No. 99771-3

SUPREME COURT
OF THE STATE OF WASHINGTON

THE WASHINGTON FOOD INDUSTRY ASSOCIATION; et al.

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

CITY OF SEATTLE'S ANSWER TO AMICUS BRIEFS

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I. INTRODUCTION

For the sake of brevity, this omnibus Answer addresses the arguments espoused by the Institute for Justice, the Chamber of Commerce of the United States ("Chamber"), and the Northwest Grocery Association ("NWGA") (collectively "Respondents' amici"). These amici take aim at the controlling standard for rational basis review, the nature of that standard, the scope and effect of the ordinance at issue, and the wisdom of the restrictions it imposes. Their arguments fail.

Respondents' amici miscomprehend the standard for rational basis review, which is highly deferential but not altogether meaningless. They overstate the reach of the challenged restrictions. They decry what they deem to be a nontraditional regulatory scheme while touting the novel features of the gig economy. They point a rosy but inaccurate picture of working conditions in the gig economy. They question the wisdom of legislative enactments, inviting the Court to substitute

its views for that of the City Council. Finally, they miscomprehend the scope of Chapter 82.84 RCW.

The City respectfully requests that the Court reject the arguments of Respondents' amici and reverse the decision of the Superior Court except as to Chapter 82.84 RCW.

II. ARGUMENT

A. *Beach Communications* remains the controlling standard for rational basis review.

The Institute for Justice dismisses the rational basis standard announced in *FCC v. Beach Communications*[1] as mere "rhetoric." Relying on a law review article penned by its Senior Vice President and Litigation Director,[2] it invites the Court to disregard that standard in favor of a more searching review.

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[1] 508 U.S. 307, 113 S. Ct. 2096, 124 L.Ed.2d 211 (1993). This standard mirrors the prevailing standard for police power claims in Washington State. *See City of Seattle v. Webster*, 115 Wn.2d 635, 645, 802 P.2d 1333 (1990) ("[I]f a state of facts justifying the ordinance can reasonably be conceived to exist, such facts must be presumed to exist and the ordinance passed in conformity therewith.").

[2] Institute for Justice Br. at 11, n. 25 (citing Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373, 378-92 (2016)).

But *Beach Communications* is binding on this Court.[3] And contrary to the Institute for Justice's assertions as to "how courts apply the rational basis test in practice," both federal courts[4] and this Court faithfully apply the "any conceivable basis" standard the Court articulated in *Beach Communications* and its progeny.[5] For example, in *American Legion Post 149 v. Washington State*

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[3] *State v. Vance*, 168 Wn.2d 754, 762 n. 7, 230 P.3d 1055 (2010). In contrast, of course, decisions of inferior federal courts are not binding. *State v. Barefield*, 110 Wn.2d 728, 732 n. 2, 756 P.2d 731 (1988).

[4] *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981) (emphasis in original) ("[T]he Equal Protection Clause is satisfied" where the legislature "*could rationally have decided*" that its chosen means would satisfy the desired ends."); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004) (dismissing plaintiff's arguments that stated bases for legislation were "not the real reasons motivating the City Council's decision" because "'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature'") (quoting *Beach Commc'ns*, 508 U.S. at 315).

[5] The deferential standard announced in *Beach Communications* not only remains the prevailing standard for rational basis review but also rests on enduring notions of separation of powers. *See, e.g., Lloyd v. School Board of Palm Beach County*, -- F. Supp.3d --, 2021 WL 5353879 at *13 (S.D. Fla. Oct. 29, 2021) (upholding mask mandate under rational basis review and recognizing that "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we think a political branch has acted.") (quoting *Beach Commc'ns*, 508 U.S. at 314).

Dep't of Health, a fraternal organization challenged a statute that exempted hotel rooms from a ban on smoking in places of employment, alleging that the classification was irrational because it was based upon economic concerns.[6] This Court rejected plaintiffs' equal protection claim, reasoning in part that,

> [T]here is a rational basis for treating hotels differently than private facilities. For example, the legislature *could have determined* hotel employees have limited access to the rooms while guests are present, whereas employees at facilities such as the Post may be required to spend their entire work shift in secondhand smoke. This *conceivable* argument serves as a rational basis for treating the two facilities differently and it is rationally related to the purpose of the Act, which is to protect employees from secondhand smoke in their workplaces.[7]

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[6] 164 Wn.2d 570, 610, 192 P.3d 306 (2008).

[7] *Id*. at 611 (emphasis supplied); *see also Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 545-46, 359 P.3d 771 (2015) (recognizing that economic legislation that does not concern fundamental rights is subject to the "highly deferential standard" of rational basis review, explaining that "a statutory classification will be upheld if *any conceivable state of facts* reasonably justifies the classification," and denying the plaintiff's equal protection challenge based on what legislature "*conceivably* perceived" and "*conceivably* decided") (cleaned up) (emphasis supplied); *Seeley v. State*, 132 Wn.2d 776, 801, 940 P.2d 604 (1997) ("It is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislative measure was a rational way to correct it.") (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563, *reh'g denied*, 349 U.S. 925, 75 S.Ct. 657, 99 L.Ed. 1256 (1955)) (emphasis supplied); *State v. Shawn P.*, 122

Contrary to the Institute for Justice's assertions, nothing in the Ninth Circuit's decision in *Lazy Y Ranch, Ltd v. Behrens*[8] casts doubt on the settled standard for rational basis review. In that case, the court expressly held that *Beach Communications* did not apply to the dispute before it, which concerned not whether a classification survived rational basis review, but "the nature of the classification—i.e., what line Defendants drew."[9] The court explained that *Beach Communications* did "not require [it] to accept Defendants' characterization of *what classification they made*."[10] Here, in contrast, there is "no dispute over what line" the City Council drew: all parties agree

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Wn.2d 553, 563-64, 859 P.2d 1220 (1993) ("Under the rational basis test, a statutory classification will be upheld if *any conceivable state of facts* reasonably justifies the classification. Such a rational basis for a legislative decision *need not have actually motivated* the Legislature's decision.") (cleaned up) (emphasis supplied); *Forbes v. City of Seattle*, 113 Wn.2d 929, 946, 785 P.2d 431 (1990).

[8] 546 F.3d 580 (9th Cir. 2008).

[9] *Id*. at 590; *see* City's Reply Br. at 19-20.

[10] *Id*. (emphasis in original).

that the Ordinance regulates FDNCs.[11] Plaintiffs' challenge thus falls squarely within the purview of *Beach Communications*.

Commentators have observed that in a small subset of rational basis cases, the Supreme Court appears to have applied a more searching standard than the standard it applied in *Beach Communications* and its progeny.[12] However, the common threads scholars have identified among these outliers include immutable traits,[13] burdens on significant rights,[14] animus

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[11] *Id*. at 589. *See* Respondents' Br. at 30.

[12] *See, e.g.*, Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071-72 (2015) (observing that in the seventeen times the Court has invalidated a law as inconsistent with the Equal Protection Clause under rational-basis scrutiny—out of more than one-hundred challenges in which it applied such scrutiny between the 1971 and 2014 Terms—the Court "appears to be employing a higher standard that scholars have sometimes referred to as 'rational basis with bite'").

[13] *Id*. at 2072.

[14] *Id*.

against an unpopular group,[15] and political powerlessness.[16] While these factors may help explain many of the decisions the Institute for Justice highlights in its brief,[17] they are markedly absent in this case, which involves only the economic regulation of businesses.

B. The Institute for Justice mischaracterizes the City's position.

The Institute for Justice maintains that the "City's test would effectively eliminate judicial review in rational basis cases."[18] Not so. While highly deferential, the settled standard for rational basis review is a meaningful bulwark against arbitrary legislation.

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[15] *Id*. at 2073 n. 12; *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause").

[16] Holoszyc-Pimentel, *supra* note 12, at 2081-82.

[17] *See generally* Institute for Justice Br. at 22 n. 41; Holoszyc-Pimental, *supra* note 12.

[18] Institute for Justice Br. at 10.

The Ninth Circuit's decision in *Fowler Packing Company, Inc. v. Lanier*[19] is instructive. *Fowler* involved an equal protection challenge to legislation that precluded three specific employers from asserting an affirmative defense to wage theft claims.[20] Recognizing that rational basis review required it to determine whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification[,]"[21] the Ninth Circuit could "*conceive of no other reason* why the California legislature would choose to carve out these three employers other than to respond to the demands of a political constituent."[22] Thus, it ruled that plaintiffs' Complaint plausibly stated a claim that the challenged provisions violated the Equal Protection Clause.[23]

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[19] 844 F.3d 809 (9th Cir. 2016).

[20] *Id*. at 812-13.

[21] *Id*. at 815 (quoting *Beach Commc'ns*, 508 U.S. at 313)

[22] *Id*. at 815 (emphasis added).

[23] *Id*. at 816.

Similarly, in *Catherine H. Barber Memorial Shelter*, a federal district court struck down a zoning ordinance that subjected a homeless shelter to a more rigorous standard than similarly situated uses after concluding that none of the potential justifications for this distinction held water.[24] For example, the court held that public concern was not a rational basis for singling out the homeless shelter because "'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases'" to treat one group differently than another similarly situated one."[25]

In stark contrast, there are obvious rational bases for distinguishing between Food Delivery Network Companies ("FDNCs") and other entities.[26] For example, City Council could have rationally concluded that FDNCs serve a uniquely critical

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[24] 2021 WL 6065159 (W.D.N.C. December 20, 2021) at *1.

[25] *Id*. at *14 (quoting *City of Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)).

[26] *See* City's Opening Br. at 31-32 (describing plausible rational bases for the distinctions between Food Delivery Network Companies and non-covered entities).

role in the community, by enabling people to obtain sustenance from the safety of their homes. Likewise, this Court need not "abandon review of government actions"[27] to conclude that requiring hazard pay for hazardous work is a lawful exercise of the police power.[28]

The Institute for Justice also contends that in the City's view, facts are "entirely irrelevant for constitutional purposes."[29] The City has never maintained as much; it has simply recognized the well-established principle that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[30] The Institute for Justice further overstates the City's position in maintaining that that the City "would never permit discovery to

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[27] Institute for Justice Br. at 10.

[28] *See* City's Opening Br. at 25 (describing myriad of conceivable rational bases for hazard pay requirement and associated "consumer protection" provisions).

[29] Institute for Justice Br. at 19.

[30] City's Opening Br. at 34 (quoting *Beach Commcn's*, 508 U.S. at 315).

proceed."[31] The Court need not make sweeping categorical pronouncements to conclude that in this particular case, proceeding to discovery is unnecessary. No discovery is necessary for a court to reach the commonsense conclusion that there are numerous conceivable bases for requiring hazard pay for hazardous work, such as compensating workers for risking their own safety to protect the safety of others. Nor must a court look beyond the Complaint to conclude that FDNC drivers, by their very definition, play a unique role in the community and can be reasonably considered worthy of special protection. Moreover, further factual development would be futile because the facts Respondents have alleged in their Complaint as to pretext and necessity would not negate these rational bases: a court may not engage in courtroom factfinding to second-guess legislative determinations of necessity, and the actual basis for

[31] Institute for Justice Br. at 19.

an enactment has no bearing on the existence of conceivable rational bases.[32]

C. The Chamber miscomprehends the scope of the Ordinance.

The Chamber's brief rests on false premises: it greatly overstates the reach of the Ordinance. It maintains that the Ordinance "bars companies like Instacart from passing those mandatory cost increases on to consumers; prohibits those companies from changing their service areas; and mandates that the companies provide access to their platforms for any delivery worker, even if the level of demand changes, such that the number of consumers seeking matches with delivery workers goes down."[33] In reality, the restrictions are far more limited: FDNCs may not alter compensation schemes because of the Ordinance, restrict a worker's access to work because of the Ordinance, raise the price of groceries—but not other foods—

[32] *See* City's Opening Br. at 26-29.

[33] Chamber of Commerce Br. at 5.

because of the Ordinance, or alter service areas because of the Ordinance.[34] Importantly, FDNCs are free to make each of these changes for reasons unrelated to the Ordinance, such as a collapse in demand for their services.

Contrary to the Chamber's assertions,[35] these modest restrictions are unremarkable. In fact, in placing narrow restrictions upon Respondents' business operations, the Ordinance is exactly "like ordinary regulations of wages, hours, and working conditions."[36]

Given the Chamber's misunderstanding of the scope of the Ordinance, it is unsurprising that the Chamber labors under another misconception: It asserts that the Ordinance cannot be rational because "if the Ordinance is permitted to go into effect, there is a real risk that companies like Instacart will be forced to exit the local market entirely, depriving workers and consumers

[34] City's Reply Br. at 10.

[35] Chamber of Commerce Br. at 5.

[36] City's Reply Br. at 24.

of the benefits the platforms provide."[37] But the Ordinance has been in place throughout this litigation, for more than 18 months, and yet Instacart and other food delivery services have continued to operate—and flourish[38]—in Seattle.

D. The Policy Arguments of Respondents' Amici Are Both Incorrect and Irrelevant.

The central premise of the Chamber's amicus brief is that the Ordinance cannot be a rational exercise of legislative authority because the gig economy's fundamental alteration of many industries and employment relationships makes traditional wage-and-hour regulation "unnecessary and counterproductive."[39] Yet while it insists that imposing ordinary

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[37] Chamber Br. at 20.

[38] Gene Balk, Ordering in: Food delivery surged in the Seattle area as COVID-19 pandemic took hold, Seattle Times, November 29, 2021, available at https://www.seattletimes.com/seattle-news/data/ordering-in-food-delivery-surged-in-the-seattle-area-as-covid-19-pandemic-took-hold/ (reporting that the number of Seattle-area households that had used a restaurant-delivery service in the past 30 days went from 226,000 to 429,000, that the number of households using grocery-delivery services had more than doubled, and that the Seattle-area had some of the largest increases in the use of food delivery services in the nation).

[39] Chamber of Commerce Br. at 13–14.

worker protections "in [the gig economy] context makes no sense" because of the gig economy's transformational nature, the Chamber maintains that the Ordinance impermissibly "departs from standard exercises of the police power to regulate economic activity."[40] In effect, the Chamber argues that the gig economy operates in ways that render traditional wage-and-hour regulation inapplicable or inappropriate, but that the City nonetheless lacks the authority to devise nontraditional regulatory schemes tailored to this novel industry. This argument fails to appreciate that legislative bodies—not courts—are in the best position to determine the extent to which regulation of these new types of workplace relationships should depart from or align with traditional wage-and-hour measures.[41]

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[40] *See id.* at 2–3, 17.

[41] *See CLEAN v. State*, 130 Wn.2d 782, 813, 928 P.2d 1054, 1069 (1996), *as amended* (Jan. 13, 1997) ("Of the three branches of government, the Legislature is best able to consider what measures promote the general welfare . . . .").

In fact, ultimately, the Chamber contends that it would be irrational for a legislature to make *any* attempt to regulate the gig economy because workers in this sector do not "need[] protection from employers with superior bargaining power."[42] As the amicus brief of the National Employment Law Project (NELP) et al. demonstrates, however, workers in the gig economy very much require employment protections addressing their particular circumstances. For example, gig workers incur significant out-of-pocket expenses—such as gas, insurance, vehicle maintenance, and insulated delivery bags—that the law does not permit employers to impose on workers classified as employees, and that can push their take home pay below even the federal minimum wage.[43] App-based delivery workers also face a high risk of severe physical injury, particularly because many food

[42] Chamber of Commerce Br. at 3.

[43] Brief of Amici Curiae National Employment Law Project et al. ("NELP Br.") at 10–12. The Chamber attempts to argue that these expenses are a *benefit* to gig workers' ability to "manage their own capital investments" and decide exactly how much to spend on insurance and gasoline. Chamber Br. at 12–13. But it is certainly not irrational for the City Council to conclude that paying additional costs does not benefit workers.

delivery workers—unlike rideshare drivers—use bikes or electric bikes, and yet lack the security that mandated workers' compensation coverage would offer if they were classified as employees.[44]

The Chamber's arguments as to why it is unnecessary to regulate gig worker compensation are unpersuasive. The Chamber maintains, for example, that Instacart and other gig-economy workers "can be on the platform whenever they choose and for as long as they choose," which "gives [these workers] an enormous amount of control over how much money they bring home in any given week" and thus obviates the need for "traditional wage and working-condition regulation."[45] But this argument lacks any legal or factual support. Nor is it ultimately relevant to the rationality of Seattle's regulation. Whether a worker can choose to work more hours and thus make more money has no bearing on whether her compensation is adequate.

[44] NELP Br. at 11.

[45] Chamber of Commerce Br. at 11.

Traditional minimum wage laws, for instance, apply with equal force to part-time employees, who, under the Chamber's logic, could also control how much money they bring home by taking on other jobs.[46] Nearly all of the benefits of the gig economy emphasized in the Chamber's brief hinge on the purported flexibility of gig work, which the City Council could rationally have determined to be illusory or overstated—or not at all relevant to the question of whether to require additional compensation for the work these workers perform and the risks they undertake.[47]

Further, despite the Chamber's contention that the benefits of gig work "loom especially large" in the pandemic, the Chamber's brief does not address the significant extra risks borne by app-based delivery workers in the pandemic.[48] Food delivery

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[46] *See* Minimum Wage Ordinance, Seattle, Wash. Municipal Code § 14.19.010.

[47] *See* Chamber of Commerce Br. at 15–19.

[48] *Id*. at 18.

drivers are particularly needed during surges of COVID-19 to make it possible for people to isolate or quarantine at home without exposing others.[49] But app-based gig workers have contracted COVID-19 at disproportionately high rates, potentially incurring significant health care expenses or losing work (without the protections offered by workers' compensation or paid sick leave) as a result of illness and isolation.[50] These risks are not mitigated by a worker's flexibility to choose hours worked, add delivery driving to another job, or take on all the costs of "vehicle maintenance, insurance, and gasoline" for herself.[51] Hazard pay for food delivery drivers incurring high

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[49] *See* CP 97 (Ordinance, Section 1.O) (finding that FDNC services support "community efforts to engage in social distancing and mitigate the spread of COVID-19").

[50] *See id.* (recognizing that FDNC drivers face "higher risk of infection"); *see also* NELP Br. at 21–22.

[51] Chamber Br. at 13. The Chamber also lists the CARES Act's inclusion of gig workers in the Paycheck Protection Program as a benefit of the gig economy that "loom[s] especially large." *Id.* at 18–19. The fact that Congress took one approach to protecting gig workers during the pandemic does not make the City Council's different approach irrational, and requiring hazard pay for delivery drivers is in no way incompatible with PPP benefits.

risks to provide essential services is rationally related to the City Council's interests in protecting workers and promoting public safety.

The policy arguments offered by Respondents' other amici are similarly unpersuasive. The NWGA acknowledges, as all parties do, that the pandemic poses significant risks to public health. In fact, the NWGA has pushed for increased "online shopping" and "home delivery" of groceries in the pandemic to mitigate the risks to grocery store employees and shoppers, particularly those in vulnerable groups.[52] The NWGA simply disagrees with the measures Seattle has adopted to support workers delivering those products.

The NWGA's policy disagreement is insufficient to support Respondents' constitutional challenge. The NWGA contends that the Ordinance was "ill-conceived" because it "fails to *adequately* address and acknowledge public health,

[52] Brief of Amicus Curiae Northwest Grocery Association ("NWGA Br.") at 11.

safety, and economic concerns.[53] But this Court and the United States Supreme Court have emphasized time and again that disagreements with a legislature's conclusions about which policies best advance health, safety, and economic welfare cannot justify striking down a statute on rational basis review."[54] "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," otherwise judicial review would deprive the "legislative branch [of] its rightful independence and its ability to function."[55] The City Council was not constitutionally required to make the same policy choices the NWGA would have made in its place.

Finally, the NWGA argues that the Ordinance "defies the intent of the voters" as expressed in RCW 82.84 by not

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[53] *Id.* at 14 (emphasis added).

[54] *See, e.g., State v. Smith*, 93 Wn.2d, 329, 338-39, 610 P.2d 329 (1980) ("It is not our proper function to substitute our judgment for that of the legislature with respect to the necessity of" exercises of the police power.).

[55] *Beach Commc'ns, Inc.*, 508 U.S. at 315 (cleaned up).

"keep[ing] the price of groceries as low as possible."[56] Of course, whether a local law contravenes the broad goals of a state statute is of no moment when, as here, the terms of the Ordinance do not "directly and irreconcilably conflict[] with the statute."[57] If the rule were otherwise, then all local government regulation that might incidentally increase the cost of groceries, such as food safety measures, could be preempted by a law that prohibits only increases in taxes and tax-like measures. In any event, the Ordinance expressly prohibits passing the costs of hazard pay on to customers, so that voter intent to keep grocery prices low is not implicated.[58] Further, while the NWGA argues that premium pay for drivers will reduce "availability of delivery services" or prevent grocers from "access to platforms

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[56] NWGA Br. at 5–6.

[57] *Watson v. City of Seattle*, 189 Wn.2d 149, 171, 401 P.3d 1 (2017). Here, the text and legislative history of RCW 82.84 both demonstrate the initiative was designed and explained to the voters as a measure to prohibit *taxes* on groceries. *See* City's Reply Br. at 43–51; Brief of Amicus Curiae State of Washington at 11–19.

[58] CP 106 (Ordinance 100.027.A.4).

like Instacart,"[59] NWGA cites no evidence that such consequences have resulted—let alone any evidence of subsequent increases in grocery costs—relying instead on disputed claims about the effects of a different hazard pay ordinance for an entirely different set of workers.[60]

III. CONCLUSION

The arguments of Respondents' amici are altogether unpersuasive. The Court should reject these arguments and reverse the decision of the superior court except as to Chapter 82.84 RCW.

[59] NWGA Br. at 7.

[60] *Id.* at 8.

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Respectfully submitted this 21st day of January, 2022.

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