Court's holding in *City of Pasco* applies with equal force to the Washington statute. Under Section 125, "[l]ocal municipalities may require that landlords provide a certificate of inspection as a business license condition." RCW 59.18.125(a). Where municipalities elect to adopt this requirement, landlords may elect to obtain certificates of inspection from private inspectors. RCW 59.18.030(1), (22). Any inspectors, whether public or private, "may only investigate a rental property as needed to provide a certificate of inspection." RCW 59.18.125(2). Thus, as with the Pasco ordinance, Washington's statute provides a mechanism for landlords to further their private interests of participating in the rental business by hiring private inspectors. Moreover, any private inspections are strictly limited in scope so that they no broader than necessary to further the landlord's business interests. Thus, *City of Pasco* controls: Plaintiffs

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cannot meet "their burden of showing that landlords and their privately engaged inspectors are state actors." *City of Pasco*, 161 Wn.2d at 461.

Plaintiffs will no doubt respond that the *City of Pasco* Court found it "[s]ignificant[]" that, under the Pasco ordinance, "if a private inspector finds code violations, the ordinance does not require the inspector to turn his or her findings over to the city." *Id.* at 460. Picking up on this, Plaintiffs try to preemptively distinguish *City of Pasco* in their Complaint by pointing to Section 125(6)(e) which provides that "[i]f a rental property owner chooses to hire a qualified inspector other than a municipal housing code enforcement officer, and a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of inspection must be provided to the local municipality." *See* Compl. ¶ 39. But contrary to Plaintiffs' suggestion, the legislature's decision to close the loophole in the Pasco ordinance—which permitted unscrupulous landlords to game the inspection system by cherry-picking inspection reports and shopping for favorable inspectors—does not turn private inspectors into state actors.

Nothing in Section 125(6)(e) changes the fact that landlords hire private rental inspectors "to further the *private* objective of obtaining a certification needed to maintain a business license," *City of Pasco*, 161Wn.2d at 460, nor that private inspectors are "acting in a private capacity as agents of the" landlords. *United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir. 1984) (holding that bail bondsmen, who captured a fugitive subject to a bench warrant and returned him to law enforcement, were not state actors because the bondsmen were acting pursuant to their contract with the bonding company, and not by any delegation of power from the state); *see also State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440 (1992) (holding that a private film lab manager who provided suspicious photos to police was not a state actor because "the motivation of the manager was to further her own purpose of avoiding liability and not to act as an agent for police").

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Importantly, Section 125(6)(e) does not impose any obligations or authority on private inspectors above and beyond those discussed in *City of Pasco*. Contrary to Plaintiffs' claims, Section 125(6)(e) does not require private inspectors to provide information to municipalities. *Contra* Compl. ¶ 39 ("[P]rivate inspectors . . . must . . . report the results of any failed inspection to the government."). Instead, it requires landlords themselves to provide the inspection reports as a part of their license applications. RCW 59.18.125(6)(e) ("If a rental property owner chooses to hire a qualified inspector other than a municipal housing code enforcement officer, and a selected unit of the rental property fails the initial inspection, both the results of the initial inspection and any certificate of inspection must be provided to the local municipality.").

Contrary to Plaintiffs' suggestion, a private person does not become an "agent or instrumentality of the State," *City of Pasco*. 161 Wn.2d at 460, merely because they create a record which someone else is required to submit to the State. Indeed, Plaintiffs' argument would entail a sweeping expansion of the state action doctrine. For example, private pediatricians give immunizations and create records thereof, which must then be provided to schools by parents who wish to enroll their children. *See* RCW 28A.210.080. Under Plaintiffs' reasoning, these private pediatricians would all become agents of the State the moment they provided immunization records to parents of schoolchildren. As would, for example, DL Roope Administrations Inc., who administers the exam required for Washingtonians to become licensed cosmetologists. *See* WAC 308-20-120; Washington State Department of Licensing, "How to get your license: Cosmetologists," *available at* https://www.dol.wa.gov/business/cosmetology/get_license.html (last accessed Feb. 25, 2019). Plaintiffs' proposed expansion of the state action doctrine to sweep in these and countless other persons is not supported by case law or common sense.[5] Simply put, Section 125(6)(e) does not turn private inspectors into

[5] This is not merely a theoretical problem. To give one example, if pediatricians were state actors, then they might be required to Mirandize parents before asking them about suspected child abuse. *See State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

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government agents—all it does is dictate what business license applicants must include with their applications.

To be fair, this case *is* distinguishable from *City of Pasco* in one key respect: here the challenged statute includes a warrant provision. If the Pasco ordinance had been backed by a statutory warrant provision, that case would have been open-and-shut. There would have been no need for the Court to wade into the state action doctrine because there would have been no grounds for plaintiffs to claim the ordinance authorized warrantless searches without consent. Such is the case here. Section 150's warrant provision make it unnecessary to consider the state action doctrine. But, as *City of Pasco* demonstrates, even if there were no warrant provision in the Rental Inspection Act, the statute would still be constitutionally permissible because it does not require state action. Plaintiffs' claim thus falls on this basis too.

F. Plaintiffs' Facial Challenge Also Fails because Tenants' Reasonable Expectations of Privacy do not Extend to Excluding Inspectors Invited by their Landlords.

Finally, to the extent Plaintiffs' claim is premised on the argument that Section 125 permits landlords to conduct inspections without their tenants' consent, their facial challenge fails because, under Washington's Residential Landlord–Tenant Act, tenants' privacy interests in their rental units does not extend to exclude building inspectors invited by their landlords.

"As a prerequisite to claiming an unconstitutional search, a [litigant] must demonstrate that he or she had a reasonable expectation of privacy in the item searched." *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). As the Court held in *City of Pasco*, tenants do not have a reasonable expectation of privacy as against inspectors invited by their landlords because the RLTA "already provides that a tenant cannot unreasonably withhold consent to the landlord to enter into the rental unit in order to inspect the premises, and the act allows some third parties to accompany the landlord upon entrance." *City of Pasco*, 161 Wn.2d at 461; *see also* RCW 59.18.150(1) ("The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations,

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or improvements, supply necessary or agreed services, or exhibit the dwelling unit to . . . workers[] or contractors.").[6] Consequently, a rental inspection scheme which permits landlords to invite hired inspectors to inspect their units "does not exceed what is already allowed by the RLTA." *Id.*; *see also id.* at 465 (Chambers, J., concurring) ("[T]he ordinance utilizes the landlord's authority under the State's Residential Landlord–Tenant Act . . . to enter the tenant's home.") (citations omitted); *City of Pasco v. Shaw*, 127 Wn. App. 417, 424, 110 P.3d 1200 (2005) ("[W]hen proper notice is given for entry by a landlord, a tenant has no reasonable expectation of privacy other than that entry for inspection will occur.").[7]

In so holding, the Court relied on its prior decision in *Kalmas v. Wagner*, in which it concluded that a tenant did not have a right to prohibit prospective tenants from entering the unit at the landlord's invitation. 133 Wn.2d 210, 219–20, 943 P.2d 1369 (1997). As the Court there explained, the RLTA "gives a landlord a limited right to invade the privacy of a tenant in his or her residence for limited purposes," and as long as "the scope of the entrance does not exceed these purposes, no unreasonable search occurs." *Id.*[8]

Kalmas and *City of Pasco* undermine Plaintiffs' claim here. Section 125 is entirely consistent with landlords' pre-existing right of entrance under Section 150. As with the Pasco ordinance, Section 125 permits municipalities to rely on landlords' traditional right to access their tenants' units to accomplish rental inspections. RCW 59.18.125(1); *see also id.* at (7)(a)

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[6] This provision has been part of the RLTA since it was first passed in 1973. Laws of 1973, Ch. 207, § 15.

[7] As both the majority and concurrence noted in *City of Pasco*, both the RLTA and the Pasco ordinance included measures to protect the tenants' reasonable expectations of privacy by, for example, requiring landlords to give at least two days' notice to a tenant before an inspection, requiring landlords to schedule inspections at reasonable times, limiting the scope of the inspection to include only what is necessary to survey a unit's habitability, and not permitting landlords or inspectors to search for evidence of crimes. *City of Pasco*, 161 Wn.2d at 461, 465. These tenant protections are also included in Sections 125 and 150 of the RLTA.

[8] Although *Kalmas* concerned a challenge under the Fourth Amendment to the federal constitution, rather than our state constitution, "[f]or purposes of determining whether a reasonable expectation of privacy exists under the state constitution, the inquiry is essentially the same as the Fourth Amendment analysis." *State v. Walter*, 66 Wn.App. 862, 867, 833 P.2d 440 (1992).

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("The landlord shall provide written notification of *his or her intent to enter* an individual unit for the purposes of providing a local municipality with a certificate of inspection[.]") (emphasis added). Aside from the warrant provision—which patently does not raise an issue under Article 1, Section 7—nothing in the Rental Inspection Act expands the permissible scope of entry into renters' units. Moreover, as amended by the Rental Inspection Act, the RLTA preserves the features that, the *City of Pasco* Court noted, protect tenants' reasonable privacy interests. Among other things, it: requires landlords to give two days' notice of their intent to inspect a unit and the tenant's right to request an inspector's identification, *id.* at .125(7), .150(6); limits inspections such that inspectors "may only investigate a rental property as needed to provide a certificate of inspection," *id.* at .125(2); limits inspections to "reasonable times," *id.* at .150(6); and maintains that "[t]he landlord has no other right of access except by court order, arbitrator or by consent of the tenant," *id.* at .150(7). Moreover, to further protect the privacy rights of tenants, Section 125 sets limits on municipalities' power to require inspections. Most notably, it prohibits municipalities from requiring an inspection more than once every three years and incorporates sampling requirements to minimize the number of units that actually need to be inspected. *Id.* at .125(3), (6).

In short, by permitting limited inspections pursuant to a landlords' traditional right of entry, Section 125 does not infringe on tenants' reasonable expectations of privacy in their rental units. Plaintiffs' facial challenge to the statute thus fails for this reason as well.

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V. CONCLUSION

For the reasons stated herein, Defendant State of Washington respectfully requests that this Court dismiss Plaintiffs' claim against it.

I certify that this memorandum contains 6,645 words, in compliance with the Local Civil Rules.

DATED this 1st day of March, 2019.

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

KEENA BEAN, et al., Plaintiffs, v. CITY OF SEATTLE, et ano, Defendants.	NO. 18-2-56192-2 SEA CERTIFICATE OF E-SERVICE

I, Andrew Hughes, certify that I initiated electronic service of the following document(s) on the parties listed below who have consented to accept electronic service via the King County eFiling Application. Service was initiated on March 1, 2019.

Document(s):
1. MOTION TO DISMISS

Parties:
1. Sarah Tilstra, Attorney for Respondent/Defendant
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Executed this 1st day of March, 2019.

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