No. 99771-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE WASHINGTON FOOD INDUSTRY ASSOCIATION; et al.
Respondents,

v.

THE CITY OF SEATTLE,
Petitioner,

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

City of Seattle Ordinances

Statutes

Rules

I. INTRODUCTION

Throughout the ongoing COVID-19 crisis, frontline workers have shouldered grave risks to protect our communities. Food delivery drivers, in particular, permit people to obtain food from the safety of their homes, checking the spread of this devastating disease; while assuming the serious health risks associated with frequenting public spaces and coming into regular contact with members of the public. In a paradigmatic exercise of its police power, the City required hazard pay for this dangerous but critical work, and Respondents promptly took to the courts. This Court should grant discretionary review to reaffirm the proper deference owed to economic legislation, to put a stop to futile proceedings, and to restore the role of CR 12(b)(6) in weeding out meritless legal challenges.

In June 2020, the City acted to protect public safety, health, and welfare by requiring food delivery network companies to pay their delivery drivers a per-delivery premium without reducing their overall compensation or impeding access to at-home food delivery. These protections are to remain in force only while the City's COVID-19 public health emergency continues. The hazard pay requirement compensates drivers for work-related risks they face, to promote retention, and to permit drivers to take steps to protect themselves and our communities.

Respondents sued, asserting that the federal and State Constitutions

privilege Respondents' private interests over the City's protection of the public, in a challenge reminiscent of nineteenth-century jurisprudence. Respondents allege that the law was unnecessary to achieve the City's legislative goals; that its stated bases were pretextual; and that it therefore exceeds the City's police powers, violates equal protection guarantees, takes Respondents' property, and unconstitutionally impairs contracts.

There is no dispute—and the trial court recognized—that the City's hazard pay law is an economic regulation subject only to "rational basis review," and so it must be upheld if *any* reasonable justification for it is *conceivable*. This deferential standard leaves no room for courts to second-guess legislative determinations of necessity or to examine a legislature's actual motives. But while the court recited the appropriate standard for economic legislation, it failed to faithfully apply it. Instead, citing the standard under CR 12(b)(6), the trial court held that Respondents' allegations of pretext and lack of necessity precluded dismissal of their police power, equal protection, and Contracts Clause claims and entitled them to discovery. And, despite contrary precedent, the trial court permitted Respondents' claim that their inchoate property rights in their contracts had been "taken" by economic regulation to proceed.

The court effectively subjected the law to heightened scrutiny, resuscitating a *Lochner*-era approach to the review of economic legislation

that courts have rejected for nearly a century. Permitting such intrusions into legislative judgments is particularly improper where, as here, legislators enact emergency legislation in response to an ongoing public health crisis. The trial court also misunderstood the interplay between rational basis review and CR 12(b)(6). While CR 12(b)(6) sets a high threshold for dismissal, it nonetheless requires a court to dispose of legally insufficient claims at the outset of a lawsuit, and as such, it plays a critical gatekeeping function.

These obvious errors pose a serious threat to democratic processes. Under the trial court's approach, any party dissatisfied with the economic impact of legislation may sue alleging pretext, lack of necessity or both; defeat a motion to dismiss; and undertake expensive, intrusive, and disruptive discovery from legislators and other government defendants. For many jurisdictions throughout Washington, the substantial costs of such litigation will prevent them from enacting new laws needed to protect the public. This Court should grant discretionary review.

II. IDENTITY OF PETITIONER

This Motion is filed by Petitioner, City of Seattle, defendant in the trial court action below.

III. DECISION BELOW

On March 26, 2021, the King County Superior Court granted in part

and denied in part the City's Motion to Dismiss. The court correctly dismissed Respondents' spurious argument that Washington tax law, RCW 82.84, preempts the City's Ordinance No. 126094 (Ordinance). But the court denied the City's motion as to claims that the Ordinance is beyond the City's police powers and infringes Respondents' State and federal constitutional rights, described below. A copy of the Order and transcript of the trial court's bench ruling is in the Appendix A at 001-003 (Order) and Appendix B at 004-054 (transcript).

IV. ISSUE PRESENTED FOR REVIEW

Should this Court grant discretionary review of the King County Superior Court's order denying the City's motion to dismiss Respondents' police power and constitutional claims, where the trial court subjected economic legislation to improper levels of scrutiny and declined to dispose of meritless claims at the CR 12(b)(6) stage of the proceeding, perpetuating useless litigation and inviting groundless but costly challenges to valid exercises of the police power?

V. STATEMENT OF THE CASE

A. The City adopts the Ordinance, which protects workers providing critical at-home delivery of food.

By unanimous vote of the City Council and under the Mayor's signature, the City of Seattle enacted the emergency, temporary Ordinance in June of 2020, recognizing the critical role of food delivery drivers in

reducing crowds and ensuring continued safe access to food.[1]

The Ordinance requires covered food delivery network companies (FDNCs) to pay delivery drivers hazard pay for each Seattle delivery.[2] As explained in the text of the Ordinance, hazard pay compensates food delivery drivers for risks they face, promotes their retention, and provides resources to help them take steps to protect themselves and the community.[3] The City and Respondents agree that drivers are essential to the response to the COVID-19 pandemic.[4]

The Ordinance also contains secondary provisions designed to ensure that the per-delivery premium increases driver compensation and does not result in reduced community access to FDNC services.[5] To protect drivers' hazard pay, the Ordinance forbids FDNCs from responding to the Ordinance by altering the system for compensating drivers or by restricting drivers' access to work.[6] To protect community access to FDNC services, the Ordinance bars FDNCs from responding to the Ordinance by changing

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[1] The pandemic has sickened more than 107,000 King County residents, resulting in more than 1,500 deaths. https://bit.ly/2QNNbNV, last accessed on May 19, 2021.
[2] Appendix C at 067, Ordinance Section 2, 100.025.D
[3] Appendix C at 056, 059 and 060, Ordinance, Section 1.B, .P, .T, .U.
[4] Appendix C at 059, Ordinance, Section 1.M; Appendix D at 103, Am. Compl. at ¶¶ 41, 43; *see* https://bit.ly/3nIMzoE (Appendix A to Governor Inslee's "stay home, stay healthy" proclamation 20-25, identifying at-home food delivery workers as part of the "essential workforce") last accessed on April 3, 2021.
[5] Appendix C at 068; *see* Ordinance, Section 2, 100.027.B (hiring entities may defend against these violations by showing "that [the] decision to take the [challenged] action(s) would have happened in the absence of this ordinance going into effect."
[6] *Id.*, Ordinance, Section 2, 100.027.A.2-.3.

service areas or passing along costs associated with hazard pay to customers purchasing groceries (but not other types of food such as restaurant deliveries).[7]

As a temporary, emergency measure, the law took effect with the Mayor's signature and will terminate when the emergency ends.[8]

B. Respondents sue for damages and injunctive relief; the trial court denies the City's motion to dismiss.

Respondents filed a complaint in King County Superior Court seeking declaratory and injunctive relief as well as damages. After the City moved to dismiss, Respondents filed an Amended Complaint.[9] The City renewed its motion,[10] which the trial court granted in part and denied in part on March 26, 2021.[11] While the court's written order did not include the court's reasoning, the court articulated its reasoning in its bench ruling.[12]

The trial court began with "the bedrock question" of "whether the [O]rdinance is a proper exercise of the City's regulatory authority… its 'police powers.'"[13] The court acknowledged that the City's police power is broad, "clearly extend[ing] to the regulation of working conditions…[;]"

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[7] *Id.*, Ordinance, Section 2, 100.027.A.1, .4.
[8] Appendix C at 067, Ordinance, Section 2, 100.025; Appendix E at 168, Ordinance No. 126122.
[9] Appendix D at 092-161 (Amended Complaint),
[10] Appendix F at 172-215 (Motion to Dismiss the Amended Complaint).
[11] Appendix A at 001-003.
[12] Appendix B at 004-054.
[13] *Id.* at 047.

and due even greater judicial deference in addressing "the exigencies of a public health emergency…."[14] It also recognized that during public health crises, "it's the political branches of government, in this case the City Council and the Mayor, who are given the authority to determine what must be done" to protect the public,[15] and "[i]t is not the function of the court to second guess the policy decisions of the political branches."[16] And it correctly pointed to this Court's statement in *City of Seattle v. Webster*, 115 Wn.2d 635 (1990),[17] that "every presumption" must be made in favor of constitutionality, and "if *any 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."[18]

Despite correctly identifying this legal standard, the court reasoned that the "high bar" for a motion to dismiss, coupled with "the allegations about the unique nature of this ordinance" and "the allegations of pretext, which are supported by allegations that there was no real need here," prevented the court from dismissing Respondents' police power claim.[19]

The court reasoned that the resolution of Respondents' equal

[14] *Id*. at Appendix B 047:13-18.
[15] *Id*. at Appendix B 047:19-45:3.
[16] *Id*. at Appendix B 048:3-4.
[17] *Id*. at Appendix B 048:10-24.
[18] *Id*. (quoting *Webster*, 115 Wn.2d at 645) (emphasis supplied).
[19] *Id*. at Appendix B 049:9-25.

protection claims "is intertwined with the police power analysis."[20] While acknowledging that these claims, too, triggered only rational basis review, the court concluded that, if Respondents were "able to establish through evidence that" the rationales for the Ordinance were "pretext, that it was not a reasonable exercise of the City's police power, [or] that it was arbitrary," Respondents could prevail on their equal protection claims.[21]

Though focused on legislative decision making, the court also permitted Contract and Takings Clause claims to proceed. Without analysis of the multi-part test for Contracts Clause violations, it held that Respondents had alleged a "substantial impairment" and that the Ordinance's "unique nature" precluded dismissal of Respondents' federal and State Contracts Clause claims.[22] And the court held that, because Respondents "pled that their business model is being appropriated by being required to deliver services at high costs" without adjustment to their business, the complaint stated federal and State Takings Clause claims.[23]

The City filed a timely Motion for Reconsideration or Certification under Rule of Appellate Procedure (RAP) 2.3(b)(4).[24] The court denied the

[20] *Id*. at Appendix B 051:19.
[21] *Id*. at Appendix B 051:25-052:5.
[22] *Id*. at Appendix B: 051:7-15.
[23] *Id*. at Appendix B 050:12-25. Having declined to dismiss Respondents' constitutional claims, the court also allowed the claim for damages under 42 U.S.C. § 1983 to proceed. *Id*. at B49:8-10.
[24] Appendix at Appendix G 216-283 (Motion to Reconsider).

City's motion on April 26, 2021 without explanation.[25] On May 14, 2021 the City filed its notice of intent to appeal.[26]

VI. ARGUMENT

Review under RAP 2.3 is appropriate where "[t]he superior court has committed an obvious error which would render further proceedings useless[.]"[27] This case presents a textbook example of such error; permitting discovery, additional motions practice, and trial will merely waste the parties' and the judiciary's resources.[28]

This Court should grant discretionary review, not only to correct the trial court's costly errors here, but also to restore the role of CR 12(b)(6) in guarding against such "useless" litigation. Under CR 12(b)(6), "the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient."[29] CR 12(b)(6) is crucial to the efficient operation of courts, as its "purpose is to weed out complaints where," even assuming the truth of plaintiffs' allegations or their 'hypothetical facts,' "the law does not provide

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[25] Appendix H at 284-286 (Order denying Motion to Reconsider).
[26] Appendix I at 287-292 (Notice of Intent to File Appeal).
[27] RAP 2.3(b)(1); *see Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808 (1991) (RAP 2.3 is satisfied if the error below results in a "useless trial"); *see also Hartley v. State*, 103 Wn.2d 768, 773–74 (1985) (citing *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880 (1982)) (discretionary review appropriate where "useless lawsuit" could be avoided by granting defendants summary judgment motion)
[28] *See, e.g., Paradise, Inc. v. Pierce County*, 124 Wn.App. 759 (2004) (reversing denial of defendant's motion to dismiss after full trial and jury verdict).
[29] *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215 (2005).

a remedy."[30] Thus, while the trial court had to credit the Respondents' allegations in considering the City's motion to dismiss, it should have measured these allegations against the substantive standards governing each of Respondents' claims to determine whether further fact-finding would be fruitful. Its failure to do so invites future litigants to assert similar frivolous challenges to economic legislation that will impose undue litigation costs and burdens on public entities.

The trial court's ruling allows Respondents to test allegations of pretext and lack of necessity that have no place under rational basis review and permits Respondents to proceed on Contracts Clause and Takings Clause claims that fail as a matter of law. The trial court overstepped its authority, revived a nineteenth-century approach to economic regulation, and invited groundless challenges to valid legislation.

A. The trial court misapplied rational basis review in declining to dismiss Respondents' police power, federal equal protection, and Contracts Clause claims.

Rational basis review does not permit a reviewing court to interrogate the motives of a legislative body or to second-guess the empirical accuracy of its policy determinations. The trial court committed obvious error in finding that Respondents' allegations of pretext and lack of

[30] *Markoff v. Puget Sound Energy, Inc.*, 9 Wn.App.2d 833, 839, *rev. denied*, 195 Wn.2d 1013 (2020).

necessity precluded dismissal of Respondents' police power, equal protection, and Contracts Clause claims.

1. The trial court erred in failing to dismiss Respondents' police power claim.

This Court has made clear that a law must be upheld as within the City's police power if any conceivable set of facts would justify it.[31] This standard "severely limits judicial review… because in order [for the law] to fail… *there must be no reasonably conceivable state of facts* creating a public need for regulation."[32] This rule maintains a "line of demarcation between legislative and judicial functions,"[33] preserving legislative decision making for the legislature. After all, "[i]t is not [courts'] proper function to substitute [courts'] judgment for that of the legislature."[34]

In holding that Respondents' allegations of pretext and lack of necessity precluded dismissal of their police power claim, the trial court ignored the applicable standard entirely in favor of a *Lochner*-era approach to economic legislation. Whether, as a factual matter, the Ordinance is "necessary" is irrelevant if any "reasonably conceivable state of facts" could

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[31] *Webster*, 115 Wn. 2d at 645; *see Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 478 (1982), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682 (2019) (emphasis supplied) (police power laws "will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.")
[32] *Petstel, Inc. v. King Cty.*, 77 Wn.2d 144, 154 (1969) (emphasis supplied).
[33] *Webster*, 115 Wn. 2d at 645.
[34] *State v. Smith*, 93 Wn. 2d 329, 338–39 (1980); *accord CLEAN v. State*, 130 Wn.2d 782, 813 (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.").

justify its enactment.

The Ordinance easily satisfies this deferential standard. The Ordinance guarantees compensation to drivers for the hazards they face in providing at-home food delivery. That the COVID-19 crisis has increased demand for delivery services or increased driver pay—the primary allegations Respondents offer to rebut the Ordinance's "necessity"—would not defeat a legislative determination that the increase in pay was insufficient or drivers should be *guaranteed* more pay for the hazards they face.[35] Likewise, the City could reasonably determine that the benefits of the Ordinance would be undermined if FDNCs responded by reducing other forms of driver compensation, requiring consumers to bear those costs, or limiting their service to the most profitable parts of Seattle.

Respondents' allegations that the public health, safety, and welfare bases for the laws are pretextual, and that the law was passed simply to assist unions, are similarly irrelevant. Given due respect for legislative functions, "courts will not examine the motives of the legislative body" in reviewing an exercise of police powers.[36] Courts "are not permitted to

[35] Indeed, the City could reasonably have determined that increased demand for delivery services and increased unemployment during the pandemic would potentially decrease driver pay by leading to an influx of new drivers.

[36] *Cougar Bus. Owners*, 97 Wn.2d at 488 (citation omitted); *see also RUI One Corp. v. City of Berkeley*, 371 F. 3d 1137 (9th Cir. 2004) (rejecting equal protection challenge to minimum-wage law despite plaintiff's contentions that city's stated reasons "were not the real reasons" and that city council "was instead motivated by a desire to help in the unionization campaign").

inquire into the motives of the city council. If the ordinance is valid on its face, the reasons or arguments that may have moved the city council to act are not pertinent[.]"[37] Respondents' allegation about the "real reasons"[38] the law was passed therefore should not have defeated the City's motion.

2. The trial court erred in failing to dismiss Respondents' federal equal protection claim.

The trial court committed the same obvious error regarding Respondents' federal equal protection claim. It is undisputed that the equal protection claims asserted here are subject only to rational basis review.[39] Thus, the Ordinance must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis[,]"[40] and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the distinction actually motivated the legislature."[41] Rational basis review does

[37] *Shepard v. City of Seattle*, 59 Wash. 363, 374 (1910).
[38] Respondents' allegations also defy common sense. Stakeholder support for a law does not, on its own, permit an inference that the law was passed only to benefit that stakeholder. If that were the standard, no legislation would survive scrutiny. Moreover, even if the adoption of the Ordinance followed longstanding legislative efforts to increase compensation for gig workers, the City rationally could have concluded that the COVID-19 pandemic, in and of itself, merited hazard pay for a class of workers bearing tremendous risks for the benefit of the community.
[39] Appendix B at 051, Appendix J at 329-330 (Opposition to the Motion to Dismiss the Amended Complaint). Though Respondents attempt to raise a claim under Washington's Privileges and Immunities Clause, their failure to identify a fundamental right of state citizenship impaired by the Ordinance dooms this claim. *See* Appendix F at 211-212.
[40] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).
[41] *Id.* at 315.; *see Vance v. Bradley*, 440 U.S. 93, 97 (1979) (cleaned up) ("The Constitution presumes that… even improvident decision 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").

not permit a court to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."[42] That is, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[43] Of course, a faithful application of rational basis review would not preclude a meaningful challenge to purely arbitrary legislation lacking an articulable rational basis.[44]

The trial court disregarded these well-established principles in concluding that allegations of pretext and lack of necessity prevent dismissal of the equal protection claim.[45] As the United States Supreme Court has explained, "[w]hether *in fact*" a law subject to rational basis review will achieve its stated goal "is not the question: the Equal Protection Clause is satisfied by [the] conclusion that the … [legislature] *could rationally have decided* that" its law would achieve the stated goal.[46] Nor does motivation matter; so long as there is a reasonably conceivable rational basis for the Ordinance, claims about legislators' ulterior motives are of no moment.

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[42] *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*).
[43] *F.C.C.*, 508 U.S. at 313.
[44] *Cf. Fowler Packing Company, Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (law failed rational basis review because court "*could conceive of no other reason* why …legislature would choose to" adopt challenged legislation) (emphasis added).
[45] Appendix B at B 051-052.
[46] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis in the original).

The trial court committed obvious error in concluding otherwise and ignoring the many reasonable bases for requiring hazard pay for FDNC drivers but not transportation network company (TNC) drivers, including that the City was considering separate legislation on TNC driver pay, that food delivery services are more essential than TNC services, and that legislation protecting TNC drivers was already in process.[47]

3. The trial court erred in failing to dismiss Respondents' Contracts Clause claims.

The trial court's misapplication of the rational basis standard also infected its analysis of Respondents' federal and State Contracts Clause claims.[48] Where a law allegedly impairs contracts between private parties, courts apply the same principles of deference to legislative judgments applied to police powers and equal protection claims.[49] The courts must not "'weigh the wisdom of the particular legislation,'" and the law must be upheld if "'there is a rational connection between the purpose of the statute and the method the statute uses to accomplish that purpose.'"[50] For the

[47] For the same reason, the City had "reasonable grounds" for distinguishing FDNC and TNC drivers, dooming Respondents' State privileges and immunities claim. *See Ockletree v. Franciscan Health Syst.*, 179 Wn.2d 769, 783 (2014).
[48] The same legal standards govern the State and federal claims. *In re Estate of Hambleton*, 181 Wn.2d 802, 830 (2014).
[49] *See, e.g., Optimer Intern., LLC*, 151 Wn. App. at 969 (where "the state is not a party to the contract affected by the challenged legislation, courts generally defer to 'legislative judgment as to the necessity and reasonableness of a particular measure'") (quoting *Energy Reserves Groups, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413 (1983)).
[50] *Id.* (quoting *State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493, 505, 506 (1991)).

reasons already noted, the Ordinance satisfies that standard, which ends the Contracts Clause inquiry; Respondents' allegations of pretext or lack of necessity are irrelevant.[51]

B. The trial court committed obvious error in failing to dismiss Respondents' Takings claims.

In declining to dismiss Respondents' Takings claims, the trial court again ignored the applicable substantive standard, which rendered useless any further litigation on these claims.[52] The "property" allegedly "taken" by the Ordinance is limited to Instacart's contracts with drivers and retailers.[53] But a Takings claim cannot be premised on the mere *frustration* of a party's contractual rights or expectations; the government must instead *acquire* those rights and dedicate them to a public purpose.[54]

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[51] Respondents' federal and State Contract Clause claims fail for a host of other reasons as well. Valid police power laws do not violate the Contracts Clause of the State or federal constitutions because all valid contracts are presumed to be entered into in the context of the government's police powers. *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 959 (2009); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940). Similarly, where laws are passed as emergency, temporary measures to respond to great public calamity, "[t]he reservation of state power appropriate to such extraordinary conditions may be deemed to be… a part of all contracts…." *Home Building Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934). The trial court further overlooked Respondents' failure to allege impairment of any *existing* contracts; instead, they alleged only an impairment of *future* rights to make unilateral changes to the terms of future deliveries. Appendix D at 103-104, 108. The Contracts Clause does not apply where, as here, the contractual rights at issue are "only theoretical." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 28 (1977).

[52] As with the Contracts Clause claims, the same legal standards apply to State and federal Takings claims. *Yim v. City of Seattle*, 194 Wn.2d 651, 672 (2019).

[53] Appendix at J29.

[54] *Omnia Commercial Co. Inc. v. United States*, 261 U.S. 502, 513 (1923) (finding no Takings claim where "the effect of the [challenged government action] was to bring the contract to an end, not to keep it alive for the use of the government"). In the trial court,

Respondents do not (and could not) allege that the City has *acquired* Instacart's contractual rights vis-á-vis drivers or retailers; they allege only that their business has been burdened (and so their contractual expectations frustrated) by economic regulation. In fact, Respondents expressly allege that Instacart does *not* have the right to require any driver to make a delivery, so the Ordinance cannot be said to dedicate to the public any contractual right of Instacart to procure grocery deliveries from its drivers.[55] Further, Instacart—not the City or the public—remains the beneficiary of its contracts with drivers and retailers, such as those governing the apportionment of customer payments. To the extent Instacart complains that it cannot exercise certain contractual rights, such an impairment is properly considered under the Contracts Clause, not the Takings Clause (and fails for the reasons explained earlier).[56]

C. This Court should grant discretionary review to correct obvious errors with dangerous implications for future litigation.

Respondents' primary argument against dismissal of their claims was that regulatory takings claims like theirs are subject to a "fact-intensive balancing analysis." Appendix at Appendix J 330. But one never gets to that analysis unless the plaintiff *has been deprived of property in the first instance*, and *Omnia* establishes the circumstances under which one may be deprived of contract rights for Takings Clause purposes.

[55] Appendix D at 103 ("Because they are independent contractors and not employees, they are never required to accept a particular order or work in a specific place or at a specific time").

[56] If a mere frustration of contracts could trigger a regulatory Takings claim subject to a "fact-intensive balancing analysis," the principles of legislative deference long recognized in the Contracts Clause context would be rendered a nullity.

The consequences of the trial court's obvious errors are substantial. By permitting Respondents' lawsuit to move forward based on an erroneous application of the rational basis standard, the trial court has announced its intention to make an evidentiary determination regarding whether the Ordinance (a) was "necessary" to achieve its stated purposes, and (b) was motivated by an improper purpose. Such a determination would impermissibly invade the legislature's exclusive province.

Permitting this case to proceed will also waste significant time and resources on the part of the parties and the court and will cause the unnecessary expenditure of public funds.[57] For example, even though pretext and necessity have no bearing on the resolution of Respondents' claims, the trial court's ruling will allow Respondents to proceed with onerous and far-reaching discovery requests.[58]

The trial court's decision, if left to stand, will also have ramifications beyond this case. In failing to apply the deference to which the Ordinance was entitled, particularly in a time of crisis,[59] the trial court invaded the

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[57] *See, e.g., Paradise, Inc. v. Pierce County*, 124 Wn. App. 759 (2004) (reversing denial of defendant's motion to dismiss after full trial and jury verdict).

[58] For example, those requests seek the identity of all persons who communicated with City government about any potential legislation regarding gig workers from 2018 to the present, and the substance of those communications. Appendix K at 334-349.

[59] *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30 (1905) (when there is a public health emergency, the right "to determine for all what ought to be done" is properly lodged with political decision makers rather than courts. Accordingly, in reviewing the exercise of emergency police powers, "it is no part of the function of a

province of the legislature and turned separation of powers principles on their head by inviting well-resourced stakeholders unhappy with legislative outcomes to assert their political grievances in court.

Practically every recent piece of economic legislation by the City has been met with immediate litigation by powerful economic interests seeking to maintain the status quo. If trial courts decline to toss out meritless litigation at the CR 12(b)(6) stage, the costs to the City will be tremendous. And for smaller localities with fewer resources, the mere threat of such costly litigation may prevent them from enacting legislation, no matter how much the public supports it. Every jurisdiction in Washington must consider such costs before enacting new laws, improperly tilting the scales against acting to protect the public interest.

Finally, in announcing its willingness to apply heightened scrutiny to legislative determinations of necessity and propriety and to entertain the "taking" of contracts by economic regulation, the trial court embraced a *Lochner*-era approach to economic legislation with dangerous ramifications for the meaningful exercise of the police power. Permitting business interests to supersede exercises of the police power "has been soundly

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court" to second guess a determination as to what method is "likely to be the most effective for the protection of the public against disease").

rejected by the United States Supreme Court and this [C]ourt."[60] This is particularly true for laws that protect workers and otherwise promote social welfare.[61] This Court should grant discretionary review to correct that fundamental error.

VII. CONCLUSION

The trial court committed obvious legal error by agreeing to sit as a superlegislature over the City's temporary, emergency, economic regulation. Its willingness to scrutinize the necessity of the Ordinance, and the motives of the legislature heralds a retreat to nineteenth century judicial review of economic legislation. The trial court failed to exercise its gate-keeping function, ignoring well-settled substantive law requiring dismissal. These errors impermissibly weaken the power of the government to protect people. The City respectfully requests that the Court grant this Motion and hear the City's appeal of the trial court's order.

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[60] *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 228 (2006), *abrogated on other grounds by Yim*, 194 Wn.2d 682 (collecting cases).

[61] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) ([t]he "power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable"); *see also Amunrud*, 158 Wn. 2d at 228 (explaining this Court's rejection of the core principle of *Lochner v. New York*, 198 U.S. 45 (1905) that the "'liberty' interest of the employees and employers to contract for" labor are "outside of the police power of the state legislature to protect workers…").

RESPECTFULLY SUBMITTED this 25th day of May, 2021.

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APPENDIX TABLE OF CONTENTS

Appendix A

Order Granting in Part and Denying in Part City of Seattle's Motion to Dismiss

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

WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR, INC. d/b/a INSTACART, a Delaware corporation

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant.

Case No. 20-2-10541-4 SEA

ORDER GRANTING IN PART AND DENYING IN PART CITY OF SEATTLE'S MOTION TO DISMISS

Honorable Michael R. Scott
Noted for March 26, 2021 at 11:00 a.m.

This matter came before the Court on the City of Seattle's Motion to Dismiss Plaintiffs' First Amended Complaint.

The Court, having reviewed:

1. The City of Seattle's Motion to Dismiss;
2. Plaintiffs' Opposition to the City of Seattle's Motion to Dismiss;
3. Any reply and supporting documents filed;
4. The record and documents herein; and
5. Having heard oral argument of counsel,

THE COURT HEREBY ORDERS that:

- The Motion to Dismiss is GRANTED IN PART as to Count I of the First Amend

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Complaint, based on alleged violation of I-1684, codified at RCW ch. 82.84. That count is DISMISSED. The dismissal is with prejudice as any amendment would be futile. and The Motion to Dismiss is DENIED as to all remaining counts.

IT IS SO ORDERED.

DATED March 26, 2021

Electronic signature attached

_____
The Honorable Michael R. Scott

Presented by:

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King County Superior Court
Judicial Electronic Signature Page

Case Number:	20-2-10541-4
Case Title:	WASHINGTON FOOD INDUSTRY ASSN ET ANO vs CITY OF SEATTLE
Document Title:	ORDER RE MTN TO DISMISS

Signed By:	Michael R. Scott
Date:	March 26, 2021

Judge: Michael R. Scott

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	B5A3B5FE79E17714D2D0890F5E0D5DD2F97A50F5
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Appendix B

Transcript of March 26, 2021 Telephonic Hearing on City of Seattle's Motion to Dismiss

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington corporation, and MAPLEBEAR INC., d/b/a INSTACART, a Delaware corporation, Plaintiffs, v. CITY OF SEATTLE, a municipal corporation, Defendant.	No.: 20-2-10541-4 SEA

HEARING - VIA TELEPHONE

The Honorable Michael Ramsey Scott Presiding

March 26, 2021

TRANSCRIBED BY: Reed Jackson Watkins
Court-Certified Legal Transcription
206.624.3005

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I N D E X O F P R O C E E D I N G S

-o0o-

March 26, 2021

THE COURT: Good morning, everyone, this is Judge Scott. Do we have everyone present who is expected to participate in the hearing this morning? It looks from my point of view that we -- and you can hear me fine. I'm seeing nodding heads, very well.

This is Judge Scott. I am in open court and we are on the record. On the calendar this morning is a motion to dismiss in Washington Food Industrial Association v. City of Seattle, Case No. 20-2-10541-4 Seattle designation.

Counsel, please state your appearances, starting with counsel for the plaintiff.

MR. MCKENNA: Your Honor, Rob McKenna appearing for Plaintiffs, Washington Food Industry Association and Instacart.

THE COURT: Good morning.

MR. MCKENNA: Good morning.

MR. RUBENS: Good morning, Your Honor. Daniel Rubens of Orrick Herrington & Sutcliffe also appearing for the plaintiffs.

THE COURT: Good morning.

And for Defendant?

MR. MILLER: Good morning, Your Honor. Jeremiah Miller,

assistant city attorney for the City of Seattle.

THE COURT: Good morning.

MS. FRANKLIN: Good morning, Your Honor. Erica Franklin, assistant city attorney for the City of Seattle.

THE COURT: Good morning.

MR. DE VERA: Good morning, Your Honor. Derrick De Vera, assistant city attorney for the City of Seattle.

THE COURT: Good morning. I understand from correspondence from the plaintiffs that Mr. McKenna and Mr. Rubens will be arguing for the defendants -- excuse me, the plaintiffs.

Who will be arguing on behalf of the City?

MR. MILLER: I will, Your Honor.

THE COURT: All right. Thank you, Mr. Miller.

I'd like you to aim to confine your arguments to 20 minutes per side. I'll be fair. If I pepper you with questions and I've interrupted your flow, I'd add some time using a soccer rule. But I have read everything you submitted. I do appreciate the effort that counsel made to send it to the Court, the bookmarked PDF file with everything that you wanted me to consider.

Having inherited this case from a series of judges, I did not have working papers. And the court file was a little bit confusing as to what exactly was pending this morning. So your submission cleared that up. And I have read

everything you have submitted carefully.

But I always find oral argument helpful. This case raises some very interesting issues and I'm looking forward to hearing from you further this morning.

Mr. McKenna and Mr. Rubens, you'd be entitled to rebuttal, so if you wish to reserve some of your 20 minutes, please let me know. I'll try to remember to give you a three-minute warning if you're approaching that. And as I said, if you need more time, if you think you're entitled to it under a soccer rule, feel free to ask.

With that I'll turn the floor over to Mr. McKenna.

MR. MCKENNA: Thank you, Your Honor. For the record, Rob McKenna appearing for Plaintiffs Instacart and Washington Food Industry Association.

Your Honor, over the next ten minutes I'll discuss how Initiative 1634 prohibits local governments from imposing fees, charges and exactions like Seattle Ordinance $2.50 fee for delivery for groceries.

I'll then explain how the City's police powers do not support the control it is exerting through the ordinance over Instacart's Seattle business operations because the City's exercised its police powers in this case to be demonstrated with discovery but also based on the available records to be pretextual and arbitrary. I'll then hand off the presentation to Mr. Rubens, who will discuss the

constitutional issues.

Your Honor, in Initiative 1634 codified in Chapter 82.84 RCW, the statutory definition of tax, fee or other assessment on groceries is very broad. You can see it in the motion to dismiss at page 14, if you don't have the text in front of you. It says that the definition includes, quote, but is not limited to sales tax, gross receipts tax, business and occupation tax, business license tax, excise tax, privilege tax or any other similar levy, charge or exaction of any kind on groceries for the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use or consumption thereof.

Now, the City argues in its motion to dismiss that Initiative 1634 only prohibits taxes that are collected by the City. They further argue that the state's law prohibiting -- the state law's prohibition of locally imposed taxes, fees and other assessments on groceries only prohibits taxes and that other -- and that, quote: Fees, other assessments, levies, charges and exactions cannot be read separately from taxes.

THE COURT: Well, Mr. McKenna --

MR. MCKENNA: In response to the City --

THE COURT: -- on that score -- thank you. It does say "similar" when it adds those more general types of potential exactions, it says similar levy, charge or exaction.

Doesn't that limit it in some way to the preceding categories?

MR. MCKENNA: Your Honor -- I think, Your Honor, that the word "similar" does modify the phrase levy, perhaps charge.

But it doesn't make sense to read the word "similar" as modifying exaction, because then it would read "or any other similar exaction of any kind." Exaction of any kind is quite broad and I don't think it (inaudible) would be read and limited by "similar" in such a way that "exaction" can only mean a tax.

One of the ways we can tell this is by reading the findings and declarations of the statute, which is clearly concerned -- this is at 82.84.020, by the way, which is clearly more concerned not only with taxes but also with fees, which are distinct from taxes under Washington law, and with any local exaction that would make groceries more expensive.

The defining declarations state that access to food is a basic human need, that keeping the price of groceries as low as possible improves access to food for all Washingtonians, and that no local government entity may impose any new fee, tax or other assessment that targets grocery items, which is defined pretty much -- I mean, really as broadly as --

THE COURT: Mr. McKenna --

MR. MCKENNA: -- you can imagine.

THE COURT: -- would the meaning that you argue for on behalf of your clients prohibit a local government from imposing a minimum wage that would include grocery workers? Would it reach --

MR. MCKENNA: It would not.

THE COURT: Why not?

MR. MCKENNA: We don't believe it would, Your Honor, because a minimum wage targeting grocery workers would be a wage of a more -- more on the lines of a general regulation as -- and would be tied to the amount of time the person works. So they could have -- they could have constructed this ordinance in that way, but they chose not to. Instead, they set up a fee on grocery delivery. They direct that fee revenue to the workers, but they don't set it up as wage legislation.

If you look at the transportation network drivers, Uber and Lyft drivers, who were originally part of this ordinance and were removed from the ordinance at the request of the Teamsters, according to the council members who moved that amendment, they constructed that ordinance differently to be a wage ordinance designed to create a minimum level of income for those drivers.

But here they didn't do that. Here they imposed a grocery delivery fee and then they direct the revenue. And the grocery delivery fee isn't tied to the amount of time that

someone works. It's tied to the number of -- it's a fee per delivery made by that worker.

So, no, we don't believe that it would necessarily prohibit a minimum wage for grocery workers.

Your Honor, we think it's evident from the language in the statute that local grocery delivery fees are prohibited because the statute language goes well beyond the collection of taxes to also prohibit a long list of locally imposed or collected measures. Not just taxes but also fees, assessments, levies, charges of exaction of any kind, whether they produce revenue for the City coffers or not and whether they apply to the sale of groceries or to the manufacturer, distribution, sale, possession, ownership, transfer, transportation, container use, or consumption.

Now, again, why is the statute so broadly drafted? Because its stated goal, codified in 020, is not just to prevent revenue generating local taxes on groceries but also to block any measure that targets groceries, makes them more expensive to consumers, including measures imposing new delivery fees.

The City chooses to ignore much of the law's plain language; we think violates part of the rule's statutory construction.

THE COURT: Mr. McKenna, with apologies, I'd like to break in again. As you know, I tend to have --

MR. MCKENNA: Of course.

THE COURT: -- lots of questions. You've just argued that the core intent of those statutes is to make sure that prices of groceries aren't increased. The ordinance we're talking about, as I understand it, would -- how would it increase the price of groceries?

MR. MCKENNA: It increases the price of the delivery of groceries, when delivery is covered by transfer or transportation.

THE COURT: Well, how would it increase that if -- to the consumer if, by the terms of the ordinance, your clients are not allowed to raise charges to the consumer?

MR. MCKENNA: Well, the statute simply prohibits from adding the fee to the charge to the consumer. You know, every business is going to -- that has to absorb mandated costs is going to find a way to recoup those costs or else it's not going to stay in business.

So it's true they can't put it on the bill along for grocery delivery, even though restaurant deliveries can, but they're not prohibited from recouping those costs in other ways, such as increasing the overall charge for their services that they provide.

THE COURT: Thank you.

MR. MCKENNA: You bet. You know, I think, Your Honor, it's fairly clear that contrary to the City's argument,

taxes aren't the same thing as fees. The Supreme Court has made that clear in cases like in Automated Transit Union and Washington Association for Substance Abuse and Violence Prevention. As we say, under the ordinance this new $2.50 regulatory fee per grocery delivery is a regulatory fee charged and exaction. It's not converted into wage legislation because revenue from the fee is paid to the delivery worker rather than the City.

Third, in addition, the law prohibits any fees or assessments on groceries, including charges and taxes of any kind which extend deeply to transferring or transporting groceries. That is not being disputed.

Your Honor, if I may, I'd like to turn some points about the police powers. And I think, not counting stoppage time, I have about five minutes, so I'll do this -- I'll try to be very efficient here, if that's okay.

The ordinance imposes a grocery delivery fee as part of a comprehensive regulatory scheme targeting new delivery network companies. And as already discussed, increasing the costs of grocery delivery per local ordinance is prohibited by Initiative 1634, which is an express limitation on the City's police power. There is no police power exception in the ordinance.

In addition, the ordinance's regulation of food and delivery network companies is unconstitutional. Mr. Rubens

will discuss it is not permitted under the City's police powers where the underlying emergency is merely a pretext for the City council and its union allies to achieve their longstanding goal of regulating gig economy and its independent contractor workers.

In other words, Your Honor, even under the rational basis standard, the City is not allowed to rely on pretext to justify the ordinance. As courts have repeatedly recognized in cases such as those we cite in our opposition on pages 30 and 31, such as Seattle Vacation Home, Savage v. Mills, DeYoung v. Providence Medical Center and more.

In addition, although the City insists that all hypothetical facts must be drawn in their favor, we're before you today on a 12(b)(6). That means, of course, that all facts must be drawn in Plaintiffs' favor at this stage, and we've (inaudible) allegation that the ordinance is untethered from public health in its rationale against ^ protection.

These alleged facts must be accepted as true at this point. And if they are accepted as true, Plaintiffs are entitled to discovery.

In fact, Your Honor, Plaintiffs here are seeking precisely the same type of discovery sought and permitted by Judge Rogoff in Seattle Vacation Home. And Plaintiffs currently have discovery pending (inaudible) all the information to

challenge the rational basis for the ordinance.

The City pushes back on the very idea that enactments under emergency -- during an emergency under its municipal police powers should be subject to review. But, of course, that isn't the case.

In Seattle Vacation Home, the 2019 case decided by Judge Rogoff, the City was -- the City was denied its motion of summary judgment on a plaintiff's challenge to another city police powers ordinance. Judge Rogoff wrote that courts cannot allow a rational basis review to serve as a rubber stamp. He continued that plaintiffs, quote, have the right to seek discovery that might prove these ordinances were arbitrarily constructed.

Therefore, Your Honor, we believe Plaintiffs should have an opportunity for discovery because rational basis review, which is required for counts 2 through 6: Police power, Takings, contracts and so on, is fact-intensive.

In addition, police power enactments during public health emergencies are not subject to a reduced level of judicial review, as the City suggests. The Supreme Court reminded us of this in Roman Catholic Diocese of Brooklyn v. Cuomo in 2020. Other federal courts such as the federal court in the Eastern District of California, Culinary Studios, Incorporated, this year concluded that, quote: Normal constitutional standards of review shall apply, not a

separate Jacobson standard. A public health emergency does not give rise to an alternative standard of review.

In the present case, Your Honor, we believe the plaintiffs are entitled to discover whether the code 19 emergency was a pretext and whether the ordinance is, in fact, a reasonable exercise of the City's police powers. The available record suggests what Plaintiffs suspect discovery will confirm: That the ordinance is a coordinated effort to achieve a longstanding goal of council members and their allies to organize independent contractors in the gig economy.

One example: The ordinance originally covered Uber and Lyft drivers. That was removed just before adoption of the ordinance by the county council by amendment. And as the council member who moved that amendment explained during their meetings brought on the ordinance, those drivers were removed by the council from the ordinance on the day it was adopted at the behest of the Teamsters who were pushing for separate permanent wage legislation for them.

So what is the standard of judicial review here? Is that emergency legislation must be rationally related to a legitimate stated interest and not impose arbitrary classifications.

Although the City disagrees with the reasonableness requirement and says that -- and argues that public health emergencies enlarge the scope of police power, that the City

should not examine its motives and require factual justification, that is not a basis for dismissing on a 12(b)(6) claim -- motion at this stage.

Sorry, Your Honor, just skipping ahead to make sure I covered the main points. I think, Your Honor, I'll stop there and hand off to Mr. Rubens.

THE COURT: That's good timing. Thank you, Mr. McKenna.

Mr. Rubens.

MR. RUBENS: Good morning, Your Honor. And I'd like to reserve three minutes of our time for rebuttal if that's possible?

THE COURT: Of course.

MR. RUBENS: Thank you.

The ordinance violates four different constitutional provisions, and I'll address each of those briefly in turn. But I wanted to start off by noting a few common reasons why the City's constitutional argument fails.

First of all, and similar to what Mr. McKenna was just saying, the City repeatedly invokes the public health emergency that constitutional rights must be projected even and especially during emergencies. And for the reasons that have been explained, ordinances and provisions are untethered from its public health justification that the City's stated reasons for the ordinance are pretextual under the facts we've alleged.

The City in its constitutional argument makes a lot of analogies to minimum wage and working condition laws that regulate employees, and those laws have been upheld against constitutional challenges. So those comparisons don't hold up here. The workers here are independent contractors, not employees, and the ordinances are more intrusive than those garden-variety wage and working condition regulations.

And the last overarching point is that the City almost entirely ignores the Rule 12(b)(6) standards which list whether there's any facts, alleged or hypothetical, upon which we could obtain relief.

We've alleged plenty of facts that establish this ordinance has a significant economic impact, that the City acted pretextually and its ordinance is disconnected from the City's stated goals. And together that's more than enough to beat this motion.

So with that background in mind, I'll address the particular things, starting with the Taking clause. And there's no question that the ordinance burdens and indeed appropriates Instacart's contractual rights. It doesn't just impose a premium fee requirement, but it prohibits us from modifying the areas to be served and it prevents us from passing along the cost in the form of a customer charge for grocery delivery.

And I think the City now concedes that contracts are a

form of property that can support the Taking claim, so that gets us to the next step, which is the Penn Central framework of regulatory taking. That's a fact-intensive, a case-specific test. And we think clear allegations of a taking under each of the factors of that test, that the City really hasn't proffered any meaningful response to.

In the motion to dismiss, the City seems to take the position that there's no need to consider the Penn Central factors when the government says it's acting to protect health and safety. But current Taking doctrine is clear that all regulatory Taking claims, including the one here, must be considered under Penn Central.

And I'll just very briefly run through the three factors, the first of which is economic impact, which (inaudible) as a serious financial loss. And we've pleaded that here based on the provisions I've mentioned that have a significant impact on our operations and ability to operate profitably, with reasonable investment-backed expectations. This is a novel and disruptive industry. It's just not plausible to describe it as heavily regulated. I think even the City recognizes that it's a new industry and you can't say that Instacart and other food delivery network companies entered and their network anticipating the pandemic or the type of unprecedented regulation.

And the last factor is the character of the government

action, which goes to the finality that the City is trying to draw with minimum wage or working conditions laws. And we have explained the ways it's different. The City has said it's just trying to exercise its police powers to serve the common good. But the whole point of the Taking clause is to identify when certain regulations go too far and single out private parties to take on a burden that really should be borne by the public.

This case doesn't resemble the fact pattern or the procedural posture of many of the cases the City cites which involves condemning properties as to public nuance or shutting down businesses to respond to a dangerous situation like an erupting volcano.

So all the questions under this factor and the Penn Central test as a whole, are intensely factual and we have pleaded more than enough here to survive a motion to dismiss.

I will go next to our contract clause claim, which is pretty closely related. The ordinance altered the terms of our existing contract and diminished their value by requiring us to have that increased pay for shoppers and stripping us of our discretion to limit access to our platform. We've identified in our complaint the specific contractual provisions that the ordinance (inaudible). The City hasn't really disagreed with that.

Under the contract clause analysis, the first test is to look at whether there's been a substantial impairment of the contractual relationship. And (inaudible) similar to the economic impact they talked about, we pleaded that.

The next step of the analysis is to look at the steps between the law's means and its ends. And that factor requires that laws be drawn in an appropriate and reasonable way to advance for a legitimate public purpose. And this goes back to our points about pretext and the lack of rational basis where the ordinance doesn't serve its stated purpose under the facts as we've alleged. And here too the City falls deaf in its assertion that the ordinance's exercise of police powers, there's no role for judicial review or constitutional scrutiny. But it's well established that even otherwise legitimate exercise of the police power -- and we dispute that here -- but even if they're legitimate, they can still violate the contract impairment clause. And the U.S. Supreme Court and the Washington Supreme Court has made clear that the contract clause is a limitation of police power that might otherwise be available.

And there's similar points in argument here about the degree of regulation in the industry. It's not plausible to compare this industry to the industries like (inaudible) questions like pension withdraw liability or energy pricing,

which come up in some of the contract cases the City relies on, which again involves a different procedural posture where there's a much more developed factual record.

And also under the Supreme Court precedent, the narrow focus of the ordinance here targeting food delivery companies alone render this suspect.

So for all those reasons, we've stated a claim for contract impairment.

THE COURT: If you wish to retain three minutes, you've got two minutes to wrap up.

MR. RUBENS: Okay. Well, I'll just briefly address our equal protection and privileges immunities claims, which go hand in hand and, again, connect to some of the points we've already discussed I think. The rational basis standard may be deferential, but here we have alleged there is no connection between what the ordinance did and its stated purpose of providing for public health. And, in fact, it was pretextual and served a longstanding goal that was unrelated to the pandemic.

So under equal protection law, and certainly given where we are in this case, those allegations are not -- you know, to survive the motion to dismiss and for us to develop a record showing that rational basis isn't a rubber stamp, and we're entitled to proceed on that claim.

And the privileges and immunities analysis is similar.

The first step of that test is to look to other -- there's a privilege which -- and Washington courts have recognized that the right to carry on business is fundamental for purposes of the clause. And we pleaded that this is more than an ordinary business regulation with an incidental effect that really goes to the heart of our operation and the ability to operate profitability.

And having identified that privilege, the next step of the test -- again, the step between a means and the end -- but under the privileges and immunity clause, it's a more demanding standard than rational basis. The Court can't hypothesize facts that support the government's justifications.

So for the same reason, the ordinance lacks rational basis, it fails the privileges and immunities clause.

So I'll reserve the remainder of our time for rebuttal.

THE COURT: Thank you, Mr. Rubens.

I'll turn now to Mr. Miller on behalf of the City of Seattle.

MR. MILLER: Thank you, Your Honor.

Plaintiffs' complaint fails to state any claim upon which this Court may grant relief, and that's for four reasons. First, the gig and workers premium pay ordinance is a proper and valid exercise of the City's authority to protect public health, safety, and welfare.

Second, state law limiting the capacity for local governments to tax groceries simply does not preempt the public -- the police power ordinance at issue in this case.

Third, the plaintiffs' private contracts for labor cannot supersede the City's ordinance in acting for the public interest.

And, fourth, the ordinance easily survives rational basis review.

Turning first to the police powers. It is quite clear that it is at the absolute heart of the police powers for governments to regulate working conditions. Properly framed, the plaintiffs' complaint would like to elevate their private arrangements to purchase work from people over -- yes, Your Honor?

THE COURT: I want to tell you what troubles me potentially about this argument so you can address that. It is, as you said, beyond doubt that governmental authorities have regulatory power to regulate workplace conditions and wages and benefits.

But what is unusual about this case, it seems to me, is that not only does the City's ordinance do that, but it precludes the regulatee from modifying its business or raising prices in a way to adjust for or recoup the additional expenses imposed by the regulation. That's a squeeze move that is unlike any other regulation that I can

think of. And combined with the pleaded allegations, which the Court must give great -- must credit at this stage of the case on a motion to dismiss, raise issues as to whether the -- you know, I think there is a question. Tell me how the City responds to that.

MR. MILLER: Thank you, Your Honor.

Yes, so I've been saying, at the core of the law is this minimum compensation, as we've described it. That's the main thing that's passed into law, that there's an additional amount paid to the drivers for each delivery. The law contains other portions that you were just referencing, Your Honor, that include restrictions on changing the compensation structure for those drivers or for restricting their access to work. I mean, both of those are clearly focused on ensuring that they get the minimum compensation that the ordinance requires.

The other two restrictions in the ordinance are on passing on the costs associated -- the per-trip costs associated with groceries only, and then restricting Plaintiffs' ability to change their surface areas in the city.

The first point I would make about all of these restrictions is they are limited to the case where the plaintiffs undertake those actions because of the ordinance going into effect. When other things happen to their businesses that impact the way they operate or create a need

to make changes in those areas, the ordinance would not prohibit that. That would be the first point I would make.

The second point I would make is -- well, I sort of already made it. The restrictions on changing compensation to the drivers and changing their access to work are related to the minimum compensation piece.

The other restrictions are part of the public health aspect of this ordinance. There's no dispute in this case that these drivers are critical to providing safe access to food, as we've seen throughout the course of this pandemic. Congregations of people are dangerous and lead to spread. So having the capacity to purchase this -- to purchase and obtain food without having to go into public and to get into groups -- yes, Your Honor?

THE COURT: Thank you. Granted that, on its face, that is a reasonable and rational measure in response to a public health crisis posed by this pandemic. But what about the argument that it was -- the regulation -- the ordinance was unnecessary because that was all happening anyway? Instacart's business has been booming since the pandemic hit, new drivers have been hired, drivers were making record wages -- compensation -- not wages, but compensation because there was such demand during the pandemic for delivery services to keep that distance.

Was the ordinance -- was there a real need that the

ordinance was to address? Or on this motion, which is at an early stage of litigation and where I must give deference to the pleading and view it in the light most favorable to the plaintiff and even consider hypothetical facts that are consistent with the pleading, can the Court say there's no pretext as a matter of law on these -- on this pleading?

MR. MILLER: Yes, Your Honor. This gets to -- in fact, on the Court's (inaudible) here which is the degree of inquiry that the Court should undertake when it comes to examining the motives or the purposes of the ordinance. It's true we are in a motion to dismiss stage, but it is also true that rational basis review works on -- in such a way that any stated facts that can be articulated that justifies regulation allows the regulation to survive a rational basis review.

Under those circumstances, there are plenty of bases that are articulated both in the ordinance itself and in the pleadings before this Court that explain the basis for this action. That is enough for the Court to dismiss the complaint.

The counterfactual is perhaps helpful, Your Honor. If the Court endorses a rule where any allegation of wrongdoing by a governmental body is sufficient to reach discovery, it's inviting a lot of meritless litigation that ultimately results in nothing.

And this is particularly true when you're looking at something like responding to a global pandemic. I mean, that is -- that's -- you know, through Business Owners Association and Jacobson.

And the thing that's important to understand there is that for those kinds of police power exercises, the courts routinely approve far more far-reaching impacts on business operations.

Coopers Business Owners Association, the entire town was shut down and businesses were physically excluded from the property. In Jacobson, the court --

THE COURT: But the difference, Mr. Miller, I think could be that in those cases there was no facial, logical, reasonable challenge to the need for the regulation.

Here the plaintiffs assert -- and it's a credible assertion if it turns out to be factually supported, but at this point I have to assume it could be factually supported -- that there was no need, that the food delivery services were thriving. It was happening all without governmental intervention. How do you deal with that?

MR. MILLER: Well, Your Honor, the businesses in Cougar Business Association alleged the same thing. They alleged that they no longer needed to be

restricted from access to their properties, that the restriction in access had gone on too long and that there wasn't any further danger from the volcano. And the state Supreme Court was unwilling to credit that, correctly in our opinion.

This is the issue about: Where do you place responsibility for determining what actions are most necessary in the face of great calamity? And the courts have been consistent about placing that duty with legislative bodies, like the City Council.

You know, to the extent that you are to make inferences in favor of the plaintiffs on this motion to dismiss, they still have to make some kind of (inaudible). The plaintiffs' assertion, for instance, this is an organizing tactic, doesn't make a lot of sense since it's not the kind of thing that the workers would necessarily get out of and organizing campaign. I mean, first of all, they're just getting it, whether or not they're organized. And secondly, Plaintiffs consistently take the position that these workers are independent contractors and would not be able to organize under (inaudible) and Aldrich.

If there isn't some level of deference given to the City's capacity to find facts and make determinations about the best way to address crises or problems that

face the public, then you are going to set up a situation where the City cannot manage.

THE COURT: Well, clearly the City, in responding to a public health emergency, is entitled to deference. I think that's beyond dispute.

It's a question of whether at this stage of litigation, on a motion to dismiss, the City can simply invoke that and that's enough to lead to dismissal of allegations that I must accept as true. That's where I'm -- that's where I'm troubled.

MR. MILLER: I understand, Your Honor. And again, I think that the difference is here you're talking about allegations as set against the City's articulable rational basis for what it did.

THE COURT: Okay. But I'm going to take one more run at this, Mr. Miller, and I don't think Cougar really helps you. And that is: Was there a need? Did the legislative body in this case have before it a real problem, a demonstrated need that it was rationally and reasonably trying to address through this ordinance?

MR. MILLER: Yes, Your Honor. That's part of her findings. Again, if you look at the ordinance, the findings conclude that this service is critical to the community and that the law will increase protection of workers, will allow them to take steps to protect

themselves in the community, such as purchasing PPE or, you know, taking care of themselves or others, and will compensate them for the hazards that they face.

I mean, that's another sort of similar and related bases on which this is a proper exercise of police powers. Just like minimum wage laws or other workplace laws, there is an independent public purpose in ensuring that workers receive the minimum compensation amount.

Here there is a public purpose in ensuring that these workers are compensated for their -- the hazards that they face. And that is unequivocal and, in fact, cannot be disputed, I don't think, that paying these workers more money would compensate them for the hazards they face.

So there are a variety of rational bases for legitimate public ends that are available on the face of the ordinance itself and in the argument presented to this Court.

THE COURT: Thank you.

MR. MILLER: So moving on, the next topic I'd like to put forward here is the taxation issue. So Plaintiffs are attempting to rely on a Washington state law that preempts local taxation. It appears in a part of the revised code that it's all about taxation. And, in

fact, its key phrase, as Counsel suggested, the -- let me -- in the prohibition on imposing or collecting any "tax, fee, or other assessment on groceries."

"Tax, fee, or other assessment on groceries" is defined in toto, with that phrase, to be a list of taxes followed by a catch-all that's "any other similar levy, charge, or exaction." On its face this law prevents taxes, not wage regulations.

Now, Plaintiffs have advanced an alternative reading of this language that in the City's view is not plausible. But even if this Court were to consider it to be plausible, at most that creates the possibility that there's ambiguity in the way that this section in the laws have been written.

If the Court thinks that there is ambiguity in this section, then the statutory interpretation require the Court to look at legislative intent. Because this was passed as an initiative, that evidence of that legislative intent is the voter pamphlet, which is attached as Exhibit A to our motion to dismiss. And from that it is unequivocal that the point of this initiative in this law was to prevent taxes. In fact, I believe the proponents for it ended their statement with, "This is a prohibition on local taxes on groceries, period."

Plaintiffs' position that a requirement to pay wages to people delivering groceries constitutes anything like what the initiative or what the law is intended to prohibit is simply not credible.

I'd like to move on now to the constitutional claims. And again here I think the important thing to keep in view is the contracts basis for these claims. Plaintiffs are attempting to return to a much earlier time in American jurisprudence when private contracts for labor superseded regulation and the public interest.

So looking first at their contracts clause claim, the idea that agreeing to pay somebody money for the work that they do can be outside of regulations on what must be paid for that work, has been disclaimed since at least Parrish in the 1930s, which upheld the Washington state Minimum Wage Act.

The same is true under Washington state laws or jurisprudence, including the Optimer case from the Court of Appeals, that found that legislation cannot unconstitutionally impair contracts when it is a valid exercise of police powers.

Plaintiffs have raised the issue that they consider their workers to be independent contractors and suggests that this takes them entirely out of the rubric. That's incorrect. The

fundamental heart of Lochner era decisions on this subject, which were roundly protected and have remained so for the last eight decades, was that a private relationship between two parties is public interest legislation, and that simply isn't the case here.

And, in fact, that is the kind of conclusion that the Western District of Washington reached just last week in the challenge brought against the City's grocery employees hazard pay ordinance.

Another issue in looking at these contract impairment claims is the temporary nature of the law. One of the critical features of this law is that it is temporary. It goes out of existence at the time that the emergency ends.

Under those circumstances, the Supreme Court has held that such laws do not impair contracts. And this is the Blaisdell case from 1934 that upheld an eviction moratorium enacted during the height of the Great Depression, on the basis that it was only temporary and so it could not be said to impair contracts.

But looking further, if you look at the well established contracts clause test, as described by Counsel, there is no substantial impairment to Instacart's contracts for labor. While Instacart may be a relatively new business, it's the food delivery

network company and other platform and equal pay worker businesses that have been the subject of significant action at both the state and local levels of the last five to ten years.

In fact, recently California had turned many of these workers into employees, subject to -- or with access to all of the regular protections for employees. It's not credible for Instacart to claim it could not have foreseen wage regulation under these circumstances.

But even if it had, we're back into the area we were discussing earlier about the relationship between the goals of the law and how it was achieved. Those remain in the rational basis arena and as -- like I said, the City believes that it firmly has a rational basis and that there aren't any (inaudible) facts that really contradict that given the deference due to the legislative fact-finding and to the capacity to express a rational basis for the law.

And this leads nicely into the Takings clause. So Plaintiffs have made it clear -- or, I'm sorry, the Takings claim. Plaintiffs have made it clear that the Takings claim is entirely about their property rights in their contracts. The issue with this is that it is clear, under existing Supreme Court precedent, that you cannot get a Takings claim for the property interest in

your contracts once the contract has been appropriated.

So the seminal case for this is Omnia Commercial Co., from the 1920s, where the Supreme Court held that there was no Takings. And the facts of those cases -- that case -- is that Omnia had contracted to buy steel from Allegheny Steel Works. The government had seized that steel as part of its war effort in the First World War, and Omnia brought a claim for an impairment in its existing contract.

The Supreme Court said that's a mere frustration of the contract; it's not an appropriation. In order for it to be an appropriation, the government would have had to take over the obligations of the contract and the rights to enforce those obligations. Anything less is merely a frustration and is not taking.

And so in Omnia, the government had completely -- had made the contract impossible to fill. Here at most the City's ordinance has some impact on how much money changes hand under the contract. That cannot be a taking.

And you can see this in part because if it were a taking, the further Penn Central Regulatory Test doesn't make a lot of sense. It talks about things like -- or it doesn't make a lot of sense to get to the Penn Central Test, in part because it would completely

obliterate the already existing contract clause test that we were just talking about.

Allowing something that merely has an impact on a contract to become a taking would render every contract clause claim -- or it would never be brought, because they would all be brought as Takings claims, with their different standards and the factual inquiry that goes along with them.

And then I guess for the...

THE COURT: Mr. -- Mr. Miller, you muted yourself accidentally.

MR. MILLER: ...me, Your Honor, I hit my mouth while I was (inaudible).

THE COURT: You found your voice.

MR. MILLER: So the last subject I'd like to address is the equal protection guarantees, broadly stated, that covers both the federal and state constitutional protection guarantees.

Again, this is the rational basis test we discussed at length earlier. I think that that sets out the City's position on this front.

With respect to privileges and immunities, the potentially heightened standard under state law, Plaintiffs have really failed to plead a fundamental right to citizenship. The state court cases made

clear, fundamental rights to citizenship, when it comes to the right to carry on business, effectively has to be framed in terms of an inability to carry on business. That's the Ralphs v. Wenatchee case. Anything less than that does not implicate that fundamental right, and so the proper standard for review is rational bases.

Just to sum up then, you know, Plaintiffs just have not stated a claim upon which really may be granted. The ordinance is a valid exercise in the City's police powers to regulate working conditions and it simply isn't a tax because it is that kind of a regulation.

It cannot be overwritten by the private contracts for labor. That view of the law has been roundly rejected for decades. And there's unequivocal rational bases, both on the face of the law itself and easily articulated by the parties in this courtroom.

This Court should reject the plaintiffs' invitation to set (inaudible) legislative response to the pandemic and override a critical health and safety law.

THE COURT: Thank you, Mr. Miller. I'll return to counsel for Plaintiffs for rebuttal arguments.

MR. MCKENNA: Thank you, Your Honor. I'll just take one minute on the 6034 and police powers, and then hand

it off to Mr. Rubens.

Your Honor, the City insists again in the argument today that the statute and inititiave only prohibit taxes. That simply isn't true. The statute refers to taxes, fees, and other assessments. Under Washington law fees are not taxes. And it goes on to define tax, fees, or other assessment very broadly, as we've already discussed.

Number 2 comes back to a point or a question you asked earlier about the fact that the ordinance attempts to -- the ordinance prohibits charges being added to customers' bills as an additional grocery delivery fee. The statute doesn't prohibit fees only that are passed through to the customers in charges. It prohibits the imposition of the fees on grocery deliveries, and it applies.

On police powers, Your Honor, as you know, that we are here on 12(b)(6). The cases that the City is relying on range from decisions arrived at after full trials to decisions arrived at on summary judgment. And here we think we're entitled to discovery in order to, you know, reach trial or at least summary judgment to substantiate our claim that the ordinance is pretextual.

Yes, the City can enact ordinances that are a valid

exercise of police powers, but the police power exercise cannot be pretextual. We think that's what discovery is going to further demonstrate. That's why we believe that we should be allowed to proceed.

Mr. Rubens.

MR. RUBENS: Thank you.

The same claims apply to the constitutional analysis where, as some of Your Honor's questions recognize, their separation of powers deference concerns are somewhat premature. We're not asking the Court here to overrule Jacobson or revise Lochner. We're just asking for the normal 12(b)(6) standard that requires our pleaded facts to be credited.

We've raised two key questions here of: Was there a need for this ordinance and was the ordinance pretextual. And we've pleaded facts on both of their points. The City disagrees but its arguments turn on (inaudible) inferences or evidence that just can't be resolved on the pleadings alone.

Was this a squeeze move, does the provision for changes that aren't as a result of the ordinance actually give us the ability to recoup some of this? This is the proper time to answer those questions.

And similar points reverberate throughout the constitutional claim. This is temporary, but how long

is temporary? It's been a year now. Were the contracts appropriated? Unlike (inaudible) the ordinance here really targets our contracts and appropriates them. It doesn't just affect them incidentally.

On the privileges and immunities, we've pleaded that this goes beyond garden-variety regulation and really cuts to the ability to carry on our business at a profit.

So that's what distinguishes our allegations here from a minimum wage for independent contractors or the type of hazard pay that just adds an increased amount to workers' pay. That was an issue in Washington Northwest Groceries case that was decided recently, but it's completely distinguishable from the combination of features here.

The City is really leaning on the rational basis standards, you know, that we've pleaded that (inaudible) claim under those standards, and many of our claims don't even depend on that standard. They are -- don't allow a hypothesized tax or they require a tighter fit and a more searching inquiry under the Takings contract (inaudible) clause.

So for all those reasons we've stated claims on which relief should be granted and the City's motion should be denied.

THE COURT: All right. Thank you, Counsel, all of you, for very carefully, thoroughly, and scholarly briefing an argument on these issues.

I want to begin with the standard of review that applies to a motion such as this, which is a Civil Rule 12(b)(6) motion to dismiss at the very earliest stage of the case, before discovery has gotten underway.

The standard, as counsel know, is that dismissal is warranted only if the Court concludes beyond a reasonable doubt that the plaintiffs cannot prove any set of facts which would justify recovery. The Court must presume all facts alleged in the plaintiffs' complaint to be true, and I may consider hypothetical facts supporting the plaintiffs' claims, hypothetical facts that are consistent with the facts alleged.

A motion to dismiss on this kind of motion is granted, as our Court has noted, and I quote, sparingly and with care. And as a practical matter, quote, only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

However, I must note that conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion.

So with that framework in mind, the standard of

review -- and as counsel well know, but I want to make sure the parties and the public know -- this Court is not ruling on the merits today. A motion to dismiss does not invoke the merits. I don't have evidence in front of me. I have allegations in a pleading that I must accept as true.

I'm going to start with the motion as applied to RCW Chapter 82.84 The plaintiffs allege that the ordinance is prohibited by that law which was passed by initiative of the people, Initiative 1634.

As the City has argued, the statement in the voters pamphlet in support of that initiative focused on taxation of groceries and pointed to -- similar to -- it's ironic, as the plaintiffs here allege that there's a pretext, so did the opponents of the grocery tax. They claimed that it was a pretext because it was supported by big soda. It was meant to oppose the imposition on taxes of sweet -- soft drinks.

But in any event, the voters pamphlet and the title given to the ordinance state that it's a "concerning taxation of certain items intended for human consumption" and that the code reviser who codified the initiative when it passed entitled it "The local grocery tax restrictions."

Now, of course, those aren't binding on the Court,

but they do kind of foreshadow what is in the substance of the law itself.

That law prohibits governments from, quote, imposing or collecting any fee -- any tax, fee, or other assessment on groceries. And that phrase, "tax, fee, or other assessment on groceries" is specifically defined as "a sales tax, a gross receipts tax, a business and occupation tax, a business license tax, an excise tax, a privilege tax, or any other similar levy, charge, or exaction of any kind on groceries or the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption thereof."

The Court must give that language, the language of the statute, its usual and customary meaning. And if there is ambiguity in that language, the Court may look to the legislative intent, which is, in this case, expressed in the voters pamphlet.

I find that the plain language of Chapter 82.84 confirms that the statute prohibits taxes and similar fees and assessments, fees and assessments that would go to the governmental entity.

There is nothing in the language of the statute, or for that matter in the voters pamphlet, which describes the intent of the initiative that would prohibit a

local government from regulating worker compensation or working conditions, which is what the Seattle ordinance here does.

So I find that as a matter of law, the ordinance does not violate Chapter 82.84, and the City's motion to dismiss that count is granted.

Turning to the other issues brought by this motion to dismiss. Really the bedrock question is, underlying all of the others and related to all the others, is whether the ordinance is a proper exercise of the City's regulatory authority known in the law as its "police powers."

And it's well established that the City has brought authority to enact legislation to promote and protect public health, safety, and welfare. And that broad authority clearly extends to regulation of working conditions, including setting minimum wages, maximum hours, and other types of employment regulations.

Furthermore, it's well established that in addressing the exigencies of a public health emergency, the City's regulatory authority is given greater deference by the courts.

Ordinarily -- well, not ordinarily. When there is a public health emergency, it's the political branches of government, in this case the City Council and the mayor,

who are given the authority to determine what must be done to protect the general, health, safety, and welfare. It is not a function of the Court to second guess the policy decisions of the political branches.

A challenge to the exercise of the City's police powers will only be sustained by a court if the regulation is palpably unreasonable or arbitrary. As the Washington Supreme Court said in the City of Seattle vs. Webster case:

> "For an ordinance to be void for unreasonableness, it must be clearly and plainly unreasonable. The burden of establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. Every presumption will be in favor of constitutionality. And if the 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.
>
> "These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions."

So that's the overview. But this case is not a

simple case. First, it's the setting in which the motion is brought, which is a Rule 12(b)(6), and which I must give credit to the well-pled allegations. I must accept them as true. All reasonable inferences must be viewed in the light most favorable to the plaintiffs, and even hypothetical facts must be assumed to test the challenge to the complaint at this stage.

And that high bar on a motion to dismiss under Rule 12(b)(6), combined with the allegations about the unique nature of this ordinance, which not only regulates compensation to drivers but also precludes the plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses, combined with the allegations of pretext, which are supported by allegations that there was no real need here since delivery services were thriving, compensation to drivers was at record highs, all of that must be accepted as true, I'm not ruling on the merits -- but based on the fact that I must accept those all as true, I find that the claim of pretext of unreasonable regulation in the face of those alleged facts -- they're not proven, they're alleged -- cannot be dismissed on a motion for -- a motion to dismiss, on a Rule 12(b)(6) motion.

So turning then to the constitutional challenges. Just as the existence of broad powers under police -- broad authority under police powers and authority made even broader by the exigencies of a pandemic can't foreclose a court from reviewing a challenge to a regulation, similarly, constitutional rights cannot be -- cannot be infringed just because there's an emergency situation.

The right to regulate is given greater leeway in an emergency, as the City persuasively argues, but again we're at the pleading stage here.

So with respect to whether the ordinance affects a taking under the Fifth Amendment of the U.S. Constitution and Article 1 Section 16 of the Washington Constitution, the issue here is that the plaintiffs have pled that their business model is being appropriated by being required to deliver services at higher costs to the plaintiffs and an inability to adjust their business model in response to those regulations.

I cannot rule as a matter of law that that does not meet the threshold requirement of stating a claim under the Takings clauses, and so I'm denying the City's motion to dismiss under Rule 12(b) under the Takings clauses of both constitutions.

Similar analysis applies to the contracts clause claims under both the federal and state constitution. As the City notes and its position is well supported, prohibition under the contract clause must be accommodated to the inherent police power of the state, and, in general, contracts can be regulated.

But the issue here is whether there's a substantial impairment. And the plaintiffs have alleged -- again, they have not yet proven, we're not at the proof stage -- but they have alleged a substantial impairment caused by the unique nature of this ordinance, which imposes burdens and restricts the ability to adjust a business model to accommodate the increased burdens. So the City's motion to dismiss the contracts clause claim is denied.

Turning to the equal protection clause. Equal protection challenges are reviewed under the rational basis test, which is the lowest threshold for review. But this is intertwined with the police power analysis. And at this stage of litigation, at the pleading stage and a motion to dismiss, where I must accept the allegations as true and all inferences in favor of the plaintiffs, I cannot as a matter of law say that the City's ordinance must be upheld as rational.

If the plaintiffs are able to establish through

evidence that this was a pretext, that it was not a reasonable exercise of the City's police power, that it was arbitrary, then the plaintiffs may be able to overcome the deference given to the City under the equal protection clause. We're not at that stage yet, so I deny the City's motion to dismiss the equal protection clause claims.

And for all the reasons I've just explained under the constitutional claims, the City's motion to dismiss the Section 1983 claim must be denied at this stage.

I reiterate, this is not a decision on the merits of litigation. I'm deciding only whether the plaintiffs have well-pled claims that survive this early challenge, and with the exception of the statute I have ruled that the claims do survive that challenge at this stage.

So the City's motion is granted in part, denied in part. The RCW 82.84 claim is dismissed with prejudice. It seems to me that any amendment would be futile. The other claims remain.

And as I recall, there's a stay on discovery in place. Is that correct, Counsel? And so the stay is lifted as part of this order.

I will be getting a written order out hopefully this afternoon. Are there any questions or is there

anything else we should address at this time?

MR. MILLER: Your Honor, I have one question about lifting the stay. The order that Judge Rogoff had in place gave the City 20 days past the date of ruling on its motion to respond to discovery. Does that deadline remain in place?

THE COURT: Does that meet your -- will that work for you? Are you asking for something different?

MR. MILLER: No, Your Honor. That would work for us. The stay order included the 20 days. I wanted to be sure that it remained in place.

THE COURT: Oh, I think it should. And I'm seeing Mr. McKenna nod, so, yes, that will remain in place. Yes.

Any other questions? Very well. Again, thank you for a very thorough, thoughtful briefing and argument. That will conclude our hearing this morning. Take care, everyone.

MR. MCKENNA: Thank you, Your Honor.

(March 26, 2021 hearing concluded)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or other legal recordings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the electronic recording directly from the trial court conducting the hearing; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

In WITNESS WHEREOF, I have hereunto set my hand this 2nd day of April, 2021.

Bonnie Reed
_____

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Appendix C

Signed Ordinance 126094

CITY OF SEATTLE

ORDINANCE 126094

COUNCIL BILL 119799

AN ORDINANCE relating to gig workers in Seattle; establishing labor standards requirements for premium pay for gig workers working in Seattle; amending Sections 3.02.125 and 6.208.020 of the Seattle Municipal Code; declaring an emergency; and establishing an immediate effective date; all by a 3/4 vote of the City Council.

WHEREAS, the new coronavirus 19 (COVID-19) disease is caused by a virus that spreads easily from person to person and may result in serious illness or death, and is classified by the World Health Organization as a worldwide pandemic; and

WHEREAS, COVID-19 has broadly spread throughout Washington State and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, the definitions of "employee" and "employer" in local, state, and federal laws are broad, but food delivery network companies rely on business models that hire gig workers as "independent contractors," thereby creating barriers for gig workers to access employee protections; and

WHEREAS, gig workers working for food delivery network companies during the COVID-19 emergency face magnified risks of catching or spreading disease because the nature of their work can involve close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease; and

WHEREAS, The City of Seattle (City) intends to make it clear that gig workers working for food delivery network companies have a right to receive premium pay for work performed during the COVID-19 emergency; and

WHEREAS, the City intends to make it clear that provision of premium pay should not result in food delivery network companies reducing or otherwise modifying the areas in the City served by the companies, reducing a gig worker's compensation, limiting a gig worker's earning capacity, or adding charges to customers; and

WHEREAS, establishing premium pay standards for gig workers working during the COVID-19 emergency will increase retention of these gig workers and compensate them for the hazards of working on the frontlines of a global pandemic; and

WHEREAS, the City is a leader on wage, labor, and workforce practices that improve workers' lives, support economic security, and contribute to a fair, healthy, and vibrant economy; and

WHEREAS, establishing a labor standard that requires premium pay for gig workers working for food delivery network companies is a subject of vital and imminent concern to the people of this City and requires appropriate action by the City Council to establish this labor standard for gig workers; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council (Council) finds and declares that:

A. In the exercise of The City of Seattle's police powers, the City is granted authority to pass regulations designed to protect and promote public, health, safety, and welfare.

B. This ordinance protects and promotes public health, safety, and welfare during the new coronavirus 19 (COVID-19) emergency by requiring food delivery network companies to provide premium pay for gig workers performing work in Seattle, thereby increasing retention of gig workers who provide essential services on the frontlines of a global pandemic and who

should be paid additional compensation for the hazards of working with significant exposure to an infectious disease.

C. The World Health Organization (WHO) has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring dramatic interventions to disrupt the spread of this disease.

D. On February 29, 2020, Washington Governor Jay Inslee proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak.

E. On March 3, Mayor Jenny Durkan proclaimed a civil emergency in response to new cases of COVID-19, authorizing the Mayor to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare, and alleviate damage, loss, hardship or suffering.

F. On March 16, 2020, Washington Governor Jay Inslee and the Public Health – Seattle & King County Local Health Officer issued parallel orders temporarily shutting down restaurants, bars, and other entertainment and food establishments, except for take-out food.

G. On March 23, 2020, Washington Governor Jay Inslee issued a "Stay Home – Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes through April 6, 2020. In addition to healthcare, public health and emergency services, the "Stay Home – Stay Healthy" proclamation identified delivery network companies and establishments selling groceries and prepared food

and beverages as essential business sectors critical to protecting the health and well-being of all Washingtonians and designated their workers as essential critical infrastructure workers.

H. On April 2, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 4, 2020.

I. On May 1, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 31, 2020 in recognition that the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace.

J. On May 4, 2020, Washington Governor Jay Inslee announced a "Safe Start" plan that reopens Washington's economy in phases and has restrictions on the seating capacity of restaurants during three of the four phases and physical distancing for high-risk populations and worksites during all four phases.

K. As of May 20, 2020, the World Health Organization Situation Report reported a global total of 4,801,202 cases of COVID-19, including 318,935 deaths; the Washington State Department of Health and Johns Hopkins University reported 18,811 cases of COVID-19, including 1,031 deaths in Washington State; and Public Health – Seattle & King County reported 7,617 cases of COVID-19, including 530 deaths, in King County.

L. Food delivery network companies are essential businesses operating in Seattle during the COVID-19 emergency and rely on business models that hire gig workers as independent contractors, thereby creating barriers for gig workers to access employee protections established by local, state, and federal law, and making gig workers highly vulnerable to economic insecurity and health or safety risks.

M. Gig workers working for food delivery network companies are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. They can work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited or no ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease.

N. In the pursuit of economic opportunity, many gig workers are immigrants and people of color who have taken on debt or invested their savings to purchase and/or lease vehicles or other equipment to work for food delivery network companies.

O. Gig workers making deliveries for food delivery network companies are supporting community efforts to engage in physical distancing and mitigate the spread of COVID-19 while simultaneously exposing themselves to a higher risk of infection

P. Gig workers working for food delivery network companies bear the brunt of the time and expenses necessary for cleaning and disinfecting equipment and engaging in other efforts to protect themselves, customers, and the public from illness.

Q. Premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress.

R. Gig workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress due to the significant risk of exposure to the COVID-19 virus. Gig workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus

presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection.

S. The availability of food delivery services is fundamental to the health of the community and is made possible during the COVID-19 emergency because gig workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by making deliveries while working in hazardous situations.

T. Establishing an immediate requirement for food delivery network companies to provide premium pay to gig workers protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

U. This ordinance is necessary in response to the COVID-19 public health emergency because requiring food delivery network companies to provide premium pay to gig workers compensates gig workers for the risks of working during a pandemic and the safety measures they are undertaking to protect themselves, customers, and the public from catching or spreading illness. The provision of premium pay also better ensures the retention of these essential workers who are on the frontlines of this pandemic to provide essential services, who are needed throughout the duration of the COVID-19 emergency, and who deserve fair and equitable compensation for their work.

Section 2. As the substantive effects of this ordinance are not permanent, this ordinance is not intended to be codified. Section numbers are for ease of reference within this ordinance, and section and subsection references refer to numbers in this ordinance unless stated otherwise.

PREMIUM PAY FOR GIG WORKERS

100.005 Short title

This ordinance shall constitute the "Premium Pay for Gig Workers Ordinance" and may be cited as such.

100.010 Definitions

For purposes of this ordinance:

"Adverse action" means reducing the compensation to a gig worker, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, putting a gig worker on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, engaging in unfair immigration-related practices, filing a false report with a government agency, or otherwise discriminating against any person for any reason prohibited by Section 100.050. "Adverse action" for a gig worker may involve any aspect of work, including compensation, work hours, responsibilities, or other material change in the terms and conditions of work. "Adverse action" also encompasses any action by the hiring entity or a person acting on the hiring entity's behalf that would dissuade a reasonable person from exercising any right afforded by this ordinance.

"Agency" means the Office of Labor Standards and any division therein.

"Aggrieved party" means a gig worker or other person who suffers tangible or intangible harm due to a hiring entity or other person's violation of this ordinance.

"Application dispatch" means technology that allows customers to directly request dispatch of gig workers for provision of delivery services and/or allows gig workers or hiring entities to accept requests for services and payments for services via the internet using mobile interfaces such as, but not limited to, smartphone and tablet applications.

"City" means The City of Seattle.

"Compensation" means the total payment owed to a gig worker by reason of working for the hiring entity, including but not limited to hiring entity payments for providing services, bonuses, and commissions, as well as tips earned from customers.

"Deactivation" means the blocking of a gig worker's access to the hiring entity's platform, changing a gig worker's status from eligible to provide delivery services to ineligible, or other material restriction in access to the hiring entity's platform that is effected by a hiring entity.

"Director" means the Director of the Office of Labor Standards or the Director's designee.

"Director rules" means: (1) rules the Director or Agency may promulgate pursuant to subsection 100.060.B or 100.060.C; or (2) other rules that the Director identifies, by means of an Agency Q&A, previously promulgated pursuant to authority in Seattle Municipal Code Title 14. Rules the Director identifies by means of an Agency Q&A shall have the force and effect of law and may be relied on by hiring entities, gig workers, and other parties to determine their rights and responsibilities under this ordinance.

"Drop-off point" means the location of any delivery resulting from the online order.

"Eating and drinking establishment" means "eating and drinking establishment" as defined in Seattle Municipal Code Section 23.84A.010.

"Food delivery network company" means an organization whether a corporation, partnership, sole proprietor, or other form, operating in Seattle, that offers prearranged delivery services for compensation using an online-enabled application or platform, such as an application dispatch system, to connect customers with workers for delivery from one or more of

the following: (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order. "Food delivery network company" includes any such entity or person acting directly or indirectly in the interest of a food delivery network company in relation to the food delivery network company worker.

"Food delivery network company worker" means a person affiliated with and accepting an offer of prearranged delivery services for compensation from a food delivery network company. For purposes of this ordinance, at any time that a food delivery network company worker is logged into the worker platform, the worker is considered a food delivery network company worker.

"Food processing" means "food processing" as defined in Seattle Municipal Code Section 23.84A.012. "Front pay" means the compensation the gig worker would earn or would have earned if reinstated by the hiring entity.

"Gig worker" means a food delivery network company worker.

"Grocery store" means "grocery store" as defined in Seattle Municipal Code Section 23.84A.014.

"Hiring entity" means a food delivery network company.

"Hiring entity payment" means the amount owed to a gig worker by reason of working for the hiring entity, including but not limited to payment for providing services, bonuses, and commissions.

"Online order" means an order placed through an online-enabled application or platform, such as an application dispatch system, provided by a hiring entity for delivery services in Seattle.

"Operating in Seattle" means, with respect to a hiring entity, offering prearranged delivery services for compensation using an online-enabled application or platform, such as an application dispatch system, to any affiliated gig worker, where such services take place in whole or part in Seattle.

"Pick-up point" means the location of any establishment accessed by the gig worker to fulfill an online order, including but not limited to (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order.

"Premium pay" means additional compensation owed to a gig worker that is separate from hiring entity payments for providing services, bonuses, and commissions, as well as tips earned from customers.

"Rate of inflation" means 100 percent of the annual average growth rate of the bi-monthly Seattle-Tacoma-Bellevue Area Consumer Price Index for Urban Wage Earners and Clerical Workers, termed CPI-W, for the 12-month period ending in August, provided that the percentage increase shall not be less than zero.

"Respondent" means a hiring entity or any person who is alleged or found to have committed a violation of this ordinance.

"Successor" means any person to whom a hiring entity quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the hiring entity's business, a major part of the property, whether real or personal, tangible or intangible, of the hiring entity's business. For purposes of this definition, "person" means an individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, corporation, business trust, partnership, limited liability partnership, company, joint stock

company, limited liability company, association, joint venture, or any other legal or commercial entity.

"Tips" means a verifiable sum to be presented by a customer as a gift or gratuity in recognition of some service performed for the customer by the gig worker receiving the tip.

"Worker platform" means the worker-facing application dispatch system software or any online-enabled application service, website, or system, used by a food delivery network worker, that enables the prearrangement of delivery services for compensation.

"Work-related stop in Seattle" means time spent by a gig worker on a commercial stop in Seattle that is related to the provision of delivery services associated with an online order, and does not include stopping for refueling, stopping for a personal meal or errands, or time spent in Seattle solely for the purpose of travelling through Seattle from a point of origin outside Seattle to a destination outside Seattle with no commercial stops in Seattle.

"Written" or "writing" means a printed or printable communication in physical or electronic format, including but not limited to a communication that is transmitted through email, text message, or a computer or mobile system, or that is otherwise sent and maintained electronically.

100.015 Gig worker coverage

For the purposes of this ordinance:

A. Covered gig workers are limited to those who perform work for a covered hiring entity, where the work is performed in whole or part in Seattle.

B. Work performed "in Seattle" means work that includes a work-related stop in Seattle.

100.020 Hiring entity coverage

A. For the purposes of this ordinance, covered hiring entities are limited to those who hire 250 or more gig workers worldwide.

B. To determine the number of gig workers hired for the current calendar year:

1. The calculation is based upon the average number per calendar week of gig workers who worked for compensation during the preceding calendar year for any and all weeks during which at least one gig worker worked for compensation. For hiring entities that did not have any gig workers during the preceding calendar year, the number of gig workers hired for the current calendar year is calculated based upon the average number per calendar week of gig workers who worked for compensation during the first 90 calendar days of the current year in which the hiring entity engaged in business.

2. All gig workers who worked for compensation shall be counted, including but not limited to:

a. Gig workers who are not covered by this ordinance;

b. Gig workers who worked in Seattle; and

c. Gig workers who worked outside Seattle.

C. Separate entities that form an integrated enterprise shall be considered a single hiring entity under this ordinance. Separate entities will be considered an integrated enterprise and a single hiring entity under this ordinance where a separate entity controls the operation of another entity. The factors to consider in making this assessment include, but are not limited to:

1. Degree of interrelation between the operations of multiple entities;

2. Degree to which the entities share common management;

3. Centralized control of labor relations; and

4. Degree of common ownership or financial control over the entities.

100.025 Premium pay requirement

A. Hiring entities shall provide each gig worker with premium pay for each online order that results in the gig worker making a work-related stop in Seattle. For each online order, hiring entities shall provide the gig worker with premium pay in the following amounts:

1. $2.50 for one pick-up point or one drop-off point in Seattle;

2. $1.25 for each additional pick-up point in Seattle; and

3. $1.25 for each additional drop-off point in Seattle.

B. Hiring entities shall provide premium pay at the same time compensation is provided for the associated online order(s).

C. When providing premium pay, hiring entities shall include notification of online orders that qualified for premium pay and itemize the premium pay separately from other compensation.

D. Hiring entities shall provide the premium pay required by subsection 100.025.A for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

E. If the City establishes a minimum compensation standard for gig workers, the Council intends to consider eliminating the premium pay requirement for gig workers before the termination of the civil emergency proclaimed by the Mayor on March 3, 2020.

100.027 Gig worker and consumer protections

A. No hiring entity shall, as a result of this ordinance going into effect, take any of the following actions:

1. Reduce or otherwise modify the areas of the City that are served by the hiring entity;

2. Reduce a gig worker's compensation; or

3. Limit a gig worker's earning capacity, including but not limited to restricting access to online orders.

4. Add customer charges to online orders for delivery of groceries.

B. It shall be a violation of this Section 100.027 if this ordinance going into effect is a motivating factor in a hiring entity's decision to take any of the actions in subsection 100.027.A unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this ordinance going into effect.

100.030 Notice of rights

A. Hiring entities shall provide each gig worker with a written notice of rights established by this ordinance. The Agency may create and distribute a model notice of rights in English and other languages. However, hiring entities are responsible for providing gig workers with the notice of rights required by this subsection 100.030.A, in a form and manner sufficient to inform gig workers of their rights under this ordinance, regardless of whether the Agency has created and distributed a model notice of rights. The notice of rights shall provide information on:

1. The right to premium pay guaranteed by this ordinance;

2. The right to be protected from retaliation for exercising in good faith the rights protected by this ordinance; and

3. The right to file a complaint with the Agency or bring a civil action for a violation of the requirements of this ordinance, including a hiring entity's denial of premium pay as required by this ordinance and a hiring entity or other person's retaliation against a gig worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this ordinance.

B. Hiring entities shall provide the notice of rights required by subsection 100.030.A in an electronic format that is readily accessible to the gig worker. The notice of rights shall be made available to the gig worker via smartphone application or online web portal, in English and any language that the hiring entity knows or has reason to know is the primary language of the gig worker(s).

100.040 Hiring entity records

A. Hiring entities shall retain records that document compliance with this ordinance for each gig worker.

B. Hiring entities shall retain the records required by subsection 100.040.A for a period of three years.

C. If a hiring entity fails to retain adequate records required under subsection 100.040.A, there shall be a presumption, rebuttable by clear and convincing evidence, that the hiring entity violated this ordinance for the periods and for each gig worker for whom records were not retained.

100.050 Retaliation prohibited

A. No hiring entity or any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this ordinance.

B. No hiring entity or any other person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this ordinance. Such rights include, but are not limited to, the right to make inquiries about the rights protected under this ordinance; the right to inform others about their rights under this ordinance; the right to inform the person's hiring entity, the person’s legal counsel, a union or similar organization, or any other person about an alleged violation of this ordinance; the right to file an oral or written

complaint with the Agency or bring a civil action for an alleged violation of this ordinance; the right to cooperate with the Agency in its investigations of this ordinance; the right to testify in a proceeding under or related to this ordinance; the right to refuse to participate in an activity that would result in a violation of city, state or federal law; and the right to oppose any policy, practice, or act that is unlawful under this ordinance.

C. No hiring entity or any other person shall communicate to a person exercising rights protected in this Section 100.050, directly or indirectly, the willingness to inform a government worker that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of a gig worker or family member of the gig worker to a federal, state, or local agency because the gig worker has exercised a right under this ordinance.

D. It shall be a rebuttable presumption of retaliation if a hiring entity or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 100.050. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the hiring entity fails to rehire a former gig worker at the next opportunity for work in the same position. The hiring entity may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

E. Proof of retaliation under this Section 100.050 shall be sufficient upon a showing that a hiring entity or any other person has taken an adverse action against a person and the person's exercise of rights protected in this Section 100.050 was a motivating factor in the adverse action, unless the hiring entity can prove that the action would have been taken in the absence of such protected activity.

F. The protections afforded under this Section 100.050 shall apply to any person who mistakenly but in good faith alleges violations of this ordinance.

G. A complaint or other communication by any person triggers the protections of this Section 100.050 regardless of whether the complaint or communication is in writing or makes explicit reference to this ordinance.

100.060 Enforcement power and duties

A. The Agency shall have the power to investigate violations of this ordinance and shall have such powers and duties in the performance of these functions as are defined in this ordinance and otherwise necessary and proper in the performance of the same and provided for by law.

B. The Agency is authorized to coordinate implementation and enforcement of this ordinance and may promulgate appropriate guidelines or rules for such purposes.

C. The Director is authorized to promulgate rules consistent with this ordinance and Chapter 3.02 of the Seattle Municipal Code. Any guidelines or rules promulgated by the Director shall have the force and effect of law and may be relied on by hiring entities, gig workers, and other parties to determine their rights and responsibilities under this ordinance.

100.070 Violation

The failure of any respondent to comply with any requirement imposed on the respondent under this ordinance is a violation.

100.080 Investigation

A. The Agency shall have the power to investigate any violations of this ordinance by any respondent. The Agency may initiate an investigation pursuant to Director rules, including but not limited to situations when the Director has reason to believe that a violation has occurred

or will occur, or when circumstances show that violations are likely to occur within a class of hiring entities or businesses because the workforce contains significant numbers of gig workers who are vulnerable to violations of this ordinance or the workforce is unlikely to volunteer information regarding such violations. An investigation may also be initiated through the receipt by the Agency of a report or complaint filed by a gig worker or other person.

B. A gig worker or other person may report to the Agency any suspected violation of this ordinance. The Agency shall encourage reporting pursuant to this Section 100.080 by taking the following measures:

1. The Agency shall keep confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the gig worker or person reporting the violation. However, with the authorization of such person, the Agency may disclose the gig worker's or person's name and identifying information as necessary to enforce this ordinance or for other appropriate purposes.

2. Hiring entities shall provide gig workers with written notice of an investigation. Hiring entities shall provide the notice in a format that is readily accessible to gig workers. The Agency shall create the notice in English and other languages.

3. The Agency may certify the eligibility of eligible persons for "U" Visas under the provisions of 8 U.S.C. § 1184.p and 8 U.S.C. § 1101.a.15.U. This certification is subject to applicable federal law and regulations, and Director rules.

C. The Agency's investigation shall commence within three years of the alleged violation. To the extent permitted by law, the applicable statute of limitations for civil actions is tolled during any investigation under this ordinance and any administrative enforcement proceeding under this ordinance based upon the same facts. For purposes of this ordinance:

1. The Agency's investigation begins on the earlier date of when the Agency receives a complaint from a person under this ordinance, or when the Agency provides notice to the respondent that an investigation has commenced under this ordinance.

2. The Agency's investigation ends when the Agency issues a final order concluding the matter and any appeals have been exhausted; the time to file any appeal has expired; or the Agency notifies the respondent in writing that the investigation has been otherwise resolved.

D. The Agency's investigation shall be conducted in an objective and impartial manner.

E. The Director may apply by affidavit or declaration in the form allowed under RCW 9A.72.085 to the Hearing Examiner for the issuance of subpoenas requiring a hiring entity to produce the records required by Section 100.040, or for the attendance and testimony of witnesses, or for the production of documents required to be retained under Section 100.040, or any other document relevant to the issue of whether any gig worker or group of gig workers has been or is afforded the proper amount of premium pay required by this ordinance and/or to whether a hiring entity has violated any provision of this ordinance. The Hearing Examiner shall conduct the review without hearing as soon as practicable and shall issue subpoenas upon a showing that there is reason to believe that: a violation has occurred, a complaint has been filed with the Agency, or that circumstances show that violations are likely to occur within a class of businesses because the workforce contains significant numbers of gig workers who are vulnerable to violations of this ordinance or the workforce is unlikely to volunteer information regarding such violations.

F. A hiring entity that fails to comply with the terms of any subpoena issued under subsection 100.080.E in an investigation by the Agency under this ordinance before the issuance

of a Director's Order issued pursuant to subsection 100.090.C may not use such records in any appeal to challenge the correctness of any determination by the Agency of liability, damages owed, or penalties assessed.

G. In addition to other remedies, the Director may refer any subpoena issued under subsection 100.080.E to the City Attorney to seek a court order to enforce any subpoena.

H. Where the Director has reason to believe that a violation has occurred, the Director may order any appropriate temporary or interim relief to mitigate the violation or maintain the status quo pending completion of a full investigation or hearing, including but not limited to a deposit of funds or bond sufficient to satisfy a good-faith estimate of compensation, interest, damages, and penalties due. A respondent may appeal any such order in accordance with Section 100.210.

100.090 Findings of fact and determination

A. Except when there is an agreed upon settlement, the Director shall issue a written determination with findings of fact resulting from the investigation and statement of whether a violation of this ordinance has or has not occurred based on a preponderance of the evidence before the Director.

B. If the Director determines that there is no violation of this ordinance, the Director shall issue a “Determination of No Violation” with notice of a gig worker or other person's right to appeal the decision, pursuant to Director rules.

C. If the Director determines that a violation of this ordinance has occurred, the Director shall issue a “Director's Order” that shall include a notice of violation identifying the violation or violations.

1. The Director's Order shall state with specificity the amounts due under this ordinance for each violation, including payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest pursuant to Section 100.200.

2. The Director's Order may specify that civil penalties and fines due to the Agency can be mitigated for respondent's timely payment of remedy due to an aggrieved party pursuant to subsection 100.200.A.4.

3. The Director's Order may specify that civil penalties and fines are due to the aggrieved party rather than due to the Agency pursuant to subsection 100.200.E or 100.200.F.

4. The Director's Order may direct the respondent to take such corrective action as is necessary to comply with the requirements of this ordinance, including but not limited to monitored compliance for a reasonable time period.

5. The Director's Order shall include notice of the respondent's right to appeal the decision pursuant to Section 100.210.

100.200 Remedies

A. The payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest provided under this ordinance is cumulative and is not intended to be exclusive of any other available remedies, penalties, fines, and procedures.

1. The amounts of all civil penalties, penalties payable to aggrieved parties, and fines contained in this Section 100.200 shall be increased annually to reflect the rate of inflation and calculated to the nearest cent on January 1 of each year thereafter. The Agency shall determine the amounts and file a schedule of such amounts with the City Clerk.

2. If a violation is ongoing when the Agency receives a complaint or opens an investigation, the Director may order payment of unpaid compensation plus interest that accrues after receipt of the complaint or after the investigation opens and before the date of the Director's Order.

3. Interest shall accrue from the date the unpaid compensation was first due at 12 percent annum, or the maximum rate permitted under RCW 19.52.020.

4. If there is a remedy due to an aggrieved party, the Director may waive part or all of the amount of civil penalties and fines due to the Agency based on timely payment of the full remedy due to the aggrieved party.

a. The Director may waive the total amount of civil penalties and fines due to the Agency if the Director determines that the respondent paid the full remedy due to the aggrieved party within ten days of service of the Director's Order.

b. The Director may waive half the amount of civil penalties and fines due to the Agency if the Director determines that the respondent paid the full remedy due to the aggrieved party within 15 days of service of the Director's Order.

c. The Director shall not waive any amount of civil penalties and fines due to the Agency if the Director determines that the respondent has not paid the full remedy due to the aggrieved party after 15 days of service of the Director's Order.

5. When determining the amount of liquidated damages, civil penalties, penalties payable to aggrieved parties, and fines due under this Section 100.200 for a settlement agreement or Director's Order, including but not limited to the mitigation of civil penalties and fines due to the Agency for timely payment of remedy due to an aggrieved party under subsection 100.200.A.4, the Director shall consider:

a. The total amount of unpaid compensation, liquidated damages, penalties, fines, and interest due;

b. The nature and persistence of the violations;

c. The extent of the respondent's culpability;

d. The substantive or technical nature of the violations;

e. The size, revenue, and human resources capacity of the respondent;

f. The circumstances of each situation;

g. The amount of penalties in similar situations; and

h. Other factors pursuant to Director rules.

B. A respondent found to be in violation of this ordinance shall be liable for full payment of unpaid compensation due plus interest in favor of the aggrieved party under the terms of this ordinance and other equitable relief. If the precise amount of unpaid compensation cannot be determined due to a respondent's failure to produce records or if a respondent produces records in a manner or form which makes timely determination of the amount of unpaid compensation impracticable, the Director may designate a daily amount for unpaid compensation due to aggrieved party. For any violation of this ordinance, the Director may assess liquidated damages in an additional amount of up to twice the unpaid compensation.

C. A respondent found to be in violation of this ordinance for retaliation under Section 100.050 shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid compensation plus interest in favor of the aggrieved party under the terms of this ordinance, and liquidated damages in an additional amount of up to twice the unpaid

compensation. The Director also shall order the imposition of a penalty payable to the aggrieved party of up to $5,462.70.

D. A respondent found to be in violation of gig worker and consumer protections under subsection 100.027.A.1 or 100.027.A.4 shall be subject to the penalties and fines established by this Section 100.200; such penalties and fines shall be payable only to the Agency. The Director is not authorized to assess unpaid compensation due under subsection 100.200.B or 100.200.C. for violations of subsection 100.027.A.1 or 100.027.A.4. All remedies are available for violations of subsection 100.027.A.2 or 100.027.A.3.

E. The Director is authorized to assess penalties and shall specify that at least 50 percent of any penalty assessed pursuant to this subsection 100.200.E is payable to the aggrieved party and the remaining penalty is payable to the Agency as a civil penalty. The Director may also specify that the entire penalty is payable to the aggrieved party.

1. For a first violation of this ordinance, the Director may assess a penalty of up to $546.07 per aggrieved party.

2. For a second violation of this ordinance, the Director shall assess a penalty of up to $1,092.13 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

3. For a third or any subsequent violation of this ordinance, the Director shall assess a penalty of up to $5,462.70 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

4. The maximum penalty for a violation of this ordinance shall be $21,849.79 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

5. For purposes of this Section 100.200, a violation is a second, third, or subsequent violation if the respondent has been a party to one, two, or more than two settlement agreements, respectively, stipulating that a violation has occurred; and/or one, two, or more than two Director's Orders, respectively, have issued against the respondent in the ten years preceding the date of the violation; otherwise, it is a first violation.

F. The Director is authorized to assess fines and may specify that the fines are due to the aggrieved party rather than due to the Agency. The Director is authorized to assess fines as follows:

Violation	**Fine**
Failure to provide a gig worker with written notice of rights under subsection 100.030.A	$546.07 per aggrieved party
Failure to retain hiring entity records for three years under subsections 100.040.A and 100.040.B	$546.07 per missing record
Failure to comply with prohibitions against retaliation for exercising rights protected under Section 100.050	$1,092.13 per aggrieved party
Failure to provide notice of investigation to gig workers under subsection 100.080.B.2	$546.07
Failure to post or distribute public notice of failure to comply with final order under subsection 100.240.A.1	$546.07

The maximum amount that may be imposed in fines in a one-year period for each type of violation listed above is $5,462.70 unless a fine for retaliation is issued, in which case the maximum amount is $21,849.79.

G. A respondent who willfully hinders, prevents, impedes, or interferes with the Director or Hearing Examiner in the performance of their duties under this ordinance shall be subject to a civil penalty of not less than $1,092.13 and not more than $5,462.70.

H. In addition to the unpaid compensation, penalties, fines, liquidated damages, and interest, the Agency may assess against the respondent in favor of the City the reasonable costs incurred in enforcing this ordinance, including but not limited to reasonable attorneys' fees.

I. A hiring entity that is the subject of a settlement agreement stipulating that a violation has occurred shall count for debarment, or a final order for which all appeal rights have been exhausted, shall not be permitted to bid, or have a bid considered, on any City contract until such amounts due under the final order have been paid in full to the Director. If the hiring entity is the subject of a final order two times or more within a five-year period, the hiring entity shall not be allowed to bid on any City contract for two years. This subsection 100.200.I shall be construed to provide grounds for debarment separate from, and in addition to, those contained in Seattle Municipal Code Chapter 20.70 and shall not be governed by that chapter provided that nothing in this subsection 100.200.I shall be construed to limit the application of Seattle Municipal Code Chapter 20.70. The Director shall notify the Director of Finance and Administrative Services of all hiring entities subject to debarment under this subsection 100.080.I.

100.210 Appeal period and failure to respond

A. A gig worker or other person who claims an injury as a result of an alleged violation of this ordinance may appeal the Determination of No Violation, pursuant to Director rules.

B. A respondent may appeal the Director's Order, including all remedies issued pursuant to Section 100.200, by requesting a contested hearing before the Hearing Examiner in writing within 15 days of service of the Director's Order. If a respondent fails to appeal the Director's Order within 15 days of service, the Director's Order shall be final. If the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the appeal period shall run until 5 p.m. on the next business day.

100.220 Appeal procedure and failure to appear

A. Contested hearings shall be conducted pursuant to the procedures for hearing contested cases contained in Section 3.02.090 of the Seattle Municipal Code and the rules adopted by the Hearing Examiner for hearing contested cases. The hearing shall be conducted de novo and the Director shall have the burden of proving by a preponderance of the evidence that the violation or violations occurred. Upon establishing such proof, the remedies and penalties imposed by the Director shall be upheld unless it is shown that the Director abused discretion. Failure to appear for a contested hearing shall result in an order being entered finding that the respondent committed the violation stated in the Director's Order. For good cause shown and upon terms the Hearing Examiner deems just, the Hearing Examiner may set aside an order entered upon a failure to appear.

B. In all contested cases, the Hearing Examiner shall enter an order affirming, modifying or reversing the Director's Order, consistent with Ordinance 126068.

100.230 Appeal from Hearing Examiner order

A. The respondent may obtain judicial review of the decision of the Hearing Examiner by applying for a Writ of Review in the King County Superior Court within 30 days from the date of the decision in accordance with the procedure set forth in chapter 7.16 RCW, other applicable law, and court rules.

B. The decision of the Hearing Examiner shall be final and conclusive unless review is sought in compliance with this Section 100.230.

100.240 Failure to comply with final order

A. If a respondent fails to comply within 30 days of service of any settlement agreement with the Agency, or with any final order issued by the Director or the Hearing Examiner for which

all appeal rights have been exhausted, the Agency may pursue, but is not limited to, the following measures to secure compliance:

1. The Director may require the respondent to post or distribute public notice of the respondent's failure to comply in a form and manner determined by the Agency.

2. The Director may refer the matter to a collection agency. The cost to the City for the collection services will be assessed as costs, at the rate agreed to between the City and the collection agency, and added to the amounts due.

3. The Director may refer the matter to the City Attorney for the filing of a civil action in King County Superior Court, the Seattle Municipal Court, or any other court of competent jurisdiction to enforce such order or to collect amounts due. In the alternative, the Director may seek to enforce a Director's Order or a final order of the Hearing Examiner under Section 100.250.

4. The Director may request that the City's Department of Finance and Administrative Services deny, suspend, refuse to renew, or revoke any business license held or requested by the hiring entity or person until such time as the hiring entity complies with the remedy as defined in the settlement agreement or final order. The City's Department of Finance and Administrative Services shall have the authority to deny, refuse to renew, or revoke any business license in accordance with this subsection 100.240.A.4.

B. No respondent that is the subject of a final order issued under this ordinance shall quit business, sell out, exchange, convey, or otherwise dispose of the respondent's business or stock of goods without first notifying the Agency and without first notifying the respondent's successor of the amounts owed under the final order at least three business days before such transaction. At the time the respondent quits business, or sells out, exchanges, or otherwise disposes of the

respondent's business or stock of goods, the full amount of the remedy, as defined in a final order issued by the Director or the Hearing Examiner, shall become immediately due and payable. If the amount due under the final order is not paid by respondent within ten days from the date of such sale, exchange, conveyance, or disposal, the successor shall become liable for the payment of the amount due, provided that the successor has actual knowledge of the order and the amounts due or has prompt, reasonable, and effective means of accessing and verifying the fact and amount of the order and the amounts due. The successor shall withhold from the purchase price a sum sufficient to pay the amount of the full remedy. When the successor makes such payment, that payment shall be deemed a payment upon the purchase price in the amount paid, and if such payment is greater in amount than the purchase price the amount of the difference shall become a debt due such successor from the hiring entity.

100.250 Debt owed The City of Seattle

A. All monetary amounts due under the Director's Order shall be a debt owed to the City and may be collected in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies, provided that amounts collected by the City for unpaid compensation, liquidated damages, penalties payable to aggrieved parties, or front pay shall be held in trust by the City for the aggrieved party and, once collected by the City, shall be paid by the City to the aggrieved party.

B. If a respondent fails to appeal a Director's Order to the Hearing Examiner within the time period set forth in subsection 100.210.B, the Director's Order shall be final, and the Director may petition the Seattle Municipal Court, or any court of competent jurisdiction, to enforce the Director's Order by entering judgment in favor of the City finding that the respondent has failed to exhaust its administrative remedies and that all amounts and relief contained in the order are

due. The Director's Order shall constitute prima facie evidence that a violation occurred and shall be admissible without further evidentiary foundation. Any certifications or declarations authorized under RCW 9A.72.085 containing evidence that the respondent has failed to comply with the order or any parts thereof, and is therefore in default, or that the respondent has failed to appeal the Director's Order to the Hearing Examiner within the time period set forth in subsection 100.210.B, and therefore has failed to exhaust the respondent's administrative remedies, shall also be admissible without further evidentiary foundation.

C. If a respondent fails to obtain judicial review of an order of the Hearing Examiner within the time period set forth in subsection 100.230.A, the order of the Hearing Examiner shall be final, and the Director may petition the Seattle Municipal Court to enforce the Director's Order by entering judgment in favor of the City for all amounts and relief due under the order of the Hearing Examiner. The order of the Hearing Examiner shall constitute conclusive evidence that the violations contained therein occurred and shall be admissible without further evidentiary foundation. Any certifications or declarations authorized under RCW 9A.72.085 containing evidence that the respondent has failed to comply with the order or any parts thereof, and is therefore in default, or that the respondent has failed to avail itself of judicial review in accordance with subsection 100.230.A, shall also be admissible without further evidentiary foundation.

D. In considering matters brought under subsections 100.250.B and 100.250.C, the Municipal Court may include within its judgment all terms, conditions, and remedies contained in the Director's Order or the order of the Hearing Examiner, whichever is applicable, that are consistent with the provisions of this ordinance.

100.260 Private right of action

A. Any person or class of persons that suffers financial injury as a result of a violation of this ordinance, or is the subject of prohibited retaliation under Section 100.050, may bring a civil action in a court of competent jurisdiction against the hiring entity or other person violating this ordinance and, upon prevailing, may be awarded reasonable attorney fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation: the payment of any unpaid compensation plus interest due to the person and liquidated damages in an additional amount of up to twice the unpaid compensation; and a penalty payable to any aggrieved party of up to $55,462.70 if the aggrieved party was subject to prohibited retaliation. Interest shall accrue from the date the unpaid compensation was first due at 12 percent per annum, or the maximum rate permitted under RCW 19.52.020.

B. For purposes of this Section 100.260, "person" includes any entity a member of which has suffered financial injury or retaliation, or any other individual or entity acting on behalf of an aggrieved party that has suffered financial injury or retaliation.

C. For purposes of determining membership within a class of persons entitled to bring an action under this Section 100.260, two or more gig workers are similarly situated if they:

1. Are or were hired for the same hiring entity or hiring entities, whether concurrently or otherwise, at some point during the applicable statute of limitations period,

2. Allege one or more violations that raise similar questions as to liability, and

3. Seek similar forms of relief.

D. For purposes of subsection 100.260.C, gig workers shall not be considered dissimilar solely because the gig workers'

1. Claims seek damages that differ in amount, or

2. Job titles or other means of classifying gig workers differ in ways that are unrelated to their claims.

100.270 Encouragement of more generous policies

A. Nothing in this ordinance shall be construed to discourage or prohibit a hiring entity from the adoption or retention of premium pay policies more generous than the one required herein.

B. Nothing in this ordinance shall be construed as diminishing the obligation of a hiring entity to comply with any contract or other agreement providing more generous protections to a gig worker than required by this ordinance.

100.280 Other legal requirements

This ordinance provides minimum requirements for premium pay while working for a hiring entity during the COVID-19 emergency and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for higher premium pay, or that extends other protections to gig workers; and nothing in this ordinance shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nor shall this ordinance be construed to preclude any person aggrieved from seeking judicial review of any final administrative decision or order made under this ordinance affecting such person. Nothing in this Section 100.280 shall be construed as restricting a gig worker's right to pursue any other remedies at law or equity for violation of their rights.

100.290 Severability

The provisions of this ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this ordinance, or the

application thereof to any hiring entity, gig worker, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 3. Section 3.02.125 of the Seattle Municipal Code, last amended by Ordinance 125948, is amended as follows:

3.02.125 Hearing Examiner filing fees

A. The filing fee for a case before the City Hearing Examiner is $85, with the following exceptions:

Basis for Case	**Fee in dollars**
* * *	
Paid Sick/Safe Leave Ordinance (Chapter 14.16)	No fee
Premium Pay for Gig Workers Ordinance (Introduced as Council Bill 119799)	No fee
Public Accommodations Ordinance (Chapter 14.06)	No fee
* * *	

* * *

Section 4. Subsection 6.208.020.A of the Seattle Municipal Code, which section was last amended by Ordinance 125930, is amended as follows:

6.208.020 Denial, revocation of, or refusal to renew business license

A. In addition to any other powers and authority provided under this Title 6, the Director, or the Director's designee, has the power and authority to deny, revoke, or refuse to renew any business license issued under the provisions of this Chapter 6.208. The Director, or the Director's designee, shall notify such applicant or licensee in writing by mail of the denial, revocation of, or refusal to renew the license and on what grounds such a decision was based. The Director may deny, revoke, or refuse to renew any license issued under this Chapter 6.208 on one or more of the following grounds:

1. The license was procured by fraud or false representation of fact.

2. The licensee has failed to comply with any provisions of this Chapter 6.208.

3. The licensee has failed to comply with any provisions of Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52.

4. The licensee is in default in any payment of any license fee or tax under Title 5 or Title 6.

5. The property at which the business is located has been determined by a court to be a chronic nuisance property as provided in Chapter 10.09.

6. The applicant or licensee has been convicted of theft under subsection 12A.08.060.A.4 within the last ten years.

7. The applicant or licensee is a person subject within the last ten years to a court order entering final judgment for violations of chapters 49.46, 49.48, or 49.52 RCW, or 29 U.S.C. 206 or 29 U.S.C. 207, and the judgment was not satisfied within 30 days of the later of either:

a. The expiration of the time for filing an appeal from the final judgment order under the court rules in effect at the time of the final judgment order; or

b. If a timely appeal is made, the date of the final resolution of that appeal and any subsequent appeals resulting in final judicial affirmation of the findings of violations of chapters 49.46, 49.48, or 49.52 RCW, or 29 U.S.C. 206 or 29 U.S.C. 207.

8. The applicant or licensee is a person subject within the last ten years to a final and binding citation and notice of assessment from the Washington Department of Labor and Industries for violations of chapters 49.46, 49.48, or 49.52 RCW, and the citation amount and

penalties assessed therewith were not satisfied within 30 days of the date the citation became final and binding.

9. Pursuant to subsections 14.16.100.A.4, 14.17.075.A, 14.19.100.A.4, 14.20.080.A.4, 14.22.115.A.4, 14.23.115.A.4, 14.26.210.A.4, 14.27.210.A.4, 14.28.210.A.4, and 14.30.180.A.4, and subsection 100.240.A.4 of this ordinance, the applicant or licensee has failed to comply, within 30 days of service of any settlement agreement, with any final order issued by the Director of the Office of Labor Standards, or any final order issued by the Hearing Examiner under Chapters 14.16, 14.17, 14.19, 14.20, 14.22, 14.23, 14.26, 14.27, 14.28, 14.29, and 14.30, and this ordinance, for which all appeal rights have been exhausted, and the Director of the Office of Labor Standards has requested that the Director deny, refuse to renew, or revoke any business license held or requested by the applicant or licensee. The denial, refusal to renew, or revocation shall remain in effect until such time as the violation(s) under Chapters 14.16, 14.17, 14.19, 14.20, 14.22, 14.23, 14.26, 14.27, 14.28, 14.29, and 14.30, and this ordinance are remedied.

10. The business is one that requires an additional license under this Title 6 and the business does not hold that license.

11. The business has been determined under a separate enforcement process to be operating in violation of law.

* * *

Section 5. This ordinance shall be automatically repealed without subsequent Council action three years after the termination of the civil emergency proclaimed by the Mayor on March 3, 2020.

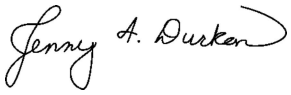
Section 6. Based on the findings of fact set forth in Section 1 of this ordinance, the Council finds and declares that this ordinance is a public emergency ordinance, which shall take effect immediately and is necessary for the protection of the public health, safety, and welfare.

Section 7. By reason of the findings set forth in Section 1, and the emergency that is hereby declared to exist, this ordinance shall become effective immediately upon its passage by a 3/4 vote of the Council and its approval by the Mayor, as provided by Article 4, subsection 1.1 of the Charter of the City.

Passed by a 3/4 vote of all the members of the City Council the 15th day of June, 2020, and signed by me in open session in authentication of its passage this 15th day of June, 2020.

President _____ of the City Council

Approved by me this 26th day of June, 2020.



Jenny A. Durkan, Mayor

Filed by me this 26th day of June, 2020.

Monica Martinez Simmons, City Clerk

(Seal)

Appendix D

First Amended Complaint for Declaratory and Injunctive Relief and Damages

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

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR INC. d/b/a INSTACART, a Delaware corporation Plaintiffs, v. CITY OF SEATTLE, Defendant.	Case No. 20-2-10541-4 SEA **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES** Honorable Roger Rogoff

Plaintiffs the Washington Food Industry Association ("WFIA") and Maplebear Inc. d/b/a Instacart ("Instacart"), through their attorneys, assert these claims against Defendant the City of Seattle:

I. NATURE OF THE CASE

1. In 2018, Washington voters approved Initiative 1634, the Prohibit Local Taxes on Groceries Measure (codified as the Keep Groceries Affordable Act of 2018, RCW Chapter 82.84) because "keeping the price of groceries as low as possible improves the access to food for all Washingtonians." To achieve its purpose, the Initiative prohibits "local government entities" from imposing any "fee" or "assessment"—including any "*charge, or exaction of any kind*"—on the "*transfer*" or "*transportation*" of groceries. This lawsuit arises from just such a prohibited "charge" or "exaction" passed by the City on food and grocery delivery services in Seattle.

2. Despite the will of Washington voters as expressed through the unequivocal mandate of I-1634, on June 15, 2020, the Seattle City Council passed Council Bill 119799 (Ordinance 126094, the "Ordinance"), which Seattle Mayor Jenny Durkan signed on June 26, 2020.[1] In an unprecedented action purportedly in response to the COVID-19 pandemic, the Ordinance requires "food delivery network companies" ("FDNCs"), including those that deliver groceries, to pay "premium pay" to independent contractors who provide delivery services (referred to in the Ordinance as "gig workers") of $2.50 for their first work-related stop on each online order and $1.25 for each additional work-related stop on the same online order.

3. The Ordinance's requirement that FDNCs provide "premium pay" to persons delivering groceries constitutes a new "fee," "assessment," "charge," or "exaction of any kind" on the transfer and transportation of groceries and is explicitly proscribed by I-1634.

4. In addition to this premium pay, the Ordinance makes unprecedented intrusions into FDNCs' most fundamental management and operational decisions. The Ordinance prohibits FDNCs from: (1) "reduc[ing] or otherwise modify[ing]" the areas they currently serve; (2) reducing a delivery person or business's compensation; (3) limiting a delivery person's or business's earning capacity including by "restricting access to online orders"; and (4) "[a]dd[ing] customer charges to online orders for delivery of groceries."

5. FDNCs that do not comply with the Ordinance, e.g., by inadvertently failing to pay a single $1.25 bonus per additional pick-up or drop-off, face draconian and disproportionate penalties. The penalties begin at $546.07 per aggrieved party and go up to $5,462.70 per aggrieved party for a particular violation.

6. By these extraordinary and unprecedented mandates, the Ordinance effectively commandeers private network businesses for the benefit of specific members of the community—"gig drivers" and consumers—rewrites the businesses' independent contracts, and undermines

[1] Ordinance 126094, "AN ORDINANCE relating to gig workers in Seattle . . . ," was passed by the Seattle City Council on June 15, 2020, and signed into law by Seattle Mayor Jenny Durkan on June 26, 2020. On August 10, 2020 (after Plaintiffs filed the original complaint in this action), the Seattle City Council passed Ordinance 126122, which made "technical corrections" to Ordinance 126094. Ordinance 126122 was signed into law by Mayor Durkan on August 14, 2020. These ordinances are attached as Appendix A. As used herein, "the Ordinance" refers to Ordinance 126094 as amended by Ordinance 126122.

their ability to profitably provide essential grocery-delivery services to consumers. The Ordinance violates Plaintiff Instacart's rights protected by the Takings, Contracts, and Equal Protection Clauses of the United States Constitution, as well as Article I, Sections 12, 16, and 23 of the Washington Constitution.

7. Because the Ordinance, without a rational basis, also precludes FDNCs from offsetting the compelled premium pay by reducing payments to delivery persons[2] and charging additional fees to customers for groceries, the Ordinance will cause Plaintiff Instacart and other FDNCs to suffer unsustainable increased operational losses in the Seattle market.

8. In effect, the Ordinance empowers the City to commandeer private food delivery businesses to force them to provide services that the City has deemed "essential services" on an unsustainable and commercially impracticable basis with no clear end-date in the City of Seattle. This effect is particularly acute in the grocery-delivery business, which is the ***only*** business prohibited from recouping Ordinance-imposed expenses from its consumers. That special disadvantage leaves grocery-delivery businesses with no path to profitability. They alone are expected to subsidize unprofitable deliveries in Seattle with revenues derived from other jurisdictions and lines of business.

9. Plaintiffs seek a declaratory judgment that the Ordinance is unlawful and invalid, insofar as it applies to Plaintiffs' facilitation of the delivery of groceries, because the Ordinance violates I-1634 (as codified at RCW Chapter 82.84). Plaintiffs also seek declaratory relief that the Ordinance (1) is an unreasonable and illegal intrusion on private business that exceeds the scope of the City's police powers to provide for the public health, safety, and welfare during and after the COVID-19 emergency declared by the Mayor; (2) violates Plaintiff Instacart's rights protected by the Fifth and Fourteenth Amendments of United States Constitution under the Takings and Equal Protection Clauses, respectively; (3) is an unconstitutional taking of private property without just compensation in violation of Plaintiff Instacart's rights under Article I,

[2] Both natural persons and business entities contract with Instacart to use its platform to shop for and deliver groceries to customers. As used herein, the term "delivery persons" encompasses both groups. Instacart also refers to these independent contractors as "full-service shoppers."

Section 16 of the Washington Constitution; (4) impairs contractual obligations in violation of the Contracts Clauses of the United States Constitution (Article I, Section 10, Clause 1) and Washington Constitution (Article I, Section 23); and (5) grants special privileges or immunities in violation of Article I, Section 12 of the Washington Constitution. As a result, Plaintiffs seek preliminary and permanent injunctions against any steps to enforce the Ordinance against Plaintiffs. Plaintiff Instacart additionally seeks damages and attorneys' fees for any costs incurred pursuant to 42 U.S.C. § 1983.

II. PARTIES

10. Plaintiff WFIA is a non-profit corporation organized under the laws of Washington and headquartered in Olympia, Washington. WFIA's members include independent grocery stores, markets, convenience stores, and their suppliers operating throughout Washington. WFIA's grocer members are privately held and not publicly traded, often family-owned, independent grocers who depend heavily on third party delivery services to remain competitive with large national and international chains that can afford their own delivery service. WFIA represents the interests of its retailer and wholesaler members on state and local legislative issues that could upend their business operations, including labor, transportation, and tax issues.

11. Plaintiff Instacart is a Delaware Corporation and WFIA member. Instacart provides an innovative service that facilitates on-demand grocery shopping and delivery services. Through its website and smartphone application, Instacart offers a method to connect independent delivery persons with consumers seeking grocery shopping and delivery services from participating grocery stores. Instacart operates across the United States, including in Seattle, and in Canada.

12. Defendant City of Seattle is a municipal corporation chartered under authority conferred by the Constitution of the State of Washington, with powers to enact legislative measures as limited by applicable state, federal, and constitutional law.

III. JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter. Washington superior courts have original jurisdiction in all cases in equity, all cases in law that involve "the legality of any tax, impost, assessment, toll or municipal fine," and in all other cases in which the demand amounts to three hundred dollars. RCW 2.08.010. This Court has the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed," RCW 7.24.010, and to grant restraining orders and injunctions, RCW 7.40.010.

14. Venue is proper in King County Superior Court against the City of Seattle, a municipal corporation located and doing business in King County. *See* RCW 4.12.025.

IV. STANDING

15. WFIA has associational standing to challenge the Ordinance. WFIA has a direct interest in protecting its members from unlawful ordinances and regulations affecting the grocery and convenience store industries. WFIA's members, including Instacart, small, independent grocery stores, and other businesses that sell food for pick-up and delivery through online orders, will suffer immediate, concrete, and specific economic injury from the Ordinance. WFIA's privately held and often family-owned grocers depend heavily on third party delivery services to remain competitive with large national and international chains that can afford to develop in-house delivery services. Without viable third-party delivery services like Instacart, WFIA's members would face great difficulty competing against these large national chains. The Ordinance unlawfully burdens WFIA members by increasing the costs of operating food-delivery services to obtain delivered groceries in Seattle and threatening the economic viability of those services in Seattle. WFIA conducts legislative advocacy on behalf of its members on a wide variety of issues, including in the areas of labor, transportation, and taxation, and it challenges laws and regulations that unlawfully burden its members' businesses and operations.

16. Instacart has standing to challenge the Ordinance. Instacart meets the Ordinance's definition of a "covered hiring entity" that "hire[s] 250 or more gig workers worldwide" and is therefore subject to the Ordinance's regulation. Ord. § 100.020(A); *see also id.* § 100.010 (defining "hiring entity" to mean a "food delivery network company"). The Ordinance will

unlawfully usurp the business judgment of Instacart's management and cause Instacart, a private business, to suffer immediate, concrete, and specific economic injury, including by, among other things: (1) forcing it to provide delivery persons with fixed "premium pay" for each "work-related stop" in Seattle, thus significantly increasing its costs of doing business and the losses it suffers on deliveries in Seattle; (2) prohibiting it from reducing or otherwise modifying the areas of Seattle that it serves; (3) prohibiting it from reducing compensation to delivery persons; (4) prohibiting it from restricting access to online orders; and (5) prohibiting it from adding charges to its customers to reduce or offset its losses from the above.

17. The Court may also hear this action because it involves a controversy of substantial public importance that immediately affects significant segments of the population who rely on the delivery of groceries to reduce their exposure to disease and to obtain food during the ongoing emergency lockdown.

V. ALLEGATIONS OF FACTS

Washington Voters Approve an Initiative to Prevent New Taxes, Fees, and Assessments on Groceries

18. Washington voters approved I-1634 in the general election on November 6, 2018. According to the explanatory statement which appeared in the Voters' Pamphlet, "If adopted, Initiative 1634 would prevent local governments from imposing or collecting any new tax, fee, or other assessment on certain grocery items after January 15, 2018. This restriction would prohibit any new local tax, fee, or assessment of any kind on the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption of certain groceries." The Voters' Pamphlet "Argument For" I-1634 section highlighted that the initiative would "help keep groceries affordable."

19. I-1634 is codified at RCW Chapter 82.84. The statute prohibits local governments from "impos[ing] or collect[ing] any tax, fee, or other assessment on groceries." RCW 82.84.040(1). The phrase "tax, fee, or other assessment on groceries" is broadly defined and "includes, but is not limited to . . . any . . . charge[] or exaction of any kind on groceries or the . . . transfer, [or] transportation . . . thereof." RCW 82.84.030(5).

Acting at the Behest of Organized Labor, the Seattle City Council Flouts the Will of Washington Voters and Engages in Overreach in Enacting the Ordinance

20. The Ordinance resulted from a long-standing collaboration among members of the City Council, their staff, and labor organizations including Working Washington, the International Brotherhood of Teamsters (the "Teamsters"), Service Employees International Union ("SEIU"), and United Food Commercial Workers Union ("UFCW") to raise the wages of so-called "gig workers" irrespective of the COVID-19 emergency. Following Mayor Durkan's Proclamation of Civil Emergency on March 3, 2020, Working Washington emailed Councilmembers Lisa Herbold and Andrew Lewis on April 26, 2020, suggesting a $5 surcharge on food deliveries made by gig workers. Councilman Lewis began working on Council Bill 119799 that same day.

21. The City Council and its staff remained in close communication with Working Washington over significant aspects of Council Bill 119799, including the industries that would be affected, which types of workers would be covered, the specific amount of the premium pay mandate, whether covered entities could pass on the costs of compliance, and other key details. The City Council also sought comment on the bill from SEIU and UFCW.

22. As contemporaneous communications make clear, the Seattle City Council and the labor unions with which it consulted were intent on increasing pay to food delivery persons and used the COVID-19 emergency as a pretext to do so. Working Washington is closely affiliated with labor organizations in Seattle that seek to organize gig workers and drive up pay for certain gig workers notwithstanding many workers prefer to remain independent and work for multiple platforms on their own schedule.

23. For example, in a May 20, 2020 email, Rachel Lauter of Working Washington offered to explain Working Washington's "thinking on the math" to Councilmember Lewis, who had assumed responsibility for drafting the portion of the legislation covering food deliveries. Ms. Lauter expressed that the goal of the legislation was to ensure that "people classified as essential workers can at least support themselves at the well-established baseline level of $15/hour."

24. On June 15, 2020, the Seattle City Council passed the Ordinance. Among other things, the Ordinance mandates that FDNCs—including Plaintiff Instacart—pay delivery persons (referred to in the Ordinance as "gig workers") "premium pay" for "each online order that results in . . . a work-related stop in Seattle." Ord. § 100.025(A). A "work-related stop in Seattle" means "time spent . . . that is related to the provision of delivery services associated with an online order." The mandated "premium pay" is "$2.50 for one pick-up point or one drop-off point in Seattle," "$1.25 for each additional pick-up point in Seattle," and "$1.25 for each additional drop-off point in Seattle." *Id.* The bill contained no legislative findings, however, relating the amount of premium pay to existing hourly income or the goal of achieving some goal of minimum hourly income.

25. The Ordinance's premium pay provisions remain in effect during the emergency declared by Mayor Durkan on March 3, 2020, in response to COVID-19. That emergency declaration, in turn, has no end date.

26. Moreover, the Ordinance makes it clear that the City Council plans to weigh permanent, mandatory increases in gig worker pay, regardless of the COVID-19 emergency's duration. As explained in Section 100.025(E), "If the City establishes a minimum compensation standard for gig workers, the Council intends to consider eliminating the premium pay requirement for gig workers before the termination of the civil emergency."

27. As originally introduced, and as discussed in communications between the City Council and Working Washington, the Ordinance would have also applied the premium pay mandate to transportation network companies ("TNCs") like Uber and Lyft that "offer[] prearranged transportation services for compensation using an online-enabled application or platform." However, at the request of the Teamsters, who purported to be drafting broader legislation covering TNCs, the TNCs were removed from the Ordinance's scope, even though TNC drivers, like taxi drivers and many other occupations in the City, face demonstrably higher risks of infection than grocery delivery drivers because they have direct person-to-person contact while transporting individuals in the confined spaces of their vehicles-for-hire.

28. The Ordinance states in prefatory language that "gig workers working for food delivery network companies during the COVID-19 emergency face magnified risks of catching or spreading disease because the nature of their work can involve close contact with the public." The Ordinance also states that "provid[ing] premium pay to gig workers protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency."

29. The Ordinance lacks any standards or rules requiring that premium payments be used by delivery persons to take proactive steps to increase health and safety. The Ordinance identifies and requires no nexus between additional cash bonuses and reducing alleged hazards faced by food delivery persons as a result of the COVID-19 emergency; it does not require that delivery persons actually take precautions to safeguard health; and it contains no finding that the amount of the bonus payments bears any relation to the cost of necessary personal protective supplies.

30. The Ordinance also contains no legislative findings that food delivery persons are at a greater risk for contracting COVID-19 than are TNC drivers or any other workers providing similar services during the COVID-19 emergency, such as taxicab drivers, private and for-hire drivers, courtesy drivers, grocery-delivery drivers other than gig workers, workers making far more frequent home deliveries of other essential and non-essential goods, retail and grocery-store workers, food-service workers, or restaurant workers.

31. The Ordinance is a solution in search of a problem that does not exist. In fact, delivery persons that use FDNCs' platforms are already experiencing a large increase in demand for their services—and therefore are working and earning more—as a result of the pandemic. In the three months after Mayor Durkan declared a COVID-19 emergency, the number of delivery persons contracting with Instacart had already more than tripled, from approximately 1,000 delivery persons serving Seattle to well over 3,000. As a result of the COVID-19 emergency, there has been an ample increase in the supply of food delivery services to handle the increased

demand for grocery delivery services from persons who wish to avoid the risks of in-person shopping.

32. Moreover, even before the Ordinance was introduced, the average hourly pay of delivery persons had also already increased substantially. Delivery persons contracting with Instacart were earning approximately $20 per hour working in Seattle in January and February 2020, including tips. As a result of increased demand leading to greater efficiencies that directly benefit delivery persons, they enjoyed a 50% increase—earning approximately $30 per hour worked as of May 2020, including tips, nearly double the $16.39 minimum wage Seattle imposes on the largest employers in the City, all before the premium payments were mandated under the Ordinance.

33. The transcripts of statements by City Council members during deliberation and adoption of the Ordinance, published reports and information from City officials, and communications between City Council members, their staff, and Working Washington (and other labor organizations), all reveal that, rather than ensuring continuity of food delivery services, the main motivation for singling out FDNCs for the premium pay requirements was to assist certain labor organizations in achieving their long-standing and continuing goal to organize workers in the so-called "gig economy."

34. The Ordinance also prohibits FDNCs from taking any of the following actions "as a result of this ordinance going into effect": (1) "reduc[ing] or otherwise modify[ing]" the areas of Seattle that are currently served; (2) reducing a delivery person or business's compensation; (3) limiting a delivery person or business's earning capacity including by "restricting access to online orders"; and (4) adding "customer charges to online orders for delivery of groceries." These provisions intrude into the core business and operations decisions of Instacart and other WFIA members.

35. As originally enacted, the Ordinance's provisions in the preceding paragraph forbidding FDNCs from taking certain actions were to remain in effect for three years following the termination of the civil emergency declared by Mayor Durkan on March 3, 2020. Following the filing of the Complaint in this action, in a "technical amendment" to the Ordinance enacted

through Council Bill 119841 and signed by Mayor Durkan on August 14, 2020, those provisions are now in effect only for the duration of the civil emergency, which is ongoing and will continue indefinitely.

36. The Ordinance also imposes steep penalties for violations. Upon receipt of a complaint that an FDNC has violated the Ordinance, the City's Office of Labor Standards ("Agency") will launch an investigation. The Ordinance gives the Agency Director the power to impose relief for each violation, including ordering corrective action, and/or payment of unpaid compensation, liquidated damages, civil penalties, fines, and interest.

37. The Ordinance also empowers the Director to request that the City's Department of Finance and Administrative Services deny, suspend, refuse to renew, or revoke the business license of an FDNC until it complies with any remedy as defined in a settlement agreement or final order.

38. The Ordinance also creates a private right of action, providing that "[a]ny person or class of persons that suffers financial injury as a result of a violation of this ordinance, or is the subject of prohibited retaliation under Section 100.050, may bring a civil action."

The Relationship Established by Food Delivery Network Companies Benefits Retailers, Consumers, and Delivery Persons

39. FDNCs operate a multi-sided platform involving relationships among multiple parties, which benefits all parties, not just the FDNCs. First, FDNCs create an online marketplace or platform. Second, grocery stores and other retailers use the platform to offer their products to consumers. Third, consumers search for and purchase products through the platform. Fourth, independent delivery persons, or their personnel, choose to provide services through the platform by delivering retailers' products to consumers.

40. Grocery stores benefit from the operations of FDNCs, which provide them greater access to customers. Instacart has enabled grocery stores to access new revenue streams without the prohibitive investment in the infrastructure necessary to create their own on-demand online ordering and delivery systems. In 2019, Instacart's online delivery technology increased grocery store revenues by $55.8 million in Washington. More significant for this case, from 2014 to

2018, net employment in Seattle metropolitan area grocery retailers has increased by approximately 1,700 persons—and *all* of that net increase was attributable to increased sales through Instacart. *See, e.g.*, Robert Kulick, The Economic Impact of Instacart on the Retail Grocery Industry: Evidence from Four States (2020).

41. Consumers also benefit from the multi-party relationship established by FDNCs by having access to a broader range of on-demand food options and being able to obtain groceries without going into a grocery store. These benefits are especially relevant during the COVID-19 pandemic, particularly for consumers in higher-risk populations. During the COVID-19 emergency, Instacart has seen an increase in the percentage of new customers who are 45 or older or retired. The networks have also helped reduce traffic in retail outlets overall, thereby promoting social distancing and potentially slowing the virus's spread.

42. In addition to the increased employment and earnings above, food delivery persons working on independent contracts, often with multiple network technology companies simultaneously, also benefit from the relationship. They enjoy significant freedom and discretion over when, where, and how long to work. They choose which orders to fulfill, when to fulfill them, and how many to fulfill. Because they are independent contractors and not employees, they are never required to accept a particular order or work in a specific place or at a specific time. This freedom most benefits workers who could not work assigned full-time shifts, including students, working parents, and people with limited work histories.

43. In fact, the availability of essential delivery-network jobs has been a lifeline for many people during the pandemic. Throughout the country, delivery networks have seen an influx of hundreds of thousands of workers offering their services for the first time, many of them recently unemployed as a result of nationwide shutdowns. In Seattle, Plaintiff Instacart has tripled the number of delivery persons with whom it contracts, from approximately 1,000 to well over 3,000.

44. When providing services through a delivery network, workers are typically paid through a mix of service fees or payments and customer tips. During the COVID-19 emergency in Seattle, there has been a surge in the number of customers ordering groceries online through

the FDNCs. Workers' earnings per hour increased because of the increased number of deliveries they can make per trip to the grocery store, and the overall increase in the number of deliveries ordered by customers. The earnings have also increased because the size of the average order—or "batch"—has increased, and thus the corresponding payment from Instacart has also increased.

45. For example, delivery persons contracting with Instacart enjoyed an increase of approximately 50% in total average hourly earnings compared to earnings immediately before COVID-19, due in large part to network efficiencies created by greater demand and larger average orders during the pandemic. In other words, well before the Ordinance was passed, delivery persons were already enjoying a huge increase in earnings to compensate them for the allegedly higher risks during COVID-19.

46. Unlike drivers for TNCs, food delivery persons do not transport passengers and so are at a low risk of infection while performing much of their job—driving from grocery stores to residences. When they arrive at a customer's residence, the default setting for all food deliveries is "Leave at My Door" to minimize person-to-person contact.

47. Instacart has also taken various measures to promote the health and safety of independent contractors in Seattle on the Instacart platform during the COVID-19 emergency. Instacart offers a free health-and-safety kit that includes a washable face mask and hand sanitizer to any active delivery person who requests one. All Instacart delivery persons in the United States can use Apple Pay or Google Pay to check out of grocery stores without needing to touch their wallets or use a keypad to pay.

48. Instacart has also updated its mobile app to provide access to safety resources and daily in-app wellness checks that direct users to contact their healthcare providers if they have COVID-19 symptoms. And delivery persons who submit proof of a COVID-19 diagnosis such as a doctor's note automatically receive a lump-sum payment equal to their earnings from Instacart for their last 14 days of delivery services (exclusive of tips) and are suspended from making deliveries during that period.

49. Instacart's relationship with delivery persons is governed by an Independent Contractor Agreement that delivery persons voluntarily sign prior to undertaking any deliveries

for Instacart. This agreement gives Instacart the right to modify the terms of the Full Service Shopper Account Access Guidelines.

The Ordinance Will Cause Substantial Harm to Instacart, Other FDNCs, and the Public

50. Instacart and other FDNCs operating or seeking to operate in Seattle will immediately and irreparably suffer financially unsustainable damages as a direct result of the Ordinance if it is not invalidated. For example, Plaintiff Instacart will (1) be obligated to pay premium pay, causing Instacart to lose additional money on every delivery; (2) be prohibited from managing its business to profitability—particularly in its use of independent contractors, charges to consumers, and the geographic areas it chooses to serve—to address its evolving economic and financial circumstances; and (3) suffer further harm by incurring significant compliance costs, including costs associated with reengineering the platform to comply with the law, keeping records, and providing delivery persons with required notices translated into multiple languages.

51. The Ordinance also subjects Plaintiffs to duplicative and draconian penalties, fines and civil judgments.

VI. CAUSES OF ACTION

52. Plaintiffs reserve the right to raise any legal bases under Washington law to challenge the constitutionality, legality, validity, or enforceability of the Ordinance.

FIRST CAUSE OF ACTION
THE ORDINANCE VIOLATES I-1634

53. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

54. There is an actual, present, and justiciable controversy as to whether the Ordinance's "premium pay" provision, insofar as it applies to Plaintiffs' facilitation of the delivery of groceries, violates I-1634, as codified at RCW Chapter 82.84. A judicial determination on the illegality, invalidity, and enforceability of the Ordinance will conclusively resolve these issues of substantial public concern and the parties' dispute.

55. I-1634, as codified at RCW Chapter 82.84, states that (subject to certain exceptions not applicable here) "a local governmental entity may not impose or collect any tax, fee, or other assessment on groceries." The phrase "[t]ax, fee, or other assessment on groceries" "includes, but is not limited to . . . any . . . charge[] or exaction of any kind on groceries or the . . . transfer [or] transportation . . . thereof." RCW 82.84.030(5).

56. The Ordinance violates RCW Chapter 82.84, insofar as it applies to Plaintiffs' facilitation of the delivery of groceries, because its premium pay provisions constitute a "fee," "other assessment," "charge," or "exaction of any kind" on the transfer or transportation of groceries.

57. Because the People have prohibited cities from levying and enacting such fees, assessments, charges, and exactions, the Ordinance is illegal, invalid, and void.

58. The Ordinance is also preempted by state law because it directly and irreconcilably conflicts with the state's prohibition on localities imposing any charge or exaction of any kind on the transfer or transportation of groceries. I-1634 contains an express legislative intent to occupy the entire field in which the Ordinance aims to regulate, and the Ordinance does not meet one of the exceptions in subsections (2)-(4) of RCW 82.84.040 that permit a locality concurrent jurisdiction with the state.

59. Instacart is suffering and will continue to suffer damages as a direct result of the Ordinance's violation of I-1634.

SECOND CAUSE OF ACTION
THE ORDINANCE EXCEEDS THE CITY'S POLICE POWERS

60. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

61. The Ordinance relies on the City's police powers as the source of the City's authority to enact and enforce the Ordinance. The Ordinance declares that it is an "emergency ordinance," and it purports to promote "public health, safety, and welfare during the . . . COVID-19 . . . emergency."

62. To be a lawful exercise of police power, an ordinance must be reasonably necessary in the interest of the public health, safety, morals, and general welfare and be

substantially related to the evil sought to be cured. In addition, the classes of businesses, products, or persons regulated must be reasonably related to the legitimate object of the legislation.

63. The Ordinance is an arbitrary and irrational response to the COVID-19 emergency, and the City Council's intention in passing the Ordinance was to promote labor organizations' goals to organize certain workers for higher pay by using the emergency as a pretext. If the Ordinance were a rational response to the COVID-19 emergency, the Ordinance would not single out FDNCs for regulation while omitting many other workers who provide essential services and come into greater contact with the public, and thereby are exposed to a greater risk of viral contraction.

64. Instacart is suffering and will continue to suffer damages as a direct result of the Ordinance's intrusions on their rights to control and manage their business operations and contractual relationships.

THIRD CAUSE OF ACTION
THE ORDINANCE TAKES PRIVATE PROPERTY IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

65. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

66. The Takings Clause of the Fifth Amendment of the Constitution of the United States, extended to state and local governments by the Fourteenth Amendment, provides that no private property shall be taken for public use without just compensation. The Washington Constitution's provision on Eminent Domain (Article I, Section 16) provides the same restriction that private property shall not be taken for public or private use without just compensation. The Ordinance violates both the Takings Clause in the U.S. Constitution and the Eminent Domain section of the Washington Constitution.

67. The U.S. Supreme Court has held that the Takings Clause applies to intangible property, such as contract rights, and that "regulatory" takings may be unlawful even where they do not directly appropriate real or tangible property.

68. By compelling Instacart to pay unsustainable premium pay for every food delivery in Seattle, while prohibiting Instacart from taking any steps to pass the costs of such charges to

consumers or receive any compensation from the government or reduce or modify areas of Seattle served by FDNCs, the City is rendering commercially impracticable Instacart's previously agreed-to contracts for services with the independent contractor delivery persons and their facilitation of food delivery services to consumers, effecting a regulatory taking of Instacart's intangible property without just compensation.

69. Further, by prohibiting FDNCs from reducing or otherwise modifying the areas of Seattle served regardless of profitability or business needs while simultaneously prohibiting Instacart from passing through to Instacart's customers the substantial additional charges and exactions the City is imposing, the City is appropriating Instacart's fundamental property rights in its business for the private benefit of independent contractors receiving "premium pay" not required by contract and Seattle residents paying below-marginal cost for food delivery services, without just compensation.

70. Instacart is suffering and will continue to suffer damages as a direct result of the City's unconstitutional takings.

FOURTH CAUSE OF ACTION
THE ORDINANCE IMPAIRS EXISTING CONTRACTUAL OBLIGATIONS IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

71. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

72. The Contracts Clause of the Constitution of the United States (Article I, Section 10, Clause 2) provides: "No State shall … pass any Law impairing the obligation of Contracts." The Washington Constitution's Contracts Clause (Article I, Section 23) likewise provides: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." The Ordinance violates the contracts clauses of both the federal and state constitutions.

73. The Ordinance substantially impairs Instacart's preexisting contractual relationships by altering the contractual obligations owed to Instacart and by depriving it of the benefit of its contractual rights and protections. Specifically, Section 100.027(A) of the Ordinance impairs several terms of Instacart's Independent Contractor Agreement with delivery persons. First, in Section 5.3 of that agreement, "Instacart reserves the right to modify the terms of Full Service Shopper Account Access Guidelines from time to time when Instacart determines,

in its reasonable and good faith business judgment, it is necessary to do so to ensure the safe and reliable operation of the Instacart platform." The Ordinance impairs that right by barring Instacart from: reducing areas served, Section 100.027(A)(1); reducing a shopper's compensation, Section 100.027(A)(2); and limiting a shopper's earning capacity, Section 100.027(A)(3). Section 100.027(A)(3) of the Ordinance impairs provision 5.4 of Instacart's Independent Contractor Agreement because it infringes on Instacart's right to "stop providing access to the Instacart Platform services" whenever it deems "necessary." And Section 100.027(A)(3)'s ban "limit[ing] a gig worker's earner capacity, including … restricting access to online orders" also impairs section 6.6 of the Independent Contractor Agreement, which states that "Instacart does not guarantee the availability of the Instacart Platform" to delivery persons.

74. These contractual impairments are substantial. Instacart's business model requires contractual terms that ensure the platform remains flexible and responsive to evolving market demands. The ability to modify terms and expand or limit access to the platform is thus essential to Instacart's business model. The Ordinance's sweeping restrictions severely diminish the value of Instacart's contracts.

75. The Ordinance was not drawn in an appropriate or reasonable way to advance a significant and legitimate public purpose. The Ordinance broadly adjusts the rights and responsibilities under existing contracts beyond the degree necessary to advance any rational and legitimate purpose of addressing the health and safety conditions caused by COVID-19.

76. Instacart is suffering and will continue to suffer damages as a direct result of the Ordinance's impairment of existing contracts.

FIFTH CAUSE OF ACTION
THE ORDINANCE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

77. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

78. The Ordinance's mandate to provide premium pay applies exclusively to FDNCs, which are defined as "an organization whether a corporation, partnership, sole proprietor, or other form, operating in Seattle, that offers prearranged delivery services for compensation using an

online-enabled application or platform, such as an application dispatch system, to connect customers with workers for delivery from one or more of the following: (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order."

79. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

80. The Ordinance violates the Equal Protection Clause. By singling out FDNCs, the Ordinance is designed to increase earnings for a subset of persons working in grocery and food delivery. The City Council purports to justify its differential treatment of those food delivery workers who use FDNCs' platforms because those workers allegedly confront special health hazards in their line of work. But because these workers have no passengers and are not near other people when driving, they face lower risks of infection than the grocery store workers who spend their entire day in the stores, or food workers in restaurants who deal with customers in person or who deliver food to customers, or transportation network drivers who transport passengers in the close confines of their vehicle for hire. There is no rational basis for singling out food delivery persons for using FDNCs' platforms for the premium pay requirement on food deliveries, and certainly no rational basis for doing so by imposing unsustainable requirements on Plaintiff Instacart without allowing it to pass on the additional charges or stop doing business in Seattle. In fact, the Ordinance bars Instacart from even adjusting its service levels, effectively freezing its businesses in place. The Ordinance places no similar burdens on taxis, TNCs, or any other businesses or service providers in the grocery and food industry that face equal or greater risks of exposure.

81. Instacart is suffering and will continue to suffer damages as a direct result of the Ordinance's unequal treatment of its business.

SIXTH CAUSE OF ACTION
THE ORDINANCE VIOLATES ARTICLE I, SECTION 12 OF THE WASHINGTON CONSTITUTION

82. Plaintiffs incorporate by reference the allegations in all the preceding paragraphs.

83. Article I, Section 12 of the Washington Constitution provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

84. The Ordinance violates Article I, Section 12 by treating similarly situated businesses differently without justification. The Ordinance singles out FDNCs for uniquely disfavored treatment, placing no similar burdens on taxis, TNCs, or any other businesses or service providers in the grocery and food industry that face equal or greater risks of exposure. The Ordinance's severe restrictions on Instacart's operations—including the Ordinance's premium pay requirement, its prohibition on allowing Instacart to pass on additional costs, and its mandate that Instacart maintain its existing service in Seattle—implicate Instacart's fundamental right to carry on business in the State. No reasonable ground exists to justify the Ordinance's disparate treatment of FDNCs vis-à-vis other similarly situated businesses.

85. Instacart is suffering and will continue to suffer damages as a direct result of the Ordinance's violation of this clause.

SEVENTH CAUSE OF ACTION
INSTACART'S CLAIM FOR VIOLATION OF 42 U.S.C. § 1983

86. Instacart incorporates by reference the allegations in all the preceding paragraphs.

87. 42 U.S.C. § 1983 prohibits any State from depriving any citizen of the United States of any of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

88. By enacting the Ordinance, the Seattle City Council has, under color of law, violated the rights of Instacart protected by the United States Constitution and federal law.

89. Instacart is entitled to recover damages and attorneys' fees as a result of such violations.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that judgment be entered as follows:

1. Declaratory Relief.

a. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable insofar as it applies to Plaintiffs' facilitation of the delivery of groceries because it violates I-1634, as codified at RCW Chapter 82.84.

b. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable in its entirety because it lacks a rational basis.

c. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable in its entirety because it violates the Takings Clauses of the United States Constitution and the Washington Constitution.

d. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable in its entirety because it impairs existing contractual obligations in violation of the Contracts Clause of the United States Constitution (Article I, Section 10, Clause 2) and the Washington Constitution (Article I, Section 23).

e. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable in its entirety because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

f. For a declaratory judgment that the Ordinance is illegal, invalid, and unenforceable in its entirety because it violates Article I, Section 12 of the Washington Constitution.

2. Damages. Plaintiff Instacart seeks an award of damages for the financial and economic injuries it is suffering and will continue to suffer as a result of the Ordinance, including the marginal cost of premium pay that it is prohibited from recouping from its customers.

3. Injunctive Relief. Plaintiffs' rights to be free of the burdens of an ordinance that violates federal and state law are in jeopardy of immediate invasion, which will cause Plaintiffs to suffer substantial irreparable injury. Plaintiffs pray for preliminary and permanent injunctions

staying and restraining the City from taking any steps to implement, collect, or enforce collection of any sum of money due that is purportedly authorized by the Ordinance, and otherwise enforce any provision.

4. Attorneys' Fees and Cost of Suit. For Plaintiffs' attorneys' fees, costs, and expenses of bringing this suit, to the extent permitted by law or equity.

5. Other Relief. For such other and further relief as the Court deems just, proper, and equitable.

DATED this 2nd day of September, 2020.

ORRICK, HERRINGTON & SUTCLIFFE LLP

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APPENDIX A

CITY OF SEATTLE

ORDINANCE 126094

COUNCIL BILL 119799

AN ORDINANCE relating to gig workers in Seattle; establishing labor standards requirements for premium pay for gig workers working in Seattle; amending Sections 3.02.125 and 6.208.020 of the Seattle Municipal Code; declaring an emergency; and establishing an immediate effective date; all by a 3/4 vote of the City Council.

WHEREAS, the new coronavirus 19 (COVID-19) disease is caused by a virus that spreads easily from person to person and may result in serious illness or death, and is classified by the World Health Organization as a worldwide pandemic; and

WHEREAS, COVID-19 has broadly spread throughout Washington State and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, the definitions of "employee" and "employer" in local, state, and federal laws are broad, but food delivery network companies rely on business models that hire gig workers as "independent contractors," thereby creating barriers for gig workers to access employee protections; and

WHEREAS, gig workers working for food delivery network companies during the COVID-19 emergency face magnified risks of catching or spreading disease because the nature of their work can involve close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease; and

WHEREAS, The City of Seattle (City) intends to make it clear that gig workers working for food delivery network companies have a right to receive premium pay for work performed during the COVID-19 emergency; and

WHEREAS, the City intends to make it clear that provision of premium pay should not result in food delivery network companies reducing or otherwise modifying the areas in the City served by the companies, reducing a gig worker's compensation, limiting a gig worker's earning capacity, or adding charges to customers; and

WHEREAS, establishing premium pay standards for gig workers working during the COVID-19 emergency will increase retention of these gig workers and compensate them for the hazards of working on the frontlines of a global pandemic; and

WHEREAS, the City is a leader on wage, labor, and workforce practices that improve workers' lives, support economic security, and contribute to a fair, healthy, and vibrant economy; and

WHEREAS, establishing a labor standard that requires premium pay for gig workers working for food delivery network companies is a subject of vital and imminent concern to the people of this City and requires appropriate action by the City Council to establish this labor standard for gig workers; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council (Council) finds and declares that:

A. In the exercise of The City of Seattle's police powers, the City is granted authority to pass regulations designed to protect and promote public, health, safety, and welfare.

B. This ordinance protects and promotes public health, safety, and welfare during the new coronavirus 19 (COVID-19) emergency by requiring food delivery network companies to provide premium pay for gig workers performing work in Seattle, thereby increasing retention of gig workers who provide essential services on the frontlines of a global pandemic and who

should be paid additional compensation for the hazards of working with significant exposure to an infectious disease.

C. The World Health Organization (WHO) has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring dramatic interventions to disrupt the spread of this disease.

D. On February 29, 2020, Washington Governor Jay Inslee proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak.

E. On March 3, Mayor Jenny Durkan proclaimed a civil emergency in response to new cases of COVID-19, authorizing the Mayor to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare, and alleviate damage, loss, hardship or suffering.

F. On March 16, 2020, Washington Governor Jay Inslee and the Public Health – Seattle & King County Local Health Officer issued parallel orders temporarily shutting down restaurants, bars, and other entertainment and food establishments, except for take-out food.

G. On March 23, 2020, Washington Governor Jay Inslee issued a "Stay Home – Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes through April 6, 2020. In addition to healthcare, public health and emergency services, the "Stay Home – Stay Healthy" proclamation identified delivery network companies and establishments selling groceries and prepared food

and beverages as essential business sectors critical to protecting the health and well-being of all Washingtonians and designated their workers as essential critical infrastructure workers.

H. On April 2, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 4, 2020.

I. On May 1, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 31, 2020 in recognition that the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace.

J. On May 4, 2020, Washington Governor Jay Inslee announced a "Safe Start" plan that reopens Washington's economy in phases and has restrictions on the seating capacity of restaurants during three of the four phases and physical distancing for high-risk populations and worksites during all four phases.

K. As of May 20, 2020, the World Health Organization Situation Report reported a global total of 4,801,202 cases of COVID-19, including 318,935 deaths; the Washington State Department of Health and Johns Hopkins University reported 18,811 cases of COVID-19, including 1,031 deaths in Washington State; and Public Health – Seattle & King County reported 7,617 cases of COVID-19, including 530 deaths, in King County.

L. Food delivery network companies are essential businesses operating in Seattle during the COVID-19 emergency and rely on business models that hire gig workers as independent contractors, thereby creating barriers for gig workers to access employee protections established by local, state, and federal law, and making gig workers highly vulnerable to economic insecurity and health or safety risks.

M. Gig workers working for food delivery network companies are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. They can work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited or no ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease.

N. In the pursuit of economic opportunity, many gig workers are immigrants and people of color who have taken on debt or invested their savings to purchase and/or lease vehicles or other equipment to work for food delivery network companies.

O. Gig workers making deliveries for food delivery network companies are supporting community efforts to engage in physical distancing and mitigate the spread of COVID-19 while simultaneously exposing themselves to a higher risk of infection

P. Gig workers working for food delivery network companies bear the brunt of the time and expenses necessary for cleaning and disinfecting equipment and engaging in other efforts to protect themselves, customers, and the public from illness.

Q. Premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress.

R. Gig workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress due to the significant risk of exposure to the COVID-19 virus. Gig workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus

presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection.

S. The availability of food delivery services is fundamental to the health of the community and is made possible during the COVID-19 emergency because gig workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by making deliveries while working in hazardous situations.

T. Establishing an immediate requirement for food delivery network companies to provide premium pay to gig workers protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

U. This ordinance is necessary in response to the COVID-19 public health emergency because requiring food delivery network companies to provide premium pay to gig workers compensates gig workers for the risks of working during a pandemic and the safety measures they are undertaking to protect themselves, customers, and the public from catching or spreading illness. The provision of premium pay also better ensures the retention of these essential workers who are on the frontlines of this pandemic to provide essential services, who are needed throughout the duration of the COVID-19 emergency, and who deserve fair and equitable compensation for their work.

Section 2. As the substantive effects of this ordinance are not permanent, this ordinance is not intended to be codified. Section numbers are for ease of reference within this ordinance, and section and subsection references refer to numbers in this ordinance unless stated otherwise.

PREMIUM PAY FOR GIG WORKERS

100.005 Short title

This ordinance shall constitute the "Premium Pay for Gig Workers Ordinance" and may be cited as such.

100.010 Definitions

For purposes of this ordinance:

"Adverse action" means reducing the compensation to a gig worker, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, putting a gig worker on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, engaging in unfair immigration-related practices, filing a false report with a government agency, or otherwise discriminating against any person for any reason prohibited by Section 100.050. "Adverse action" for a gig worker may involve any aspect of work, including compensation, work hours, responsibilities, or other material change in the terms and conditions of work. "Adverse action" also encompasses any action by the hiring entity or a person acting on the hiring entity's behalf that would dissuade a reasonable person from exercising any right afforded by this ordinance.

"Agency" means the Office of Labor Standards and any division therein.

"Aggrieved party" means a gig worker or other person who suffers tangible or intangible harm due to a hiring entity or other person's violation of this ordinance.

"Application dispatch" means technology that allows customers to directly request dispatch of gig workers for provision of delivery services and/or allows gig workers or hiring entities to accept requests for services and payments for services via the internet using mobile interfaces such as, but not limited to, smartphone and tablet applications.

"City" means The City of Seattle.

"Compensation" means the total payment owed to a gig worker by reason of working for the hiring entity, including but not limited to hiring entity payments for providing services, bonuses, and commissions, as well as tips earned from customers.

"Deactivation" means the blocking of a gig worker's access to the hiring entity's platform, changing a gig worker's status from eligible to provide delivery services to ineligible, or other material restriction in access to the hiring entity's platform that is effected by a hiring entity.

"Director" means the Director of the Office of Labor Standards or the Director's designee.

"Director rules" means: (1) rules the Director or Agency may promulgate pursuant to subsection 100.060.B or 100.060.C; or (2) other rules that the Director identifies, by means of an Agency Q&A, previously promulgated pursuant to authority in Seattle Municipal Code Title 14. Rules the Director identifies by means of an Agency Q&A shall have the force and effect of law and may be relied on by hiring entities, gig workers, and other parties to determine their rights and responsibilities under this ordinance.

"Drop-off point" means the location of any delivery resulting from the online order.

"Eating and drinking establishment" means "eating and drinking establishment" as defined in Seattle Municipal Code Section 23.84A.010.

"Food delivery network company" means an organization whether a corporation, partnership, sole proprietor, or other form, operating in Seattle, that offers prearranged delivery services for compensation using an online-enabled application or platform, such as an application dispatch system, to connect customers with workers for delivery from one or more of

the following: (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order. "Food delivery network company" includes any such entity or person acting directly or indirectly in the interest of a food delivery network company in relation to the food delivery network company worker.

"Food delivery network company worker" means a person affiliated with and accepting an offer of prearranged delivery services for compensation from a food delivery network company. For purposes of this ordinance, at any time that a food delivery network company worker is logged into the worker platform, the worker is considered a food delivery network company worker.

"Food processing" means "food processing" as defined in Seattle Municipal Code Section 23.84A.012. "Front pay" means the compensation the gig worker would earn or would have earned if reinstated by the hiring entity.

"Gig worker" means a food delivery network company worker.

"Grocery store" means "grocery store" as defined in Seattle Municipal Code Section 23.84A.014.

"Hiring entity" means a food delivery network company.

"Hiring entity payment" means the amount owed to a gig worker by reason of working for the hiring entity, including but not limited to payment for providing services, bonuses, and commissions.

"Online order" means an order placed through an online-enabled application or platform, such as an application dispatch system, provided by a hiring entity for delivery services in Seattle.

"Operating in Seattle" means, with respect to a hiring entity, offering prearranged delivery services for compensation using an online-enabled application or platform, such as an application dispatch system, to any affiliated gig worker, where such services take place in whole or part in Seattle.

"Pick-up point" means the location of any establishment accessed by the gig worker to fulfill an online order, including but not limited to (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order.

"Premium pay" means additional compensation owed to a gig worker that is separate from hiring entity payments for providing services, bonuses, and commissions, as well as tips earned from customers.

"Rate of inflation" means 100 percent of the annual average growth rate of the bi-monthly Seattle-Tacoma-Bellevue Area Consumer Price Index for Urban Wage Earners and Clerical Workers, termed CPI-W, for the 12-month period ending in August, provided that the percentage increase shall not be less than zero.

"Respondent" means a hiring entity or any person who is alleged or found to have committed a violation of this ordinance.

"Successor" means any person to whom a hiring entity quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the hiring entity's business, a major part of the property, whether real or personal, tangible or intangible, of the hiring entity's business. For purposes of this definition, "person" means an individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, corporation, business trust, partnership, limited liability partnership, company, joint stock

company, limited liability company, association, joint venture, or any other legal or commercial entity.

"Tips" means a verifiable sum to be presented by a customer as a gift or gratuity in recognition of some service performed for the customer by the gig worker receiving the tip.

"Worker platform" means the worker-facing application dispatch system software or any online-enabled application service, website, or system, used by a food delivery network worker, that enables the prearrangement of delivery services for compensation.

"Work-related stop in Seattle" means time spent by a gig worker on a commercial stop in Seattle that is related to the provision of delivery services associated with an online order, and does not include stopping for refueling, stopping for a personal meal or errands, or time spent in Seattle solely for the purpose of travelling through Seattle from a point of origin outside Seattle to a destination outside Seattle with no commercial stops in Seattle.

"Written" or "writing" means a printed or printable communication in physical or electronic format, including but not limited to a communication that is transmitted through email, text message, or a computer or mobile system, or that is otherwise sent and maintained electronically.

100.015 Gig worker coverage

For the purposes of this ordinance:

A. Covered gig workers are limited to those who perform work for a covered hiring entity, where the work is performed in whole or part in Seattle.

B. Work performed "in Seattle" means work that includes a work-related stop in Seattle.

100.020 Hiring entity coverage

A. For the purposes of this ordinance, covered hiring entities are limited to those who hire 250 or more gig workers worldwide.

B. To determine the number of gig workers hired for the current calendar year:

1. The calculation is based upon the average number per calendar week of gig workers who worked for compensation during the preceding calendar year for any and all weeks during which at least one gig worker worked for compensation. For hiring entities that did not have any gig workers during the preceding calendar year, the number of gig workers hired for the current calendar year is calculated based upon the average number per calendar week of gig workers who worked for compensation during the first 90 calendar days of the current year in which the hiring entity engaged in business.

2. All gig workers who worked for compensation shall be counted, including but not limited to:

a. Gig workers who are not covered by this ordinance;

b. Gig workers who worked in Seattle; and

c. Gig workers who worked outside Seattle.

C. Separate entities that form an integrated enterprise shall be considered a single hiring entity under this ordinance. Separate entities will be considered an integrated enterprise and a single hiring entity under this ordinance where a separate entity controls the operation of another entity. The factors to consider in making this assessment include, but are not limited to:

1. Degree of interrelation between the operations of multiple entities;

2. Degree to which the entities share common management;

3. Centralized control of labor relations; and

4. Degree of common ownership or financial control over the entities.

100.025 Premium pay requirement

A. Hiring entities shall provide each gig worker with premium pay for each online order that results in the gig worker making a work-related stop in Seattle. For each online order, hiring entities shall provide the gig worker with premium pay in the following amounts:

1. $2.50 for one pick-up point or one drop-off point in Seattle;

2. $1.25 for each additional pick-up point in Seattle; and

3. $1.25 for each additional drop-off point in Seattle.

B. Hiring entities shall provide premium pay at the same time compensation is provided for the associated online order(s).

C. When providing premium pay, hiring entities shall include notification of online orders that qualified for premium pay and itemize the premium pay separately from other compensation.

D. Hiring entities shall provide the premium pay required by subsection 100.025.A for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

E. If the City establishes a minimum compensation standard for gig workers, the Council intends to consider eliminating the premium pay requirement for gig workers before the termination of the civil emergency proclaimed by the Mayor on March 3, 2020.

100.027 Gig worker and consumer protections

A. No hiring entity shall, as a result of this ordinance going into effect, take any of the following actions:

1. Reduce or otherwise modify the areas of the City that are served by the hiring entity;

2. Reduce a gig worker's compensation; or

3. Limit a gig worker's earning capacity, including but not limited to restricting access to online orders.

4. Add customer charges to online orders for delivery of groceries.

B. It shall be a violation of this Section 100.027 if this ordinance going into effect is a motivating factor in a hiring entity's decision to take any of the actions in subsection 100.027.A unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this ordinance going into effect.

100.030 Notice of rights

A. Hiring entities shall provide each gig worker with a written notice of rights established by this ordinance. The Agency may create and distribute a model notice of rights in English and other languages. However, hiring entities are responsible for providing gig workers with the notice of rights required by this subsection 100.030.A, in a form and manner sufficient to inform gig workers of their rights under this ordinance, regardless of whether the Agency has created and distributed a model notice of rights. The notice of rights shall provide information on:

1. The right to premium pay guaranteed by this ordinance;

2. The right to be protected from retaliation for exercising in good faith the rights protected by this ordinance; and

3. The right to file a complaint with the Agency or bring a civil action for a violation of the requirements of this ordinance, including a hiring entity's denial of premium pay as required by this ordinance and a hiring entity or other person's retaliation against a gig worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this ordinance.

B. Hiring entities shall provide the notice of rights required by subsection 100.030.A in an electronic format that is readily accessible to the gig worker. The notice of rights shall be made available to the gig worker via smartphone application or online web portal, in English and any language that the hiring entity knows or has reason to know is the primary language of the gig worker(s).

100.040 Hiring entity records

A. Hiring entities shall retain records that document compliance with this ordinance for each gig worker.

B. Hiring entities shall retain the records required by subsection 100.040.A for a period of three years.

C. If a hiring entity fails to retain adequate records required under subsection 100.040.A, there shall be a presumption, rebuttable by clear and convincing evidence, that the hiring entity violated this ordinance for the periods and for each gig worker for whom records were not retained.

100.050 Retaliation prohibited

A. No hiring entity or any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this ordinance.

B. No hiring entity or any other person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this ordinance. Such rights include, but are not limited to, the right to make inquiries about the rights protected under this ordinance; the right to inform others about their rights under this ordinance; the right to inform the person's hiring entity, the person’s legal counsel, a union or similar organization, or any other person about an alleged violation of this ordinance; the right to file an oral or written

complaint with the Agency or bring a civil action for an alleged violation of this ordinance; the right to cooperate with the Agency in its investigations of this ordinance; the right to testify in a proceeding under or related to this ordinance; the right to refuse to participate in an activity that would result in a violation of city, state or federal law; and the right to oppose any policy, practice, or act that is unlawful under this ordinance.

C. No hiring entity or any other person shall communicate to a person exercising rights protected in this Section 100.050, directly or indirectly, the willingness to inform a government worker that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of a gig worker or family member of the gig worker to a federal, state, or local agency because the gig worker has exercised a right under this ordinance.

D. It shall be a rebuttable presumption of retaliation if a hiring entity or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 100.050. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the hiring entity fails to rehire a former gig worker at the next opportunity for work in the same position. The hiring entity may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

E. Proof of retaliation under this Section 100.050 shall be sufficient upon a showing that a hiring entity or any other person has taken an adverse action against a person and the person's exercise of rights protected in this Section 100.050 was a motivating factor in the adverse action, unless the hiring entity can prove that the action would have been taken in the absence of such protected activity.

F. The protections afforded under this Section 100.050 shall apply to any person who mistakenly but in good faith alleges violations of this ordinance.

G. A complaint or other communication by any person triggers the protections of this Section 100.050 regardless of whether the complaint or communication is in writing or makes explicit reference to this ordinance.

100.060 Enforcement power and duties

A. The Agency shall have the power to investigate violations of this ordinance and shall have such powers and duties in the performance of these functions as are defined in this ordinance and otherwise necessary and proper in the performance of the same and provided for by law.

B. The Agency is authorized to coordinate implementation and enforcement of this ordinance and may promulgate appropriate guidelines or rules for such purposes.

C. The Director is authorized to promulgate rules consistent with this ordinance and Chapter 3.02 of the Seattle Municipal Code. Any guidelines or rules promulgated by the Director shall have the force and effect of law and may be relied on by hiring entities, gig workers, and other parties to determine their rights and responsibilities under this ordinance.

100.070 Violation

The failure of any respondent to comply with any requirement imposed on the respondent under this ordinance is a violation.

100.080 Investigation

A. The Agency shall have the power to investigate any violations of this ordinance by any respondent. The Agency may initiate an investigation pursuant to Director rules, including but not limited to situations when the Director has reason to believe that a violation has occurred

or will occur, or when circumstances show that violations are likely to occur within a class of hiring entities or businesses because the workforce contains significant numbers of gig workers who are vulnerable to violations of this ordinance or the workforce is unlikely to volunteer information regarding such violations. An investigation may also be initiated through the receipt by the Agency of a report or complaint filed by a gig worker or other person.

B. A gig worker or other person may report to the Agency any suspected violation of this ordinance. The Agency shall encourage reporting pursuant to this Section 100.080 by taking the following measures:

1. The Agency shall keep confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the gig worker or person reporting the violation. However, with the authorization of such person, the Agency may disclose the gig worker's or person's name and identifying information as necessary to enforce this ordinance or for other appropriate purposes.

2. Hiring entities shall provide gig workers with written notice of an investigation. Hiring entities shall provide the notice in a format that is readily accessible to gig workers. The Agency shall create the notice in English and other languages.

3. The Agency may certify the eligibility of eligible persons for "U" Visas under the provisions of 8 U.S.C. § 1184.p and 8 U.S.C. § 1101.a.15.U. This certification is subject to applicable federal law and regulations, and Director rules.

C. The Agency's investigation shall commence within three years of the alleged violation. To the extent permitted by law, the applicable statute of limitations for civil actions is tolled during any investigation under this ordinance and any administrative enforcement proceeding under this ordinance based upon the same facts. For purposes of this ordinance:

1. The Agency's investigation begins on the earlier date of when the Agency receives a complaint from a person under this ordinance, or when the Agency provides notice to the respondent that an investigation has commenced under this ordinance.

2. The Agency's investigation ends when the Agency issues a final order concluding the matter and any appeals have been exhausted; the time to file any appeal has expired; or the Agency notifies the respondent in writing that the investigation has been otherwise resolved.

D. The Agency's investigation shall be conducted in an objective and impartial manner.

E. The Director may apply by affidavit or declaration in the form allowed under RCW 9A.72.085 to the Hearing Examiner for the issuance of subpoenas requiring a hiring entity to produce the records required by Section 100.040, or for the attendance and testimony of witnesses, or for the production of documents required to be retained under Section 100.040, or any other document relevant to the issue of whether any gig worker or group of gig workers has been or is afforded the proper amount of premium pay required by this ordinance and/or to whether a hiring entity has violated any provision of this ordinance. The Hearing Examiner shall conduct the review without hearing as soon as practicable and shall issue subpoenas upon a showing that there is reason to believe that: a violation has occurred, a complaint has been filed with the Agency, or that circumstances show that violations are likely to occur within a class of businesses because the workforce contains significant numbers of gig workers who are vulnerable to violations of this ordinance or the workforce is unlikely to volunteer information regarding such violations.

F. A hiring entity that fails to comply with the terms of any subpoena issued under subsection 100.080.E in an investigation by the Agency under this ordinance before the issuance

of a Director's Order issued pursuant to subsection 100.090.C may not use such records in any appeal to challenge the correctness of any determination by the Agency of liability, damages owed, or penalties assessed.

G. In addition to other remedies, the Director may refer any subpoena issued under subsection 100.080.E to the City Attorney to seek a court order to enforce any subpoena.

H. Where the Director has reason to believe that a violation has occurred, the Director may order any appropriate temporary or interim relief to mitigate the violation or maintain the status quo pending completion of a full investigation or hearing, including but not limited to a deposit of funds or bond sufficient to satisfy a good-faith estimate of compensation, interest, damages, and penalties due. A respondent may appeal any such order in accordance with Section 100.210.

100.090 Findings of fact and determination

A. Except when there is an agreed upon settlement, the Director shall issue a written determination with findings of fact resulting from the investigation and statement of whether a violation of this ordinance has or has not occurred based on a preponderance of the evidence before the Director.

B. If the Director determines that there is no violation of this ordinance, the Director shall issue a “Determination of No Violation” with notice of a gig worker or other person's right to appeal the decision, pursuant to Director rules.

C. If the Director determines that a violation of this ordinance has occurred, the Director shall issue a “Director's Order” that shall include a notice of violation identifying the violation or violations.

1. The Director's Order shall state with specificity the amounts due under this ordinance for each violation, including payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest pursuant to Section 100.200.

2. The Director's Order may specify that civil penalties and fines due to the Agency can be mitigated for respondent's timely payment of remedy due to an aggrieved party pursuant to subsection 100.200.A.4.

3. The Director's Order may specify that civil penalties and fines are due to the aggrieved party rather than due to the Agency pursuant to subsection 100.200.E or 100.200.F.

4. The Director's Order may direct the respondent to take such corrective action as is necessary to comply with the requirements of this ordinance, including but not limited to monitored compliance for a reasonable time period.

5. The Director's Order shall include notice of the respondent's right to appeal the decision pursuant to Section 100.210.

100.200 Remedies

A. The payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest provided under this ordinance is cumulative and is not intended to be exclusive of any other available remedies, penalties, fines, and procedures.

1. The amounts of all civil penalties, penalties payable to aggrieved parties, and fines contained in this Section 100.200 shall be increased annually to reflect the rate of inflation and calculated to the nearest cent on January 1 of each year thereafter. The Agency shall determine the amounts and file a schedule of such amounts with the City Clerk.

2. If a violation is ongoing when the Agency receives a complaint or opens an investigation, the Director may order payment of unpaid compensation plus interest that accrues after receipt of the complaint or after the investigation opens and before the date of the Director's Order.

3. Interest shall accrue from the date the unpaid compensation was first due at 12 percent annum, or the maximum rate permitted under RCW 19.52.020.

4. If there is a remedy due to an aggrieved party, the Director may waive part or all of the amount of civil penalties and fines due to the Agency based on timely payment of the full remedy due to the aggrieved party.

a. The Director may waive the total amount of civil penalties and fines due to the Agency if the Director determines that the respondent paid the full remedy due to the aggrieved party within ten days of service of the Director's Order.

b. The Director may waive half the amount of civil penalties and fines due to the Agency if the Director determines that the respondent paid the full remedy due to the aggrieved party within 15 days of service of the Director's Order.

c. The Director shall not waive any amount of civil penalties and fines due to the Agency if the Director determines that the respondent has not paid the full remedy due to the aggrieved party after 15 days of service of the Director's Order.

5. When determining the amount of liquidated damages, civil penalties, penalties payable to aggrieved parties, and fines due under this Section 100.200 for a settlement agreement or Director's Order, including but not limited to the mitigation of civil penalties and fines due to the Agency for timely payment of remedy due to an aggrieved party under subsection 100.200.A.4, the Director shall consider:

a. The total amount of unpaid compensation, liquidated damages, penalties, fines, and interest due;

b. The nature and persistence of the violations;

c. The extent of the respondent's culpability;

d. The substantive or technical nature of the violations;

e. The size, revenue, and human resources capacity of the respondent;

f. The circumstances of each situation;

g. The amount of penalties in similar situations; and

h. Other factors pursuant to Director rules.

B. A respondent found to be in violation of this ordinance shall be liable for full payment of unpaid compensation due plus interest in favor of the aggrieved party under the terms of this ordinance and other equitable relief. If the precise amount of unpaid compensation cannot be determined due to a respondent's failure to produce records or if a respondent produces records in a manner or form which makes timely determination of the amount of unpaid compensation impracticable, the Director may designate a daily amount for unpaid compensation due to aggrieved party. For any violation of this ordinance, the Director may assess liquidated damages in an additional amount of up to twice the unpaid compensation.

C. A respondent found to be in violation of this ordinance for retaliation under Section 100.050 shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid compensation plus interest in favor of the aggrieved party under the terms of this ordinance, and liquidated damages in an additional amount of up to twice the unpaid

compensation. The Director also shall order the imposition of a penalty payable to the aggrieved party of up to $5,462.70.

D. A respondent found to be in violation of gig worker and consumer protections under subsection 100.027.A.1 or 100.027.A.4 shall be subject to the penalties and fines established by this Section 100.200; such penalties and fines shall be payable only to the Agency. The Director is not authorized to assess unpaid compensation due under subsection 100.200.B or 100.200.C. for violations of subsection 100.027.A.1 or 100.027.A.4. All remedies are available for violations of subsection 100.027.A.2 or 100.027.A.3.

E. The Director is authorized to assess penalties and shall specify that at least 50 percent of any penalty assessed pursuant to this subsection 100.200.E is payable to the aggrieved party and the remaining penalty is payable to the Agency as a civil penalty. The Director may also specify that the entire penalty is payable to the aggrieved party.

1. For a first violation of this ordinance, the Director may assess a penalty of up to $546.07 per aggrieved party.

2. For a second violation of this ordinance, the Director shall assess a penalty of up to $1,092.13 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

3. For a third or any subsequent violation of this ordinance, the Director shall assess a penalty of up to $5,462.70 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

4. The maximum penalty for a violation of this ordinance shall be $21,849.79 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

5. For purposes of this Section 100.200, a violation is a second, third, or subsequent violation if the respondent has been a party to one, two, or more than two settlement agreements, respectively, stipulating that a violation has occurred; and/or one, two, or more than two Director's Orders, respectively, have issued against the respondent in the ten years preceding the date of the violation; otherwise, it is a first violation.

F. The Director is authorized to assess fines and may specify that the fines are due to the aggrieved party rather than due to the Agency. The Director is authorized to assess fines as follows:

Violation	**Fine**
Failure to provide a gig worker with written notice of rights under subsection 100.030.A	$546.07 per aggrieved party
Failure to retain hiring entity records for three years under subsections 100.040.A and 100.040.B	$546.07 per missing record
Failure to comply with prohibitions against retaliation for exercising rights protected under Section 100.050	$1,092.13 per aggrieved party
Failure to provide notice of investigation to gig workers under subsection 100.080.B.2	$546.07
Failure to post or distribute public notice of failure to comply with final order under subsection 100.240.A.1	$546.07

The maximum amount that may be imposed in fines in a one-year period for each type of violation listed above is $5,462.70 unless a fine for retaliation is issued, in which case the maximum amount is $21,849.79.

G. A respondent who willfully hinders, prevents, impedes, or interferes with the Director or Hearing Examiner in the performance of their duties under this ordinance shall be subject to a civil penalty of not less than $1,092.13 and not more than $5,462.70.

H. In addition to the unpaid compensation, penalties, fines, liquidated damages, and interest, the Agency may assess against the respondent in favor of the City the reasonable costs incurred in enforcing this ordinance, including but not limited to reasonable attorneys' fees.

I. A hiring entity that is the subject of a settlement agreement stipulating that a violation has occurred shall count for debarment, or a final order for which all appeal rights have been exhausted, shall not be permitted to bid, or have a bid considered, on any City contract until such amounts due under the final order have been paid in full to the Director. If the hiring entity is the subject of a final order two times or more within a five-year period, the hiring entity shall not be allowed to bid on any City contract for two years. This subsection 100.200.I shall be construed to provide grounds for debarment separate from, and in addition to, those contained in Seattle Municipal Code Chapter 20.70 and shall not be governed by that chapter provided that nothing in this subsection 100.200.I shall be construed to limit the application of Seattle Municipal Code Chapter 20.70. The Director shall notify the Director of Finance and Administrative Services of all hiring entities subject to debarment under this subsection 100.080.I.

100.210 Appeal period and failure to respond

A. A gig worker or other person who claims an injury as a result of an alleged violation of this ordinance may appeal the Determination of No Violation, pursuant to Director rules.

B. A respondent may appeal the Director's Order, including all remedies issued pursuant to Section 100.200, by requesting a contested hearing before the Hearing Examiner in writing within 15 days of service of the Director's Order. If a respondent fails to appeal the Director's Order within 15 days of service, the Director's Order shall be final. If the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the appeal period shall run until 5 p.m. on the next business day.

100.220 Appeal procedure and failure to appear

A. Contested hearings shall be conducted pursuant to the procedures for hearing contested cases contained in Section 3.02.090 of the Seattle Municipal Code and the rules adopted by the Hearing Examiner for hearing contested cases. The hearing shall be conducted de novo and the Director shall have the burden of proving by a preponderance of the evidence that the violation or violations occurred. Upon establishing such proof, the remedies and penalties imposed by the Director shall be upheld unless it is shown that the Director abused discretion. Failure to appear for a contested hearing shall result in an order being entered finding that the respondent committed the violation stated in the Director's Order. For good cause shown and upon terms the Hearing Examiner deems just, the Hearing Examiner may set aside an order entered upon a failure to appear.

B. In all contested cases, the Hearing Examiner shall enter an order affirming, modifying or reversing the Director's Order, consistent with Ordinance 126068.

100.230 Appeal from Hearing Examiner order

A. The respondent may obtain judicial review of the decision of the Hearing Examiner by applying for a Writ of Review in the King County Superior Court within 30 days from the date of the decision in accordance with the procedure set forth in chapter 7.16 RCW, other applicable law, and court rules.

B. The decision of the Hearing Examiner shall be final and conclusive unless review is sought in compliance with this Section 100.230.

100.240 Failure to comply with final order

A. If a respondent fails to comply within 30 days of service of any settlement agreement with the Agency, or with any final order issued by the Director or the Hearing Examiner for which

all appeal rights have been exhausted, the Agency may pursue, but is not limited to, the following measures to secure compliance:

1. The Director may require the respondent to post or distribute public notice of the respondent's failure to comply in a form and manner determined by the Agency.

2. The Director may refer the matter to a collection agency. The cost to the City for the collection services will be assessed as costs, at the rate agreed to between the City and the collection agency, and added to the amounts due.

3. The Director may refer the matter to the City Attorney for the filing of a civil action in King County Superior Court, the Seattle Municipal Court, or any other court of competent jurisdiction to enforce such order or to collect amounts due. In the alternative, the Director may seek to enforce a Director's Order or a final order of the Hearing Examiner under Section 100.250.

4. The Director may request that the City's Department of Finance and Administrative Services deny, suspend, refuse to renew, or revoke any business license held or requested by the hiring entity or person until such time as the hiring entity complies with the remedy as defined in the settlement agreement or final order. The City's Department of Finance and Administrative Services shall have the authority to deny, refuse to renew, or revoke any business license in accordance with this subsection 100.240.A.4.

B. No respondent that is the subject of a final order issued under this ordinance shall quit business, sell out, exchange, convey, or otherwise dispose of the respondent's business or stock of goods without first notifying the Agency and without first notifying the respondent's successor of the amounts owed under the final order at least three business days before such transaction. At the time the respondent quits business, or sells out, exchanges, or otherwise disposes of the

respondent's business or stock of goods, the full amount of the remedy, as defined in a final order issued by the Director or the Hearing Examiner, shall become immediately due and payable. If the amount due under the final order is not paid by respondent within ten days from the date of such sale, exchange, conveyance, or disposal, the successor shall become liable for the payment of the amount due, provided that the successor has actual knowledge of the order and the amounts due or has prompt, reasonable, and effective means of accessing and verifying the fact and amount of the order and the amounts due. The successor shall withhold from the purchase price a sum sufficient to pay the amount of the full remedy. When the successor makes such payment, that payment shall be deemed a payment upon the purchase price in the amount paid, and if such payment is greater in amount than the purchase price the amount of the difference shall become a debt due such successor from the hiring entity.

100.250 Debt owed The City of Seattle

A. All monetary amounts due under the Director's Order shall be a debt owed to the City and may be collected in the same manner as any other debt in like amount, which remedy shall be in addition to all other existing remedies, provided that amounts collected by the City for unpaid compensation, liquidated damages, penalties payable to aggrieved parties, or front pay shall be held in trust by the City for the aggrieved party and, once collected by the City, shall be paid by the City to the aggrieved party.

B. If a respondent fails to appeal a Director's Order to the Hearing Examiner within the time period set forth in subsection 100.210.B, the Director's Order shall be final, and the Director may petition the Seattle Municipal Court, or any court of competent jurisdiction, to enforce the Director's Order by entering judgment in favor of the City finding that the respondent has failed to exhaust its administrative remedies and that all amounts and relief contained in the order are

due. The Director's Order shall constitute prima facie evidence that a violation occurred and shall be admissible without further evidentiary foundation. Any certifications or declarations authorized under RCW 9A.72.085 containing evidence that the respondent has failed to comply with the order or any parts thereof, and is therefore in default, or that the respondent has failed to appeal the Director's Order to the Hearing Examiner within the time period set forth in subsection 100.210.B, and therefore has failed to exhaust the respondent's administrative remedies, shall also be admissible without further evidentiary foundation.

C. If a respondent fails to obtain judicial review of an order of the Hearing Examiner within the time period set forth in subsection 100.230.A, the order of the Hearing Examiner shall be final, and the Director may petition the Seattle Municipal Court to enforce the Director's Order by entering judgment in favor of the City for all amounts and relief due under the order of the Hearing Examiner. The order of the Hearing Examiner shall constitute conclusive evidence that the violations contained therein occurred and shall be admissible without further evidentiary foundation. Any certifications or declarations authorized under RCW 9A.72.085 containing evidence that the respondent has failed to comply with the order or any parts thereof, and is therefore in default, or that the respondent has failed to avail itself of judicial review in accordance with subsection 100.230.A, shall also be admissible without further evidentiary foundation.

D. In considering matters brought under subsections 100.250.B and 100.250.C, the Municipal Court may include within its judgment all terms, conditions, and remedies contained in the Director's Order or the order of the Hearing Examiner, whichever is applicable, that are consistent with the provisions of this ordinance.

100.260 Private right of action

A. Any person or class of persons that suffers financial injury as a result of a violation of this ordinance, or is the subject of prohibited retaliation under Section 100.050, may bring a civil action in a court of competent jurisdiction against the hiring entity or other person violating this ordinance and, upon prevailing, may be awarded reasonable attorney fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation: the payment of any unpaid compensation plus interest due to the person and liquidated damages in an additional amount of up to twice the unpaid compensation; and a penalty payable to any aggrieved party of up to $55,462.70 if the aggrieved party was subject to prohibited retaliation. Interest shall accrue from the date the unpaid compensation was first due at 12 percent per annum, or the maximum rate permitted under RCW 19.52.020.

B. For purposes of this Section 100.260, "person" includes any entity a member of which has suffered financial injury or retaliation, or any other individual or entity acting on behalf of an aggrieved party that has suffered financial injury or retaliation.

C. For purposes of determining membership within a class of persons entitled to bring an action under this Section 100.260, two or more gig workers are similarly situated if they:

1. Are or were hired for the same hiring entity or hiring entities, whether concurrently or otherwise, at some point during the applicable statute of limitations period,

2. Allege one or more violations that raise similar questions as to liability, and

3. Seek similar forms of relief.

D. For purposes of subsection 100.260.C, gig workers shall not be considered dissimilar solely because the gig workers'

1. Claims seek damages that differ in amount, or

2. Job titles or other means of classifying gig workers differ in ways that are unrelated to their claims.

100.270 Encouragement of more generous policies

A. Nothing in this ordinance shall be construed to discourage or prohibit a hiring entity from the adoption or retention of premium pay policies more generous than the one required herein.

B. Nothing in this ordinance shall be construed as diminishing the obligation of a hiring entity to comply with any contract or other agreement providing more generous protections to a gig worker than required by this ordinance.

100.280 Other legal requirements

This ordinance provides minimum requirements for premium pay while working for a hiring entity during the COVID-19 emergency and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for higher premium pay, or that extends other protections to gig workers; and nothing in this ordinance shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nor shall this ordinance be construed to preclude any person aggrieved from seeking judicial review of any final administrative decision or order made under this ordinance affecting such person. Nothing in this Section 100.280 shall be construed as restricting a gig worker's right to pursue any other remedies at law or equity for violation of their rights.

100.290 Severability

The provisions of this ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this ordinance, or the

application thereof to any hiring entity, gig worker, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 3. Section 3.02.125 of the Seattle Municipal Code, last amended by Ordinance 125948, is amended as follows:

3.02.125 Hearing Examiner filing fees

A. The filing fee for a case before the City Hearing Examiner is $85, with the following exceptions:

Basis for Case	**Fee in dollars**
* * *	
Paid Sick/Safe Leave Ordinance (Chapter 14.16)	No fee
Premium Pay for Gig Workers Ordinance (Introduced as Council Bill 119799)	No fee
Public Accommodations Ordinance (Chapter 14.06)	No fee
* * *	

* * *

Section 4. Subsection 6.208.020.A of the Seattle Municipal Code, which section was last amended by Ordinance 125930, is amended as follows:

6.208.020 Denial, revocation of, or refusal to renew business license

A. In addition to any other powers and authority provided under this Title 6, the Director, or the Director's designee, has the power and authority to deny, revoke, or refuse to renew any business license issued under the provisions of this Chapter 6.208. The Director, or the Director's designee, shall notify such applicant or licensee in writing by mail of the denial, revocation of, or refusal to renew the license and on what grounds such a decision was based. The Director may deny, revoke, or refuse to renew any license issued under this Chapter 6.208 on one or more of the following grounds:

1. The license was procured by fraud or false representation of fact.

2. The licensee has failed to comply with any provisions of this Chapter 6.208.

3. The licensee has failed to comply with any provisions of Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52.

4. The licensee is in default in any payment of any license fee or tax under Title 5 or Title 6.

5. The property at which the business is located has been determined by a court to be a chronic nuisance property as provided in Chapter 10.09.

6. The applicant or licensee has been convicted of theft under subsection 12A.08.060.A.4 within the last ten years.

7. The applicant or licensee is a person subject within the last ten years to a court order entering final judgment for violations of chapters 49.46, 49.48, or 49.52 RCW, or 29 U.S.C. 206 or 29 U.S.C. 207, and the judgment was not satisfied within 30 days of the later of either:

a. The expiration of the time for filing an appeal from the final judgment order under the court rules in effect at the time of the final judgment order; or

b. If a timely appeal is made, the date of the final resolution of that appeal and any subsequent appeals resulting in final judicial affirmation of the findings of violations of chapters 49.46, 49.48, or 49.52 RCW, or 29 U.S.C. 206 or 29 U.S.C. 207.

8. The applicant or licensee is a person subject within the last ten years to a final and binding citation and notice of assessment from the Washington Department of Labor and Industries for violations of chapters 49.46, 49.48, or 49.52 RCW, and the citation amount and

penalties assessed therewith were not satisfied within 30 days of the date the citation became final and binding.

9. Pursuant to subsections 14.16.100.A.4, 14.17.075.A, 14.19.100.A.4, 14.20.080.A.4, 14.22.115.A.4, 14.23.115.A.4, 14.26.210.A.4, 14.27.210.A.4, 14.28.210.A.4, and 14.30.180.A.4, and subsection 100.240.A.4 of this ordinance, the applicant or licensee has failed to comply, within 30 days of service of any settlement agreement, with any final order issued by the Director of the Office of Labor Standards, or any final order issued by the Hearing Examiner under Chapters 14.16, 14.17, 14.19, 14.20, 14.22, 14.23, 14.26, 14.27, 14.28, 14.29, and 14.30, and this ordinance, for which all appeal rights have been exhausted, and the Director of the Office of Labor Standards has requested that the Director deny, refuse to renew, or revoke any business license held or requested by the applicant or licensee. The denial, refusal to renew, or revocation shall remain in effect until such time as the violation(s) under Chapters 14.16, 14.17, 14.19, 14.20, 14.22, 14.23, 14.26, 14.27, 14.28, 14.29, and 14.30, and this ordinance are remedied.

10. The business is one that requires an additional license under this Title 6 and the business does not hold that license.

11. The business has been determined under a separate enforcement process to be operating in violation of law.

* * *

Section 5. This ordinance shall be automatically repealed without subsequent Council action three years after the termination of the civil emergency proclaimed by the Mayor on March 3, 2020.

Section 6. Based on the findings of fact set forth in Section 1 of this ordinance, the Council finds and declares that this ordinance is a public emergency ordinance, which shall take effect immediately and is necessary for the protection of the public health, safety, and welfare.

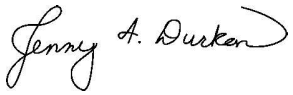
Section 7. By reason of the findings set forth in Section 1, and the emergency that is hereby declared to exist, this ordinance shall become effective immediately upon its passage by a 3/4 vote of the Council and its approval by the Mayor, as provided by Article 4, subsection 1.1 of the Charter of the City.

Passed by a 3/4 vote of all the members of the City Council the 15th day of June, 2020, and signed by me in open session in authentication of its passage this 15th day of June, 2020.

_____

President _____ of the City Council

Approved by me this 26th day of June, 2020.



_____

Jenny A. Durkan, Mayor

Filed by me this 26th day of June, 2020.

_____

Monica Martinez Simmons, City Clerk

(Seal)

CITY OF SEATTLE

ORDINANCE 126122

COUNCIL BILL 119841

AN ORDINANCE relating to gig workers in Seattle; establishing labor standards requirements for premium pay for gig workers in Seattle; amending Sections 100.015, 100.027, and 100.200 of Ordinance 126094 to make technical corrections; declaring an emergency; and establishing an immediate effective date; all by a 3/4 vote of the City Council.

WHEREAS, in June 2020, the City Council (Council) passed emergency legislation, Ordinance 126094 (Premium Pay for Gig Workers Ordinance), requiring food delivery network companies to provide gig workers with premium pay for work performed in Seattle during the new coronavirus 19 emergency; and

WHEREAS, the Premium Pay for Gig Workers Ordinance went into effect upon the Mayor's signature on June 26, 2020; and

WHEREAS, The City of Seattle is a leader on wage, labor, and workforce practices that improve workers' lives, support economic security, and contribute to a fair, healthy, and vibrant economy; and

WHEREAS, amending the Premium Pay for Gig Workers Ordinance to make technical corrections will support implementation and enforcement of the ordinance's requirements; and

WHEREAS, amending the Premium Pay for Gig Workers Ordinance requires appropriate action by the Council; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council (Council) finds and declares that:

A. In the exercise of The City of Seattle's police powers, the City is granted authority to pass regulations designed to protect and promote public health, safety, and welfare.

B. This ordinance protects and promotes public health, safety, and welfare during the new coronavirus 19 (COVID-19) emergency by making technical amendments to the Premium Pay for Gig Workers Ordinance that are consistent with the Council's intention and that will support implementation and enforcement of ordinance requirements.

C. The World Health Organization (WHO) has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring dramatic interventions to disrupt the spread of this disease.

D. On February 29, 2020, Washington Governor Jay Inslee proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak.

E. On March 3, Mayor Jenny Durkan proclaimed a civil emergency in response to new cases of COVID-19, authorizing the Mayor to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare, and alleviate damage, loss, hardship or suffering.

F. On March 16, 2020, Washington Governor Jay Inslee and the Public Health – Seattle & King County Local Health Officer issued parallel orders temporarily shutting down restaurants, bars, and other entertainment and food establishments, except for take-out food.

G. On March 23, 2020, Washington Governor Jay Inslee issued a "Stay Home – Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes through April 6, 2020. In addition to healthcare, public health and emergency services, the "Stay Home – Stay Healthy" proclamation

identified delivery network companies and establishments selling groceries and prepared food and beverages as essential business sectors critical to protecting the health and well-being of all Washingtonians and designated their workers as essential critical infrastructure workers.

H. On April 2, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 4, 2020.

I. On May 1, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 31, 2020 in recognition that the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace.

J. On May 4, 2020, Washington Governor Jay Inslee announced a "Safe Start" plan that reopens Washington's economy in phases and has restrictions on the seating capacity of restaurants during three of the four phases and physical distancing for high-risk populations and worksites during all four phases.

K. On June 19, 2020, Washington State Secretary of Health John Wiesman approved King County to move to Phase 2 of the "Safe Start" plan. Under Phase 2, restaurants must comply with health and safety requirements that include limiting guest occupancy to 50 percent or less of the maximum building occupancy, limiting table size to five guests or fewer, and prohibiting bar seating.

L. On July 23, Governor Jay Inslee and Washington State Secretary of Health John Wiesman announced changes to the "Safe Start" plan to slow COVID-19 exposure, including a new requirement that restaurants limit indoor parties to members of the same household. The announcement also confirmed that takeaway remains available for small parties from different

households.

M. As of July 28, 2020, the WHO Situation Report reported a global total of 16,341,920 cases of COVID-19, including 650,805 deaths; the Washington State Department of Health and Johns Hopkins University reported 53,321 cases of COVID-19, including 1,518 deaths in Washington State; and Public Health – Seattle & King County reported 14,579 cases of COVID-19, including 645 deaths, in King County.

N. In June 2020, the Council passed Ordinance 126094 (Premium Pay for Gig Workers Ordinance), emergency legislation to support gig workers for the risks of working for food delivery network companies during the COVID-19 emergency and for the costs of taking preventative safety measures to protect themselves and others from spreading the virus.

O. Effective June 26, 2020, the Premium Pay for Gig Workers Ordinance requires covered food delivery network companies to provide premium pay to gig workers working in Seattle for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

P. The Premium Pay for Gig Workers Ordinance also establishes gig worker and consumer protections. Food delivery service companies, as a result of the ordinance going into effect, are prohibited from reducing areas of service in Seattle; reducing a gig worker's compensation; limiting a gig worker's earning capacity; or adding customer charges for delivery of groceries.

Q. The City's Office of Labor Standards (OLS) implements and enforces the Premium Pay for Gig Workers Ordinance. If OLS finds that a food service delivery network company violated the ordinance, the Director can issue an order requiring payment of unpaid compensation to the gig worker(s) and penalties payable to the City and the gig worker(s).

R. Food delivery network companies are essential businesses operating in Seattle during the COVID-19 emergency and rely on business models that hire gig workers as independent contractors, thereby creating barriers for gig workers to access employee protections established by local, state, and federal law, and making gig workers highly vulnerable to economic insecurity and health or safety risks.

S. Gig workers working for food delivery network companies are essential workers performing services that are fundamental to the economy and health of the community during the COVID-19 crisis. They can work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited or no ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease.

T. In the pursuit of economic opportunity, many gig workers are immigrants and people of color who have taken on debt or invested their savings to purchase and/or lease vehicles or other equipment to work for food delivery network companies.

U. Gig workers making deliveries for food delivery network companies are supporting community efforts to engage in physical distancing and mitigate the spread of COVID-19 while simultaneously exposing themselves to a higher risk of infection. Gig workers also bear the brunt of the time and expenses necessary for cleaning and disinfecting equipment and engaging in other efforts to protect themselves, customers, and the public from illness.

V. Premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress.

W. Gig workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress due to the significant risk of exposure to the COVID-19 virus. Gig workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection.

X. The availability of food delivery services is fundamental to the health of the community and is made possible during the COVID-19 emergency because gig workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by making deliveries while working in hazardous situations.

Y. Requiring food delivery network companies to provide premium pay to gig workers protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

Z. This ordinance is immediately necessary in response to the COVID-19 public health emergency because making technical amendments to the Premium Pay for Gig Workers Ordinance will support implementation and enforcement of premium pay requirements that are vital to the financial well-being of gig workers and public safety during a global pandemic.

Section 2. Section 100.015 of Ordinance 126094 is amended as follows:

100.015 Gig worker coverage

For the purposes of this ordinance:

A. Covered gig workers are limited to those who perform work for a covered hiring entity, where the work is performed in whole or part in Seattle.

B. Work performed "in Seattle" means work that includes a work-related stop in Seattle.

C. Gig workers who are employees under Seattle Municipal Code Chapter 14.20 for covered hiring entities are not covered gig workers under this ordinance. Hiring entities must pay all compensation owed to such gig workers in accordance with their obligations under Seattle Municipal Code Chapter 14.20.

Section 3. Section 100.027 of Ordinance 126094 is amended as follows:

100.027 Gig worker and consumer protections

A. No hiring entity shall, as a result of this ordinance going into effect, take any of the following actions:

1. Reduce or otherwise modify the areas of the City that are served by the hiring entity;

2. Reduce a gig worker's compensation; ((~~or~~))

3. Limit a gig worker's earning capacity, including but not limited to restricting access to online orders((~~.~~)) ; or

4. Add customer charges to online orders for delivery of groceries.

B. It shall be a violation of this Section 100.027 if this ordinance going into effect is a motivating factor in a hiring entity's decision to take any of the actions in subsection 100.027.A unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this ordinance going into effect.

C. Hiring entities shall comply with the requirements in subsection 100.027.A for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

Section 4. Section 100.200 of Ordinance 126094 is amended as follows:

100.200 Remedies

* * *

D. A respondent found to be in violation of gig worker and consumer protections under subsection 100.027.A.1 or 100.027.A.4 shall be subject to the penalties and fines established by this Section 100.200; such penalties and fines shall be payable only to the Agency. The Director is not authorized to assess unpaid compensation due under subsection 100.200.B or 100.200.C((.)) for violations of subsection 100.027.A.1 or 100.027.A.4. All remedies are available for violations of subsection 100.027.A.2 or 100.027.A.3.

E. The Director is authorized to assess penalties and shall specify that at least 50 percent of any penalty assessed pursuant to this subsection 100.200.E is payable to the aggrieved party and the remaining penalty is payable to the Agency as a civil penalty. The Director may also specify that the entire penalty is payable to the aggrieved party.

1. For a first violation of this ordinance, the Director may assess a penalty of up to $546.07 per aggrieved party.

2. For a second violation of this ordinance, the Director shall assess a penalty of up to $1,092.13 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

3. For a third or any subsequent violation of this ordinance, the Director shall assess a penalty of up to $5,462.70 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

((~~4. The maximum penalty for a violation of this ordinance shall be $21,849.79 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.~~))

((~~5.~~)) 4. For purposes of this Section 100.200, a violation is a second, third, or subsequent violation if the respondent has been a party to one, two, or more than two settlement agreements, respectively, stipulating that a violation has occurred; and/or one, two, or more than two Director's Orders, respectively, have issued against the respondent in the ten years preceding the date of the violation; otherwise, it is a first violation.

Section 5. Based on the findings of fact set forth in Section 1 of this ordinance, the Council finds and declares that this ordinance is a public emergency ordinance, which shall take effect immediately and is necessary for the protection of public health, safety, and welfare.

Section 6. By reason of the findings set forth in Section 1, and the emergency that is hereby declared to exist, this ordinance shall become effective immediately upon its passage by a 3/4 vote of the Council and its approval by the Mayor, as provided by Article 4, subsection 1.1 of the Charter of the City.

Passed by a 3/4 vote of all the members of the City Council the 10th day of August, 2020, and signed by me in open session in authentication of its passage this 10th day of August, 2020.

President _____ of the City Council

Approved by me this 14th day of August, 2020.

Jenny A. Durkan, Mayor

Filed by me this 21st day of August, 2020.

Monica Martinez Simmons, City Clerk

(Seal)

Appendix E

Signed Ordinance 126122

CITY OF SEATTLE

ORDINANCE 126122

COUNCIL BILL 119841

AN ORDINANCE relating to gig workers in Seattle; establishing labor standards requirements for premium pay for gig workers in Seattle; amending Sections 100.015, 100.027, and 100.200 of Ordinance 126094 to make technical corrections; declaring an emergency; and establishing an immediate effective date; all by a 3/4 vote of the City Council.

WHEREAS, in June 2020, the City Council (Council) passed emergency legislation, Ordinance 126094 (Premium Pay for Gig Workers Ordinance), requiring food delivery network companies to provide gig workers with premium pay for work performed in Seattle during the new coronavirus 19 emergency; and

WHEREAS, the Premium Pay for Gig Workers Ordinance went into effect upon the Mayor's signature on June 26, 2020; and

WHEREAS, The City of Seattle is a leader on wage, labor, and workforce practices that improve workers' lives, support economic security, and contribute to a fair, healthy, and vibrant economy; and

WHEREAS, amending the Premium Pay for Gig Workers Ordinance to make technical corrections will support implementation and enforcement of the ordinance's requirements; and

WHEREAS, amending the Premium Pay for Gig Workers Ordinance requires appropriate action by the Council; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council (Council) finds and declares that:

A. In the exercise of The City of Seattle's police powers, the City is granted authority to pass regulations designed to protect and promote public health, safety, and welfare.

B. This ordinance protects and promotes public health, safety, and welfare during the new coronavirus 19 (COVID-19) emergency by making technical amendments to the Premium Pay for Gig Workers Ordinance that are consistent with the Council's intention and that will support implementation and enforcement of ordinance requirements.

C. The World Health Organization (WHO) has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring dramatic interventions to disrupt the spread of this disease.

D. On February 29, 2020, Washington Governor Jay Inslee proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak.

E. On March 3, Mayor Jenny Durkan proclaimed a civil emergency in response to new cases of COVID-19, authorizing the Mayor to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare, and alleviate damage, loss, hardship or suffering.

F. On March 16, 2020, Washington Governor Jay Inslee and the Public Health – Seattle & King County Local Health Officer issued parallel orders temporarily shutting down restaurants, bars, and other entertainment and food establishments, except for take-out food.

G. On March 23, 2020, Washington Governor Jay Inslee issued a "Stay Home – Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes through April 6, 2020. In addition to healthcare, public health and emergency services, the "Stay Home – Stay Healthy" proclamation

identified delivery network companies and establishments selling groceries and prepared food and beverages as essential business sectors critical to protecting the health and well-being of all Washingtonians and designated their workers as essential critical infrastructure workers.

H. On April 2, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 4, 2020.

I. On May 1, 2020, Washington Governor Jay Inslee extended the "Stay Home – Stay Healthy" proclamation through May 31, 2020 in recognition that the worldwide COVID-19 pandemic and its progression in Washington State continue to threaten the life and health of our people as well as the economy of Washington State, and remain a public disaster affecting life, health, property or the public peace.

J. On May 4, 2020, Washington Governor Jay Inslee announced a "Safe Start" plan that reopens Washington's economy in phases and has restrictions on the seating capacity of restaurants during three of the four phases and physical distancing for high-risk populations and worksites during all four phases.

K. On June 19, 2020, Washington State Secretary of Health John Wiesman approved King County to move to Phase 2 of the "Safe Start" plan. Under Phase 2, restaurants must comply with health and safety requirements that include limiting guest occupancy to 50 percent or less of the maximum building occupancy, limiting table size to five guests or fewer, and prohibiting bar seating.

L. On July 23, Governor Jay Inslee and Washington State Secretary of Health John Wiesman announced changes to the "Safe Start" plan to slow COVID-19 exposure, including a new requirement that restaurants limit indoor parties to members of the same household. The announcement also confirmed that takeaway remains available for small parties from different

households.

M. As of July 28, 2020, the WHO Situation Report reported a global total of 16,341,920 cases of COVID-19, including 650,805 deaths; the Washington State Department of Health and Johns Hopkins University reported 53,321 cases of COVID-19, including 1,518 deaths in Washington State; and Public Health – Seattle & King County reported 14,579 cases of COVID-19, including 645 deaths, in King County.

N. In June 2020, the Council passed Ordinance 126094 (Premium Pay for Gig Workers Ordinance), emergency legislation to support gig workers for the risks of working for food delivery network companies during the COVID-19 emergency and for the costs of taking preventative safety measures to protect themselves and others from spreading the virus.

O. Effective June 26, 2020, the Premium Pay for Gig Workers Ordinance requires covered food delivery network companies to provide premium pay to gig workers working in Seattle for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

P. The Premium Pay for Gig Workers Ordinance also establishes gig worker and consumer protections. Food delivery service companies, as a result of the ordinance going into effect, are prohibited from reducing areas of service in Seattle; reducing a gig worker's compensation; limiting a gig worker's earning capacity; or adding customer charges for delivery of groceries.

Q. The City's Office of Labor Standards (OLS) implements and enforces the Premium Pay for Gig Workers Ordinance. If OLS finds that a food service delivery network company violated the ordinance, the Director can issue an order requiring payment of unpaid compensation to the gig worker(s) and penalties payable to the City and the gig worker(s).

R. Food delivery network companies are essential businesses operating in Seattle during the COVID-19 emergency and rely on business models that hire gig workers as independent contractors, thereby creating barriers for gig workers to access employee protections established by local, state, and federal law, and making gig workers highly vulnerable to economic insecurity and health or safety risks.

S. Gig workers working for food delivery network companies are essential workers performing services that are fundamental to the economy and health of the community during the COVID-19 crisis. They can work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited or no ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease.

T. In the pursuit of economic opportunity, many gig workers are immigrants and people of color who have taken on debt or invested their savings to purchase and/or lease vehicles or other equipment to work for food delivery network companies.

U. Gig workers making deliveries for food delivery network companies are supporting community efforts to engage in physical distancing and mitigate the spread of COVID-19 while simultaneously exposing themselves to a higher risk of infection. Gig workers also bear the brunt of the time and expenses necessary for cleaning and disinfecting equipment and engaging in other efforts to protect themselves, customers, and the public from illness.

V. Premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress.

W. Gig workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress due to the significant risk of exposure to the COVID-19 virus. Gig workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection.

X. The availability of food delivery services is fundamental to the health of the community and is made possible during the COVID-19 emergency because gig workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by making deliveries while working in hazardous situations.

Y. Requiring food delivery network companies to provide premium pay to gig workers protects public health, supports stable incomes, and promotes job retention by ensuring that gig workers are compensated now and for the duration of the public health emergency for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

Z. This ordinance is immediately necessary in response to the COVID-19 public health emergency because making technical amendments to the Premium Pay for Gig Workers Ordinance will support implementation and enforcement of premium pay requirements that are vital to the financial well-being of gig workers and public safety during a global pandemic.

Section 2. Section 100.015 of Ordinance 126094 is amended as follows:

100.015 Gig worker coverage

For the purposes of this ordinance:

A. Covered gig workers are limited to those who perform work for a covered hiring entity, where the work is performed in whole or part in Seattle.

B. Work performed "in Seattle" means work that includes a work-related stop in Seattle.

C. Gig workers who are employees under Seattle Municipal Code Chapter 14.20 for covered hiring entities are not covered gig workers under this ordinance. Hiring entities must pay all compensation owed to such gig workers in accordance with their obligations under Seattle Municipal Code Chapter 14.20.

Section 3. Section 100.027 of Ordinance 126094 is amended as follows:

100.027 Gig worker and consumer protections

A. No hiring entity shall, as a result of this ordinance going into effect, take any of the following actions:

1. Reduce or otherwise modify the areas of the City that are served by the hiring entity;

2. Reduce a gig worker's compensation; ((~~or~~))

3. Limit a gig worker's earning capacity, including but not limited to restricting access to online orders((~~.~~)) ; or

4. Add customer charges to online orders for delivery of groceries.

B. It shall be a violation of this Section 100.027 if this ordinance going into effect is a motivating factor in a hiring entity's decision to take any of the actions in subsection 100.027.A unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this ordinance going into effect.

C. Hiring entities shall comply with the requirements in subsection 100.027.A for the duration of the civil emergency proclaimed by the Mayor on March 3, 2020.

Section 4. Section 100.200 of Ordinance 126094 is amended as follows:

100.200 Remedies

* * *

D. A respondent found to be in violation of gig worker and consumer protections under subsection 100.027.A.1 or 100.027.A.4 shall be subject to the penalties and fines established by this Section 100.200; such penalties and fines shall be payable only to the Agency. The Director is not authorized to assess unpaid compensation due under subsection 100.200.B or 100.200.C((.)) for violations of subsection 100.027.A.1 or 100.027.A.4. All remedies are available for violations of subsection 100.027.A.2 or 100.027.A.3.

E. The Director is authorized to assess penalties and shall specify that at least 50 percent of any penalty assessed pursuant to this subsection 100.200.E is payable to the aggrieved party and the remaining penalty is payable to the Agency as a civil penalty. The Director may also specify that the entire penalty is payable to the aggrieved party.

1. For a first violation of this ordinance, the Director may assess a penalty of up to $546.07 per aggrieved party.

2. For a second violation of this ordinance, the Director shall assess a penalty of up to $1,092.13 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

3. For a third or any subsequent violation of this ordinance, the Director shall assess a penalty of up to $5,462.70 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.

((~~4. The maximum penalty for a violation of this ordinance shall be $21,849.79 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid compensation, whichever is greater.~~))

((~~5.~~)) 4. For purposes of this Section 100.200, a violation is a second, third, or subsequent violation if the respondent has been a party to one, two, or more than two settlement agreements, respectively, stipulating that a violation has occurred; and/or one, two, or more than two Director's Orders, respectively, have issued against the respondent in the ten years preceding the date of the violation; otherwise, it is a first violation.

Section 5. Based on the findings of fact set forth in Section 1 of this ordinance, the Council finds and declares that this ordinance is a public emergency ordinance, which shall take effect immediately and is necessary for the protection of public health, safety, and welfare.

Section 6. By reason of the findings set forth in Section 1, and the emergency that is hereby declared to exist, this ordinance shall become effective immediately upon its passage by a 3/4 vote of the Council and its approval by the Mayor, as provided by Article 4, subsection 1.1 of the Charter of the City.

Passed by a 3/4 vote of all the members of the City Council the 10th day of August, 2020, and signed by me in open session in authentication of its passage this 10th day of August, 2020.

President _____ of the City Council

Approved by me this 14th day of August, 2020.

Jenny A. Durkan, Mayor

Filed by me this 21st day of August, 2020.

Monica Martinez Simmons, City Clerk

(Seal)

Appendix F

City of Seattle's Motion to Dismiss the Amended Complaint

The Honorable Roger Rogoff
Noted for: November 13, 2020 at 10AM
With Oral Argument

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

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington corporation, and MAPLEBEAR INC., d/b/a INSTACART, a Delaware corporation, Plaintiffs, vs. CITY OF SEATTLE, a municipal corporation; Defendant.	Civil Case No.: 20-2-10541-4 SEA CITY OF SEATTLE'S MOTION TO DISMISS THE AMENDED COMPLAINT Noted for: November 13, 2020 at 10AM With Oral Argument

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TABLE OF CONTENTS

Page(s)

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

Rules

Internet Sources

Ordinances

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Constitutional Provisions

Law Reviews

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I. RELIEF REQUESTED

In the midst of a global pandemic, Defendant City of Seattle ("City") enacted Ordinance No. 126094 (Ordinance),[1] a law that ensures that at-home food delivery services continue to be available and that the workers providing those services are properly compensated for the hazards they brave to protect their customers and the general public from COVID-19. The City, Governor Inslee, and even Plaintiffs agree that providing at-home delivery of food is critical to combating the COVID-19 pandemic. The City, exercising its Constitutional powers, determined that the Ordinance was a method of protecting that critical service.

Plaintiffs now ask this Court to override the City's legislative functions and decide that the methods the City selected to protect this vital service are impermissible. Because the Ordinance falls squarely within the scope of the City's police power authority to regulate working conditions for public safety, health, and general welfare, and because the Ordinance does not violate State law or any constitutional provisions, this Court should dismiss this action. Plaintiffs' desire to avoid regulation for the good of the community, especially during a public health crisis, is properly addressed politically, not in this Court.

Accordingly, the City now moves to dismiss Plaintiffs' Complaint pursuant to Civil Rule (CR) 12(b)(6).

II. STATEMENT OF FACTS

The City, like the rest of the United States and the world, is facing a public health emergency of a magnitude not seen in at least a century. The novel coronavirus, COVID-19 has spread to all

[1] Attached as Appendix A to the Amended Complaint, available at http://seattle.legistar.com/View.ashx?M=F&ID=8656949&GUID=450BE067-D41F-4C49-A3C9-7A7D67A2DB9D, accessed September 25, 2020.

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corners of the globe. Throughout the United States, millions have been confirmed to have contracted COVID-19, causing more than two hundred thousand deaths.[2] In King County more than twenty thousand people have tested positive for COVID-19, and hundreds have died because of the disease.[3] COVID-19 is spread by close contact between humans; there is currently no vaccine or effective treatment for this disease.

As a result, Governor Inslee has declared an emergency[4] and promulgated a series of proclamations directing Washingtonians to stay home and avoid contact with one another to limit the spread of the disease.[5] Governor Inslee's proclamations broadly restricted public life and closed businesses, with exceptions for critical services, including services that enable at-home food delivery.[6]

By unanimous vote of the City Council and under the Mayor's signature, the City enacted the emergency Ordinance at issue here on June 15, 2020, recognizing the critical role played by at-home food delivery services in permitting people in Seattle to obtain food without coming into close contact with large groups of people. The key requirement of the Ordinance is that covered Food Delivery

[2] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html accessed on September 25, 2020.
[3] https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard accessed on September 25, 2020.
[4] Mayor Jenny Durkan also declared a state of emergency in Seattle on March 3, 2020. https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/03/COVID-19-Mayoral-Proclamation-of-Civil-Emergency.pdf accessed on September 25, 2020.
[5] *See, e.g.*, Proclamation 20-25, "Stay Home—Stay Healthy" accessed at https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronovirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf on September 25, 2020.
[6] *Id.*; *see also* Appendix, Proclamation 20-25, accessed at https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf on September 25, 2020.

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Network Companies (FDNCs)[7] must pay covered workers[8] premium pay for each pick-up or drop-off in Seattle until the Mayor's declaration of emergency is revoked.[9] In order to support this key requirement, and ensure that the critical services offered by covered FDNCs continue to be accessible to the public, the Ordinance also contains consumer protections.[10] Covered FDNCs are prohibited from taking certain actions "as a result of" the Ordinance going into effect; and may defend against an allegation that they violated the consumer protection by showing "that [the] decision to take the [challenged] action(s) would have happened in the absence of this ordinance going into effect."[11] All consumer protections end when the Mayor declares an end to the emergency.[12]

Two of the consumer protection provisions also ensure that the delivery drivers actually receive the benefit of the core premium pay requirement of the Ordinance. FDNCs are prohibited from altering the system they use to compensate workers or restricting those workers' access to work in response to the Ordinance.[13] The other two consumer protections are essential to ensuring that at home food delivery is available in Seattle: FDNCs may not change their service area or pass along the costs of the premium pay requirement to customers purchasing groceries (but not other types of

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[7] FDNC means "an organization … operating in Seattle, that offers prearranged delivery services for compensation using an online-enabled application or platform … to connect customers with workers for delivery from one or more of the following: (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order." Ordinance, Section 2, 100.010. FDNCs with more than 250 workers worldwide are subject to the requirements of the law. *Id.* at Section 2, 100.020.

[8] Workers are covered if they are "a person affiliated with and accepting an offer of prearranged delivery services for compensation from a food delivery network company. For purposes of this ordinance, at any time that a food delivery network company worker is logged into the worker platform, the worker is" covered. *Id*. at Section 2, 100.010. A technical amendment on August 10, 2020 clarified that workers who are "employees under Seattle Municipal Code Chapter 14.20 for covered hiring entities are not covered gig workers under this ordinance." Ordinance No. 126122, [8] Ordinance No. 126122, passed on August 10, 2020 attached in Appendix A to the Amended Complaint, available at http://seattle.legistar.com/View.ashx?M=F&ID=8763319&GUID=998EAFEF-0B1C-463C-82A2-5D0B532D3296 accessed on September 25, 2020.

[9] Ordinance at Section 2, 100.025.

[10] *Id*. at Section 2, 100.027.

[11] *Id*. at Section 2, 100.027.A, .B.

[12] Ordinance No. 126122. As noted in Ordinance No. 126122, the amendments therein are merely technical amendments to clarify the intent of the original Ordinance.

[13] Ordinance at Section 2, 100.027.A.2, .3.

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food) because of the Ordinance.[14]

The City and Plaintiffs agree that services provided by covered workers are essential to the safety and health of people in Seattle.[15] The provision of at-home food delivery services allows people to engage in effective social distancing, reducing their contact with large groups of people and slows the spread of COVID-19.[16] And, because FDNCs often designate their workers "independent contractors," covered workers otherwise face barriers to accessing protections due employees, suffering greater risks to their health and safety and that of their communities.[17] The City found that the law was immediately necessary to increase the retention of workers who deliver food for FDNCs, to compensate the workers for hazards they face, and to compensate workers for the time and expense they bear for sanitizing their equipment and engaging in other efforts to protect themselves, customers, and the public from illness.[18]

III. STATEMENT OF ISSUES

Should Plaintiffs' Amended Complaint be dismissed for failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6) because none of Plaintiffs' claims state a legally sufficient basis for granting the relief sought?

IV. EVIDENCE RELIED ON

This motion relies on the pleadings in this case.[19]

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[14] *Id.* at Section 2, 100.027.A.1, .4.
[15] *Id.* at Section 1.M; Amended Complaint at ¶¶ 41, 43.
[16] Ordinance, Section 1.S.
[17] *Id.* at Section 1.L; Amended Complaint at ¶¶ 7 & n.2, 42, 47, 49, 50.
[18] Ordinance, Section 1.B, .P, .T, .U.
[19] Other materials, such as the text of the Ordinance, Ordinance No. 126122 and the 2018 Voter's Pamphlet covering Initiative 1634 are offered for judicial notice, consistent with a CR 12 motion to dismiss. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844 (2015). Further, this court may consider other materials to understand the factual context of this Motion. *Haberman v. Washington Pub. Power Supply Sys*., 109 Wn. 2d 107, 121 (1987), *amended*, 109 Wn.2d 107 (1988).

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V. AUTHORITY & ARGUMENT

Plaintiffs have raised no claims upon which this Court may grant relief. The Ordinance is unquestionably a valid exercise of the City's police powers to protect public safety, health and welfare, particularly during the COVID-19 emergency. Further, there is simply no invasion of Plaintiffs' fundamental rights caused by the Ordinance. As a matter of law, the Ordinance does not violate the Fifth and Fourteenth Amendment to the United States Constitution, Article I, Section 10 of the United States Constitution, or Article I, Sections 12 or 16 of the Washington State Constitution. Indeed, during this public health crisis, in the absence of "a plain, palpable invasion" of these rights, shown "beyond all question" Plaintiffs simply cannot carry their substantial burden in seeking to invalidate the Ordinance.[20]

Properly framed, Plaintiffs' actual complaint is about the adjustment of the economic burdens and benefits during this time of crisis.[21] The City has determined that the risks and costs associated with providing home delivery of food should be shared by FDNCs. Plaintiffs disagree. Plaintiffs' desire not to be subject to regulation is a political question, not a legal one; they should "resort to the polls, not to the courts" to obtain the relief they seek.[22]

A. Civil Rule 12(b)(6)

Under CR 12, a defendant may bring a motion to dismiss for "failure to state a claim upon which relief can be granted …."[23] For such a motion, "the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient."[24] Here, Plaintiffs' claims are not legally sufficient, and

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[20] *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30 (1905); *State v. Malone*, 9 Wn. App. 122, 126 (1973).
[21] *See, e.g.*, Amended Complaint, ¶ 50 (complaining about the costs to Plaintiffs of complying with the law).
[22] *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (quotation marks omitted) (quoting *Munn v. People of State of Illinois*, 94 U.S. 113, 134 (1876)).
[23] CR 12(b)(6).
[24] *Gorman v. Garlock, Inc.*, 155 Wn. 2d 198, 215 (2005).

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therefore, they have wholly failed to state any claim upon which relief may be granted.

B. The Ordinance is a proper exercise of the City's police powers.

In the ordinary course of affairs, the City has broad authority to regulate working conditions affecting people in Seattle, including setting pay and prohibiting practices that harm the public. In these extraordinary times, this power is even more extensive, clearly encompassing the Ordinance.

1. The City's police powers are broad, providing authority to regulate working conditions in the City.

Under the Washington State Constitution's "home rule" principles, cities and counties exercise much of the state's power.[25] Accordingly, "[m]unicipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws …."[26] And this power "not only extends to enactments designed to protect and promote public peace, health, morals, and safety, but also to those intended to promote the general public welfare and prosperity."[27]

The police powers of the City clearly permit the regulation of working conditions. "In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[28] For example, governments in Washington may exercise their police powers to set

[25] *See* Wash. Const. Art. XI, § 11(cities and counties are empowered to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws"); *see also* Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809 (2015) (providing a detailed discussion of "home rule" principles in Washington).

[26] *Covell v. City of Seattle*, 127 Wn. 2d 874, 878 (1995), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn. 2d 651 (2019) (quoting *Hillis Homes, Inc. v. Snohomish County*, 97 Wn. 2d 804, 808 (1982)).

[27] *City of Tacoma v. Fox*, 158 Wn. 325, 330–331 (1930).

[28] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937); *see RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) *cert. denied* 543 U.S. 1081 (2005) ("[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power. …. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety... are only a few examples") (internal quotations and citations omitted).

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minimum wages,[29] set maximum hours,[30] outlaw employment discrimination,[31] and set maximum fees charged by employment agencies.[32] This authority extends to the working conditions of those labeled independent contractors.[33]

2. The City's police powers are at their maximum in addressing emergencies like the public health crisis caused by COVID-19.

The City's police powers are even greater in the context of the ongoing public health catastrophe. More than a century ago, in *Jacobson v. Commonwealth of Massachusetts*, the United States Supreme Court recognized that public health emergencies necessarily enlarge the scope of the police powers.[34] Upholding a local ordinance compelling citizens to be vaccinated to address a smallpox outbreak or face imprisonment over a variety of constitutional challenges, the Court first noted that general, non-emergency police powers permit governments "to enact quarantine laws and 'health laws of every description'…."[35] And when there is a public health emergency, the right "to determine for all what ought to be done" is properly lodged with political decision makers rather than courts. Accordingly, in reviewing the exercise of emergency police powers, "it is no part of the function of a court" to second guess a determination as to what method is "likely to be the most effective for the protection of the public against disease."[36] This is true, even if it results in restrictions of constitutional rights. "'Under the pressure of great dangers,' constitutional rights may be

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[29] *Filo Foods, LLC v. City of SeaTac*, 183 Wn. 2d 770 (2015).
[30] *State v. Buchanan*, 29 Wash. 602 (1902).
[31] *Seattle Newspaper-Web Pressmen's Union Local No. 26 v. City of Seattle*, 24 Wn. App. 462 (1979).
[32] *Petstel, Inc. v. King Cty.*, 77 Wn. 2d 144 (1969).
[33] *See, e.g., Marquis v. City of Spokane*, 130 Wn. 2d 97, 112–113 (1996) (holding that portions of the Washington Law Against Discrimination extend to independent contractors); *see also Stute v. P.B.M.C., Inc*., 114 Wn. 2d 454, 457 (1990) (Washington Industrial Safety and Health Act requires businesses to provide for the safety of independent contractors under some circumstances); *Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn. 2d 565, 584 (1972) (requiring ophthalmologists to indemnify their customers for losses caused by independent contractors for the ophthalmologist was a valid exercise of the state's police power).
[34] *Jacobson*, 197 U.S. 11.
[35] *Id*. at 25 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824)).
[36] *Id*. at 30.

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reasonably restricted 'as the safety of the general public may demand.'"[37]

Chief Justice Roberts relied on *Jacobson* in upholding California's ban on large public gatherings, remarking "[o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad."[38] Courts have repeatedly applied *Jacobson*'s formulation of the scope of emergency police powers in the context of the current pandemic. [39]

Indeed, in *Slidewaters LLC v. Washington Dep't of Labor & Indus.*, the United States District Court for the Eastern District of Washington recently declined to issue a temporary restraining order against the Governor (and denied a later motion for preliminary injunction subsequently converted to motion for permanent injunction), concluding that *Jacobson* limited its review of the exercise of emergency police powers.[40] The court rejected plaintiffs' claims that the state lacked the authority to order their business closed, and that the order violated Plaintiffs' state and federal constitutional rights.[41] Ultimately, the court "join[ed] the growing consensus of district courts that constitutional

[37] *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (alterations removed)(quoting *Jacobson* 197 U.S. at 29) (upholding state limitations on access to abortion during the COVID-19 pandemic under the "settled rule" announced in *Jacobson*).
[38] *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief) (internal quotations, alterations and citation omitted).
[39] *See, e.g., Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111, at *4 & n.3 (E.D. Cal. 2020) (slip copy, appeal pending) (denying Temporary Restraining Order sought by church to overcome California Governor's order prohibiting church gatherings, collecting cases); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (upholding an Arkansas ban on surgical procedures over constitutional challenges, remarking "[i]n our analysis, we must take care not to 'usurp the functions of another branch of government,'") (quoting *Jacobson*, 197 U.S. at 28); *Alsop v. Desantis*, 2020 WL 4927592, at *2 (M.D. Fla. Aug. 21, 2020) (slip op.) (orders restricting vacation rentals in response to COVID-19 involve no suspect classes and "are [therefore] subject to rational-basis review. And because [the orders are] in response to a public health emergency, [they] enjoy[] an 'especially broad' latitude.") (quoting *S. Bay United Pentecostal Church*, 140 S.Ct. 1613); *see also* Section V.D.1.a, *infra*.
[40] *Slidewaters LLC v. Washington Dep't of Labor & Indus*, 2020 WL 3130295 (E.D. Wash., June 12, 2020) (slip copy); *see* 2020 WL 3979661 (E.D. Wash. July 14, 2020) (order from the court denying preliminary and permanent injunction on the same grounds).
[41] 2020 WL 3130295 at *3-*4.

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challenges to similar COVID-19 related measures are precluded by *Jacobson*."[42]

Under analogous circumstances, Washington courts have rejected attempts to second guess the decisions of policy makers in response to emergencies. In *Cougar Business Owners Association v. State* the Washington State Supreme Court held that the Governor's order designating certain areas around Mt. St. Helens closed, effectively shuttering businesses, was a constitutionally valid exercise of the police power.[43] The Court rejected plaintiffs' contentions that the order violated their rights, holding that courts reviewing the exercise of emergency police powers "will not examine the motives of the legislative body; they will not require factual justification for the legislation if it can reasonably be presumed; and the courts will not weigh the wisdom of the particular legislation enacted."[44] If the basis of an emergency law, issued pursuant to the police power is debatable, courts must uphold the governmental determination that the law is necessary.[45]

3. Plaintiffs' contention that the Ordinance is beyond the scope of the City's police powers is meritless.

The City's exercise of police powers is presumed proper "if any state of facts either known or which could be reasonably assumed affords support for" the challenged action.[46] Support includes a finding that the exercise of the police power "reasonably tend[s] to correct some evil or promote some public interest."[47] Further, "[u]nless the measure adopted [pursuant to police powers] is palpably unreasonable and arbitrary so as to needlessly invade constitutionally protected rights, the legislative judgment will prevail."[48] The last time the Washington State Supreme Court directly addressed this

[42] *Id.* at *4.
[43] *Cougar Business Owners Assn. v. State*, 97 Wn. 2d 466 (1982) *abrogated on other grounds by Yim*, 194 Wn. 2d 651.
[44] *Id.* at 478 (quoting *Petstel*, 77 Wn.2d at 154-155).
[45] *Id*. at 477-479.
[46] *Id*. at 478.
[47] *Malone*, 9 Wn. App. at 126 (1973).
[48] *Id.*

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type of challenge,[49] it set an extraordinarily high bar.

> [For a]n ordinance to be void for unreasonableness [it] must be clearly and plainly unreasonable. The burden of establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. Every presumption will be in favor of constitutionality. And, if 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. These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions.[50]

Thus, an ordinance may only be found to be an improper exercise of the police powers where the ordinance was enacted "either in a mistake, or in a spirit of fraud or wantonness" by the legislating body.[51] Where the law was enacted in the context of public health emergency, review is even more deferential.[52]

a. The Ordinance is unquestionably related to public safety and health.

Here, Plaintiffs' bald assertions that the Ordinance is "an arbitrary and irrational response" to the current pandemic defies common sense and is legally insufficient to support the complaint.[53] This particular public health crisis requires that people limit their contact with one another. Food delivery services are critical to limiting the time people in Seattle spend in groups and in public. The City has determined that premium pay for covered workers is necessary to ensure that these workers continue to provide delivery services and that they have the means to take precautions to protect their own health and the health of their customers and the public.[54] The City has also determined that allowing

[49] The City respectfully disagrees with cases adding a "reasonableness" gloss to the police powers granted by Wash. Const. Art. XI, §11.
[50] *City of Seattle v. Webster*, 115 Wn. 2d 635, 645 (1990).
[51] *City of Walla Walla v. Ferdon*, 21 Wash. 308, 311 (1899).
[52] *Jacobson*, 197 U.S. at 30; *see United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971) (in reviewing the state's exercise of police powers to address an emergency, court review "must be limited to a determination of whether the [governmental] actions were taken in good faith and whether there is some factual basis for [the] decision that the restrictions he imposed were necessary…").
[53] Amended Complaint at ¶ 63.
[54] Ordinance, Section 1.R, T.

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covered hiring entities to increase the costs of groceries obtained through home delivery, or reduce the availability of home delivery services in response to that requirement would have immediate consequences for public health by reducing access to these critical services.[55] These findings are wholly consistent with the Governor's determination that FDNCs and their drivers are part of the "essential workforce" necessary "to protect communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security" during the COVID-19 pandemic.[56]

Plaintiffs themselves recognize the crucial role that maintaining FDNC services plays in combating the pandemic, acknowledging that "[c]onsumers… benefit from [their services by]…being able to obtain groceries without going into a grocery store" and that this is particularly critical for "consumers in higher-risk populations."[57] Consequently, there is no dispute that the provision of home food delivery services is critical to responding to the public health crisis caused by the COVID-19 pandemic. The City, in selecting the Ordinance as a method of protecting those critical services, properly exercised its police powers.

That Plaintiffs evidently would have added additional requirements[58] to protect public and worker health is beside the point. As the Washington State Supreme Court has explained,

> In legislating for health, safety and welfare, certain constraints upon individual freedom have traditionally been imposed by the State. Often, such constraints protect both society generally and the individual personally from the perceived harm. …. It is not our proper function to substitute our judgment for that of the legislature with respect to the necessity of these constraints.[59]

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[55] Ordinance, Section 1.S.
[56] Governor's Proclamation, 20-25 and Appendix, https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf accessed on July 16, 2020.
[57] Amended Complaint at ¶ 41.
[58] *See id*. at ¶ 29 (decrying the lack of a requirement that covered workers spend their premium pay on personal protective equipment); *see also id.* at ¶¶ 27, 63 (other workers/businesses should be subject to the same requirements).
[59] *State v. Smith*, 93 Wn. 2d 329, 338–39 (1980).

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b. The Ordinance's requirements are not extreme.

Notwithstanding Plaintiffs' apoplectic description of the Ordinance and the regulation it imposes on their businesses; the Ordinance falls squarely within the traditional bounds of the City's police powers. Plaintiffs suggest that the Ordinance constitutes an "unprecedented intrusion[] into FDNCs' most fundamental management and operational decisions[,]" "burdens" Plaintiffs and "usurps Instacart's business judgment…."[60] These complaints are overstated, as Plaintiffs mischaracterize the limitations on their business activities. It has long been recognized that laws requiring minimum compensation for workers do not unduly interfere with the operations of private businesses.[61] Also, while Plaintiffs characterize the consumer protections in the Ordinance as severe restrictions on their capacity to operate, they do not properly credit the fact that the consumer protections only apply if the prohibited actions are taken "as a result of this ordinance going into effect …."[62] For example, if demand for their services were to collapse, changes in compensation to drivers, service areas or fees for customers could be made on that basis without violating the Ordinance. Hiring entities are free to operate their businesses, with the sole exception that they cannot take certain narrow categories of actions *because* they are required to pay additional compensation to their workers. Coupled with the fact that the consumer protections end when the emergency ends, these restrictions on hiring entities' activities are far less expansive than Plaintiffs allege.

Ultimately, the Ordinance is no different than other valid "regulations adjusting the benefits and burdens of economic life to promote the social good" that courts routinely uphold as proper

[60] *Id*. at ¶¶ 4, 15, 16.
[61] *See, e.g., Parrish*, 300 U.S. at 393 (upholding a Washington minimum wage law over a variety of constitutional challenges).
[62] Ordinance, Section 2, 100.027.A.

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exercises of the police powers.[63] Any law that regulates working conditions impinges on "business decisions." A requirement to pay a minimum wage prevents a business from obtaining an absolute minimum for its labor costs. Workplace safety and health measures prevent businesses from minimizing costs related to personal protective equipment, or choosing quicker, but more dangerous, methods of completing their tasks. Anti-discrimination laws impinge on the freedom of employers to hire, fire, promote or discipline workers. Yet none of these "burdens" on business operations exceeds the scope of the police power.

Even if Plaintiffs' contentions raised issues for the City's normal exercise of its police powers, the COVID-19 emergency unquestionably expands those powers to reach the Ordinance. Emergency police powers encompass the power to compel people to be vaccinated against their will, as in *Jacobson*,[64] the power to wholly close towns and businesses as in *Cougar Business Association*, the power to restrict access to medical care as in *Abbott*, and the power to limit the size of public gatherings as in *S. Bay United Pentecostal Church*. By comparison, the Ordinance merely requires payment to workers and restricts changes to business methods that harm public health in response to that requirement. The emergency police power must reach this reasonable effort to ensure access to food while reducing community transmission of COVID-19.

C. The Ordinance is not forbidden by Chapter 82.84 RCW.

Plaintiffs' assertion that the Ordinance is preempted by Washington state tax law is baseless. The Ordinance requires FDNCs to pay money to delivery drivers. Because that money is *not* collected

[63] *Manufactured Hous. Cmtys of Washington v. State*, 142 Wn. 2d 347, 413 (2000), *abrogated on other grounds by Yim*, 194 Wn. 2d 651; *see* Section V.D, *infra*.

[64] And as routinely upheld by federal courts. *See, e.g., Zucht v. King*, 260 U.S. 174 (1922) (upholding the exclusion of non-vaccinated children from a school district against a due process and equal protection challenge); *Phillips v. City of New York*, 775 F.3d 538 (2nd Cir. 2015) (a challenge to mandatory vaccination law was "foreclosed" by *Jacobson*); *Workman v. Mingo Cty. Bd. of Ed.*, 419 Fed. Appx. 348 (4th Cir. 2011) (unpublished) (mandatory vaccination for schoolchildren does not infringe on religious free exercise rights).

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by the City or any other governmental agency, it is not a tax. State law limiting the authority of local governments to impose taxes is irrelevant to this Ordinance, which regulates the conduct of businesses and payment of wages in Seattle.

To prevail, Plaintiffs would need to demonstrate either the Ordinance directly conflicts with state law or operates in a field that the legislature wholly occupies by statute.[65] Because the law cited by Plaintiffs only functions to prevent local taxes on groceries, it does not, as a matter of law, preempt the Ordinance.

Chapter 82.84 RCW (a codification of Initiative 1634 approved by Washington voters in 2018) is titled "Local Grocery Tax Restrictions" and is located in Title 82, which is comprised of excise tax statutes. Chapter 82.84 RCW prohibits local governments from "impos[ing] or collect[ing] any tax, fee, or other assessment on groceries."[66] The law defines "tax, fee, or other assessment on groceries" as

> a sales *tax*, gross receipts *tax*, business and occupation *tax*, business license *tax*, excise *tax*, privilege *tax*, *or any other similar levy, charge, or exaction of any kind* on groceries or the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption thereof.[67]

Washington courts interpret initiatives according to the normal canons of statutory interpretation.[68] Accordingly, "[s]tatutory language must be given its usual and ordinary meaning, regardless of the policy behind the enactment."[69] The "legislative intent" behind the initiative is only relevant if there is some ambiguity in the meaning of the law; in that case, a court "should focus on

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[65] *See State v. Kirwin*, 165 Wn. 2d 818, 825 (2009) (conflict preemption applies "where [the ordinance] permits what state law forbids or forbids what state law permits"); *see also Heinsma v. City of Vancouver*, 144 Wn. 2d 556, 561 (2001) (field preemption results where the state legislature has expressly or impliedly occupied an entire area of regulation).
[66] RCW 82.84.040.
[67] RCW 82.84.030(5) (emphasis supplied).
[68] *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn. 2d 91, 97 (1988) (citing *Hi–Starr, Inc. v. Liquor Control Bd.*, 106 Wn. 2d 455, 460 (1986); *Dep't of Rev. v. Hoppe*, 82 Wn. 2d 549, 552 (1973)).
[69] *Id.*

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the voters' intent and the language of the initiative as the average informed lay voter would read it."[70] Statements in the voter pamphlet are evidence of voter intent.[71]

By its own terms, the law prevents the imposition of taxes. The examples given in defining the key phrase "tax, fee, or other assessment on groceries" are all taxes, and the more general categories (levy, charge, or exaction) are limited to those that are "similar" to the list of taxes prohibited. Taxes are "burdens or charges imposed by legislative authority on persons or property, to *raise money for public purposes*, or, more briefly, *an imposition for the supply of the public treasury*."[72] Setting wage requirements, where hiring entities are required to pay money to their workers, not to the City, does not raise money for the City treasury and cannot reasonably be considered "similar" to a sales tax, business and occupation tax or the like.

The language of Chapter 82.84 RCW is plain: local governments are prohibited from taxing groceries; the law does not prohibit regulating working conditions. But even if there were some ambiguity in the text of Chapter 82.84 RCW, nothing in the history of the underlying initiative supports Plaintiffs' contorted reading. The voter pamphlet is clear: the initiative is about the taxation power of local governments. The pamphlet frames the measure as "concern[ing] taxation of certain items intended for human consumption."[73] The section entitled "the law as it presently exists" begins "[a]ll local taxation must be authorized by state law" and exclusively focuses on the taxation powers of local governments.[74] Further, the statements in favor of and against the initiative are exclusively focused on taxation issues. For example, in rebutting the statement against, proponents of the

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[70] *Id*. (internal quotations and citation omitted).
[71] *Amalgamated Transit Union Local 587 v. State*, 142 Wn. 2d 183, 206 (2000).
[72] *King Cty. Fire Prot. Dists. No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cty.*, 123 Wn. 2d 819, 833 (1994) (internal quotations and citations omitted, emphases supplied).
[73] Exhibit A to this Motion (the 2018 Voter's Pamphlet, available at https://www.sos.wa.gov/_assets/elections/research/2018/-ed05-all%209.12%20low%20res.pdf accessed on September 25, 2020).
[74] *Id.*

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initiative stated "I-1634 prohibits new, local taxes on groceries, period." *Id*.

While the City is unaware of any Washington court interpreting Chapter 82.84 RCW, the common-sense reading of the statute as only prohibiting taxes (*i.e.* charges that raise revenue for the government) is consistent with other analyses of nearly identical legal commands. For example, in *Schmeer v. Cty. of Los Angeles*, the California Court of Appeals refused to strike down a county ordinance imposing a fee for the use of paper bags in grocery stores (payable to the grocery store) under California's constitutional prohibition on local taxes.[75] California's constitution prohibits local governments from "impos[ing], extend[ing], or increase[ing] any … tax" without approval of the electorate.[76] That prohibition is accompanied by the following definition: "'tax' means any levy, charge, or exaction of any kind …."[77] The plaintiffs in *Schmeer* alleged that a county requirement that grocery stores charge a fee for providing paper bags to shoppers was prohibited by the state constitution as a levy, charge or exaction.[78] Relying on the ordinary meaning of the words and other textual clues, the court "conclud[ed] that the language 'any levy, charge, or exaction of any kind imposed by a local government'… is limited to charges payable to, or for the benefit of, a local government."[79] Based on this understanding of the prohibition, the court held "[b]ecause the [paper bag] charge is not remitted to the county and raises no revenue for the county, we conclude that the charge is not" prohibited by the California constitution.[80]

Indeed, if the prohibition on local taxes on groceries did extend to the Ordinance, Chapter 82.84 RCW would become a general prohibition on regulating working conditions for any worker

[75] *Schmeer v. Cty. of Los Angeles*, 213 Cal. App. 4th 1310 (2013).
[76] Cal. Const. art. 13C, § 2(b), (d).
[77] Cal. Const. art. 13C, § 1(e).
[78] *Schmeer*, 213 Cal. App. 4th at 1315.
[79] *Id*. at 1328-1329.
[80] *Id*. at 1329.

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whose work involved "the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption" of groceries.[81] For example, a local law requiring personal protective equipment for grocery workers would increase the marginal labor costs and would be forbidden under Plaintiffs' interpretation of the law. Such an outcome could not have been the intent of the voters when they approved an initiative prohibiting "new, local taxes on groceries, period."

This Court should reject Plaintiffs' absurd reading of a state prohibition on local taxation authority. Chapter 82.84 RCW does not, as a matter of law, forbid the Ordinance.

D. The Ordinance does not violate the State or federal constitutions.

Instacart's contentions that the Ordinance violates the State and federal constitutions are without merit. Even in the absence of a global emergency, the Ordinance would pass constitutional muster. Indeed, "[w]hen economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands."[82]

But should any doubt remain, Instacart's constitutional claims must be viewed in the context of the extraordinary factual circumstances underlying the legislation at issue. Because the Ordinance aims to reduce community transmission in the midst of an unprecedented public health crisis, the City's "interest in protecting public health … is at its zenith."[83] In fact, when faced with a society-threatening epidemic, a government may go so far as to "implement emergency measures that curtail constitutional rights" as long as the measures have a relation to the crisis and they are not "beyond

[81] RCW 82.84.030(5).
[82] *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (footnote omitted) (citing *Hodel v. Indiana*, 452 U.S. 314, 331–332 (1981); *Williamson*, 348 U.S. at 488–489)
[83] *Abbott*, 954 F.3d at 795.

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all question a plain, palpable invasion of rights secured by the fundamental law."[84] Applying this deferential standard, "courts around the country … have overwhelmingly upheld COVID-related state and local restrictions" impacting constitutional rights.[85] Against this extraordinary factual backdrop, the Court should dismiss Instacart's constitutional claims.

1. The Ordinance does not effect a "taking."

Instacart's takings claims[86] under the Fifth Amendment and article I, Section 16 of the Washington Constitution[87] are unavailing. Courts routinely reject takings challenges to laws designed to protect health and safety, and even in the absence of a global public health emergency, Instacart's takings claims would fail. "For government action to require compensation under the Takings Clause, it must involve 'property' and that property must be 'taken.'"[88] The Ordinance satisfies neither criterion.

a. The pandemic requires rejection of Instacart's takings claims.

This Court should exercise restraint in considering Instacart's takings claims.[89] In similar public emergencies, courts have rejected takings challenges to government actions protecting health and safety. For example, courts have held that wholly excluding owners of businesses and other private property from those businesses and properties in a town near Mount St. Helens did not amount to a taking while the volcano was erupting,[90] that closing a flea market to "abate the danger posed by

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[84] *Id.* at 784 (quoting *Jacobson*, 197 U.S. at 31).
[85] *McCarthy v. Cuomo*, 2020 WL 3286530, at *3 (E.D.N.Y. 2020) (collecting cases).
[86] *See* Amended Complaint at ¶¶ 65-70.
[87] Washington courts apply the same standard for takings claims under the Fifth Amendment and claims under article I, section 16 of the Washington Constitution. *Yim*, 194 Wn. 2d at 662.
[88] *Classic Cab, Inc. v. D.C.*, 288 F. Supp. 3d 218, 227 (D.D.C. 2018)
[89] *Cf. Mugler v. Kansas,* 123 U.S. 623, 669 (1887) "The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community").
[90] *Cougar Business Ass'n,* 97 Wn.2d at 476-79.

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unexploded artillery shells" was "an exercise of [the government's] police power that did not require just compensation,"[91] that prohibiting bump-stock devices to protect public safety in the wake of a mass shooting did not effect a taking,[92] and that COVID-related shutdown orders "constitute[d] a classic example of the use of police power to 'protect the lives, health, morals, comfort, and general welfare of the people'" and as such, did not effect a taking.[93] If wholesale closures of businesses and exclusion of property owners from real property are constitutional, the Ordinance, which only applies certain conditions on business operations, is constitutional.

b. The portions of Instacart's business affected by the Ordinance do not qualify for takings protections.

Even in the absence of a global crisis, Instacart's takings claim would fail for lack of legally cognizable "property,"[94] as a reduction in business assets, revenues, profits, or profitability does not give rise to a taking. The Fifth Amendment protects an owner's interest only in the possession at issue, and not interests merely "incident to ... ownership."[95] A taking "does not include losses to [an owner's] business,"[96] profits, or profitability.[97] "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate

[91] *Nat'l Amusements, Inc. v. Borough of Palmyra*, 716 F.3d 57, 63 (3rd Cir. 2013)
[92] *McCutcheon v. United States*, 145 Fed. Cl. 42, 51 (Fed. Cl. 2019) (appeal filed) (noting that "there are certain exercises of the police power that ha[ve] repeatedly been treated as legitimate even in the absence of compensation to the owners of the … property") (quotation omitted) (collecting cases).
[93] *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 895–96 (Pa. 2020) (first alteration added).
[94] *Classic Cab, Inc. v. D.C.*, 288 F. Supp. 3d at 227.
[95] *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).
[96] *Id*. at 380.
[97] *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (fact that challenged regulations "prevent the most profitable use of [plaintiffs'] property...is not dispositive" because "a reduction in the value of property is not necessarily equated with a taking"); *Fed. Home Loan Mortgage Corp. N.Y. Div. Housing & Cmty. Renewal*, 83 F.3d 45, 48 (2nd. Cir. 1996) (upholding rent stabilization law over takings challenge because "[a]lthough [plaintiff] will not profit as much as it could under a market-based system, it may still rent apartments and collect regulated rents") (citing *Bowles v. Willingham*, 321 U.S. 503, 517-518 (1944) (recognizing that while "price control, the same as other forms of regulation, may reduce the value of the property regulated…that does not mean that the regulation is unconstitutional" and that a "member of the class which is regulated may suffer economic losses not shared by others" and "[h]is property may lose utility and depreciate in value as a consequence of regulation")).

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must be viewed in its entirety."[98]

Classic Cab is instructive. That case involved a takings challenge to a requirement to adopt newer metering systems.[99] *Classic Cab* rejected the takings claim because the regulation did not implicate a legally cognizable property interest—it did not "outright strip the plaintiffs of their business" but, rather, imposed a condition on the business's continued operation.[100] "Businesses generally do not have property interests in their assets or revenues. Those are 'incidents' to ownership—goals that are far from guaranteed, and certainly not guaranteed by the government."[101]

Like that taxi regulation, the Ordinance does not deprive FDNCs of their businesses altogether, nor does it destroy the full bundle of rights associated with FDNCs' ownership of their businesses.[102] It merely imposes modest regulations on their continued operation. Indeed, Instacart is evidently entirely financially sound. Throughout the Complaint, Instacart repeatedly explains that its business is booming, that it has tripled the number of new drivers in Seattle and that drivers are making in excess of $30 per hour.[103] Absent a complete deprivation of economic value—a possibility foreclosed by Instacart's thriving business in the face of the pandemic—any impact on assets, revenues, or profits that may result from the Ordinance does not constitute a taking.[104]

c. Regulations that merely adjust the benefits and burdens of economic life to advance the common good are not takings.

Even if the Ordinance implicated legally cognizable "property," Plaintiffs could not establish

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[98] *Andrus*, 444 U.S. at 65–66 (no taking under the Fifth Amendment where "a significant restriction has been imposed on one means of disposing of" plaintiff's property but challenged regulations "do not compel the surrender" of the property and "there is no physical invasion or restraint upon them").
[99] 288 F. Supp.3d at 221.
[100] *Id.* at 225.
[101] *Id.* (citing *Gen. Motors Corp*., 323 U.S. at 378; *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) ("To have a property interest in a benefit, a person…must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it").
[102] *See Andrus*, 444 U.S. at 65–66.
[103] Amended Complaint at ¶¶ 31-32.
[104] *See Andrus*, 444 U.S. at 66*; Fed. Home Loan Mortgage Corp*., 83 F.3d at 48.

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a "taking" within the meaning of the Fifth Amendment.[105] The requirements at issue are nothing more than garden-variety business regulations.[106]

In *Connolly v. Pension Benefit Guaranty Corp.*, the United States Supreme Court recognized that business regulations often fall outside the purview of the Takings Clause.

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.[107]

Connolly rejected a takings claim against a regulation requiring a withdrawing employer to fund its share of the a benefit plan's unfunded liabilities, reasoning that the regulation "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good."[108]

This standard has been applied to uphold a regulation that distributes economic burdens in the face of the pandemic's upheaval. In *Elmsford Apartment Associates v. Cuomo*, the court held that a COVID-motivated eviction moratorium did not amount to a regulatory taking because although the moratorium "may embody a policy decision to take from Pete [the landlords] to pay Paul [the tenants] ... such burden shifting does not, without more, amount to a regulatory taking."[109] The court

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[105] *Classic Cab, Inc*.., 288 F. Supp. 3d at 227.
[106] *See* Section V.B.3.b., *supra*.
[107] *Connolly v. Pension Benefit Guaranty Corp*, 475 U.S. 211, 223 (1986); *accord. Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example.") (internal quotations and citation omitted).
[108] *Connolly*, 475 U.S. at 225; *see Classic Cab, Inc.* 288 F. Supp. 3d at 228 (challenged regulation requiring taxi operators to adopt modern metering systems "does not physically invade or permanently appropriate any of the [business's] assets for its own use, but rather interferes with the plaintiffs' contract rights in a way that adjusts the benefits and burdens of economic life to promote the common good. As such, it is not a 'taking' of any property right associated with Classic Cab's contract") (quotations and citation omitted).
[109] *Elmsford Apartment Associates v. Cuomo*,2020 WL 3498456 at *11 (S.D.N.Y. 2020) (slip copy) (granting summary dismissal of plaintiff's constitutional claims) (alterations in original) (quotation omitted).

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also dismissed an objection that the moratorium "foisted exclusively upon landlords the burden of rental issues," because "state governments may, in times of emergency or otherwise, reallocate economic hardships between private parties, including landlords and their tenants, without violating the Takings Clause."[110]

Like the challenged regulation in *Connolly* and *Elmsford Apartment Associates*, the Ordinance distributes economic burdens by reallocating funds from FDNCs to their drivers to ensure the continued availability of grocery delivery services for the duration of the pandemic and to ensure that drivers have the means to take precautions on behalf of themselves and the public.[111] This shifting of benefits and burdens for the greater good is by no means "unprecedented;"[112] it routinely occurs in modern society through such accepted practices as minimum wage laws,[113] workers' compensation programs,[114] rent control laws,[115] and taxes.[116] Like the panoply of other regulations to which businesses and other entities are subject, the Ordinance does not constitute a taking under the Fifth Amendment.[117]

2. The Ordinance does not violate the Washington Constitution's privileges and immunities clause.

Plaintiffs fail to state a claim under the privileges and immunities clause of the Washington Constitution. Article I, section 12 provides, "No law shall be passed granting to any citizen, class of

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[110] *Id.* at *12; *see also Fed. Home Loan Mortgage Corp.,* 83 F.3d at 47-48 ("However, where a property owner offers property for rental housing, the Supreme Court has held that governmental regulation of the rental relationship does not constitute a physical taking.") (citing *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992)).
[111] *See* Section V.B.
[112] Complaint at ¶ 4.
[113] *Connolly*, 475 U.S. at 223 (Congress "may set minimum wages" without effecting a taking).
[114] *Id.* (statute requiring coal mine operators to compensate disabled former employees in *Usery v. Turner Elkhorn Mining Co*, 428 U.S. 1 (1976) did not amount to a taking).
[115] *Fed. Home Loan Mortgage Corp*., 83 F.3d at 48.
[116] *Penn. Cent. Transp. Co.*, 438 U.S. at 124.
[117] This is true regardless of any disturbance of contractual obligations, as alleged by Plaintiffs. *See Connolly*, 475 U.S. at 224 ("a regulatory statute… otherwise within the powers of [the government]… may not be defeated by private contractual provisions" or invalidated because it upsets existing contractual relationships); *see* Section I.D.3, *infra*.

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citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."[118] Courts interpret Washington's privilege and immunity clause independently of its federal analogue and engage in a two-step analysis to determine whether a violation of the clause has occurred.[119] First, the court determines whether the challenged law involves a privilege or immunity; if not, it does not implicate article I, section 12. Second, if the challenged law involves a privilege or immunity, the court determines whether the legislature had a "reasonable ground" for granting the privilege or immunity at issue.[120] The Ordinance easily clears both hurdles.

Differential treatment of different businesses does not necessarily implicate the privileges and immunities clause.[121] "Not every legislative classification constitutes a 'privilege' within the meaning of article I, section 12 but only those where it is, in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law."[122] As the Washington Supreme Court has explained, if the definition of a privilege or immunity were construed more broadly, courts "could be called on to second-guess the distinctions drawn by the legislature for policy reasons nearly every time it enacts a statute."[123] A wide array of statutory exemptions could come under attack, from property tax exemptions based on age, disability, or veteran status, to exemptions from emission control inspections for farm vehicles and hybrid vehicles.[124]

[118] Wash. Const. Art I, sec. 12.
[119] *Ass'n of Washington Spirits and Wine Distribs. v. Washington State Liquor Control Bd*., 182 Wn.2d 342, 359 (2015).
[120] *Ockletree v. Franciscan Health Syst*., 179 Wn.2d 769, 776 (2014)
[121] *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 606-07 (2008).
[122] *Ockletree*, 179 Wn.2d at 778 (internal quotation omitted).
[123] *Id*. at 779.
[124] *Id*.

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Plaintiffs attempt to shoehorn their claims into the narrow definition of a privilege or immunity by alleging that the Ordinance "implicate[s] Instacart's fundamental right to carry on business in the State."[125] But courts have declined, time and again, to characterize ordinary business regulations like the Ordinance as intrusions on the right to "carry on business" for purposes of article I, section 12. In particular, "Washington courts have been hesitant to broadly apply the right to carry on a business in any legislative act that happens to harm a single aspect of a business."[126] Similarly, "mere harm to a business's profits caused by a change in the laws does not implicate the right to carry on a business."[127]

For example, Seattle's minimum wage ordinance, which subjected large businesses to higher labor costs over a three-year period than small businesses, did not "substantially burden or prohibit [those classified as large businesses] from carrying on business in Seattle."[128] By the same token, courts have held that an administrative rule that imposed certain fees on spirits distributor licensees but not other entities in the supply chain,[129] a statute that prohibited smoking in certain facilities but not in others,[130] an ordinance that "simply impose[d] certain business regulations" on distributors of yellow pages phonebooks,[131] and a rate schedule that subjected certain industries to higher rates than others[132] did not implicate the fundamental right to carry on a business. In stark contrast, a law that

[125] Am. Compl. at ¶ 84; *See Am. Legion Post #149*, 164 Wn.2d at 608 (statute that does not "prevent any entity from engaging in business" falls outside purview of article I, section 12).
[126] *Blocktree Properties, LLC v. Public Utility Dist. No. 2 of Grant Cty, Washington*, 380 F. Supp.3d 1002, 1124 (E.D. Wash. 2019) (citing *Am. Legion Post #149*, 164 Wn.2d 570, *Ass'n of Washington Spirits & Wine Distribs,* 182 Wn.2d 342 (2015).
[127] *Blocktree Properties, LLC*, 380 F. Supp.3d at 1124 (citing *Am. Legion Post #149*, 164 Wn.2d 570, *Ass'n of Washington Spirits & Wine Distribs,* 182 Wn.2d 342 (2015).
[128] *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 97 F. Supp.3d 1256, 1285 (W.D. Wash. 2015).
[129] *Ass'n of Washington Spirits and Wine Distribs.,* 182 Wn.2d 342.
[130] *Am. Legion Post #149*, 164 Wn.2d 570.
[131] *Dex Media West, Inc. v. City of Seattle*, 2011 WL 4352121 (W.D. Wash. 2011).
[132] *Blocktree Properties, LLC*, 380 F. Supp.3d 1102.

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"*effectively prohibited* nonresidents from engaging in the photography business" implicated the right to carry on a business.[133]

Nothing in the Ordinance implicates Instacart's right to engage in or carry on a business. Just as Seattle's minimum wage ordinance subjected certain businesses to higher labor costs during the phase-in period, the Ordinance merely subjects a class of businesses to higher labor costs for the duration of the civil emergency, impacting the manner in which FDNCs do business but by no means precluding them from engaging in business altogether.[134] Plaintiffs also overstate the degree to which the Ordinance intrudes on their operations. Contrary to Plaintiffs' allegations, the Ordinance does not "mandate that Instacart maintain its existing service in Seattle."[135] The Ordinance merely restricts FDNCs' ability to modify service areas or pass along costs of the premium pay requirement on groceries if these actions are taken "as a result of this ordinance going into effect…."[136] FDNCs are free to make any changes to their service areas, compensation schemes, access to work or costs for consumers that would have been made in the absence of the Ordinance.[137] In any event, requiring FDNCs to *continue to* operate their businesses under certain circumstances lies far outside the scope of article I, section 12, which instead focuses on regulations that *prohibit* entities from operating their businesses.

The Ordinance also fails to implicate article I, section 12 because it does not "unfairly discriminate against a class of businesses to the benefit of another class of the *same businesses*."[138]

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[133] *Am. Legion Post #149*, 164 Wn.2d at 608 (emphasis added) (citing *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644 (1949).
[134] Ordinance, Section 2, 100.025; *see Ass'n of Washington Spirits & Wine Distribs,* 182 Wn.2d at 1285; *see also Dex Media West, Inc*., 2011 WL 4352121 at *15 (ordinance that "simply imposes certain business regulations upon" plaintiffs did not prevent plaintiffs "from engaging in or carrying on business."
[135] Am. Compl. at ¶ 84.
[136] Ordinance, Section 2, 100.027.A.
[137] *Id*. at Section 2, 100.027.B.
[138] *Ass'n of Washington Spirits and Wine Distribs*., 182 Wn.2d at 362 (emphasis supplied).

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Plaintiffs do not allege—nor could they—that FDNCs "bear any greater expense or costs" as a result of the Ordinance's inapplicability to taxis, Transportation Network Companies (TNCs), or other differently situated entities within the food or grocery business.[139] Consequently, it does not "offend the anticompetitive concerns underlying article I, section 12," and it falls beyond the reach of that provision.[140]

Even if the Court were to find that the Ordinance implicated a "privilege or immunity," Plaintiffs' article I, section 12 claim would fail because "reasonable grounds" exist for distinguishing between FDNCs and other entities that employ front-line workers.[141] Courts find "reasonable grounds" when legislative distinctions "rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act."[142] Reasonable grounds abound here. The purpose of the Ordinance is not only to compensate FDNC workers for the hazards they brave in doing their jobs but also to ensure the continued availability of food delivery services during a pandemic and thus allow Seattle residents to meet their basic needs without venturing into public spaces and spreading infection.[143] There are "real and substantial differences" between FDNCs and, for example, TNCs, in this regard.[144]

Furthermore, while Plaintiffs decry "the request of the Teamsters" to exclude TNCs, the prospect of "broader legislation covering TNCs" that the Teamsters "purported to be drafting"[145] further supports a legislative distinction between FDNCs and TNCs, as premium pay is less critical for workers covered by other statutory protections.

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[139] *Ockletree*, 179 Wn.2d at 782.
[140] *Id*.
[141] *Id*. at 783.
[142] *Id*. (internal quotation omitted).
[143] *See, e.g.*, Section I.A.3.a *supra*; *see also* Section I.D.4, *infra*.
[144] The City does not dispute the risks facing other front-line workers, such as TNC drivers.
[145] Amended Compl. at ¶ 27.

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3. The Ordinance does not violate the federal or Washington Constitutions' Contracts Clauses.

Instacart alleges that its private agreements regarding working conditions with its drivers trump public laws enacted to protect the safety, health and welfare of the people in Seattle.[146] This retrograde view of the relationship between businesses and their workers has no merit under either the federal or Washington State Constitution.

Both the state and federal constitutions prohibit impairment of contracts.[147] Washington courts interpret the state and federal constitutions' Contracts Clause using the same federal law.[148] Despite the wording of these provisions, it has long been recognized that "the prohibition against any impairment of contracts is 'not an absolute one and is not to be read with literal exactness.'"[149] Indeed, the "governing constitutional principle" for Contracts Clause challenges is that

> when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people,"… is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.[150]

Accordingly, the Contract Clause "prohibition must be accommodated to the inherent police power of the State"[151] safeguarding the vital interests of the people, because such police powers are "paramount to any rights under contracts between individuals."[152]

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[146] Amended Complaint at ¶¶ 72-75.
[147] U.S. Const., Art. I, §10 (prohibiting states from passing "any… law impairing the obligations of contracts…"); Wash. Const. Art. I, §23 (providing that "[n]o… law impairing the obligations of contracts…" may be enacted).
[148] *In re Estate of Hambleton*, 181 Wn.2d 802, 830 (2014).
[149] *Tyrpak v. Daniels,* 124 Wn.2d 146, 151 (1994) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428 (1934)).
[150] *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232, 234 (1945) (quoting *Blaisdell*, 209 U.S. at 434).
[151] *Energy Reserves Group, Inc. v. Kan. Power and Light Co.,* 459 U.S. 400, 410 (1983); *Hambleton,* 181 Wn.2d at 830 (quoting *Energy Reserves*).
[152] *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241 (1978).

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Under these principles, the first question is whether the challenged law constitutes a "substantial impairment" of contracts.[153] Critically, this threshold condition is not met when the challenged law is a valid exercise of the police powers.[154] Here, because the Ordinance is addressed to working conditions and is a valid exercise of the City's power to protect the safety and welfare of the people of Seattle, Plaintiffs cannot meet this requirement.

For more than 80 years, it has been abundantly clear that the freedom to contract for labor is subordinate to the police power. In 1937, the United States Supreme Court upheld Washington's minimum wage law over the allegation that it unconstitutionally interfered with contracts for wages between employers and employees. The Court held that the "power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."[155] In support, the Court cited cases approving laws that set maximum hours, limit methods or means of payment, and establish workers' compensation systems.[156] The Court concluded that workplace regulations, protecting "health and safety… peace and good order" properly supersede private contracts because they "insure wholesome conditions of work and freedom from oppression."[157]

The challenged Ordinance is best understood as a requirement to pay minimum compensation to workers for deliveries in Seattle accompanied by certain restrictions on FDNCs intended to ensure that workers actually receive increased compensation and to protect public health and safety during

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[153] *Energy Reserves*, 326 U.S. at 411; *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wn.App. 954, 965 (2009).
[154] *See Optimer*, 151 Wn. App. at 966 ("legislation does not unconstitutionally impair contractual obligations where the legislation constitutes an exercise of the police power in advancing a legitimate public purpose"); *see also Energy Reserves*, 459 U.S. at 411 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)) ("[t]he Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them'").
[155] *Parrish*, 300 U.S. 392-393 (footnote omitted).
[156] *Id*.
[157] *Id*.

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a global pandemic. And the Ordinance's core commands are temporary; the requirement to pay compensation to covered drivers and associated consumer protections end when the emergency ends.[158] Additionally, given the broad authority of the City to regulate working conditions, Instacart is "operating in a heavily regulated industry" and so additional workplace laws cannot be said to substantially impair their contracts.[159] Such a police power regulation of working conditions is not a substantial impairment of contracts as a matter of law and is therefore not a violation of the State or federal Contracts Clauses.

Even if Instacart had pled allegations sufficient to meet the threshold question, it still has not pled a constitutionally cognizable impairment of their contracts. If there were a "substantial impairment" of Instacart's contracts, Instacart would still need to allege that the challenged law does not have a "significant and legitimate" public purpose.[160] As discussed at length above, the parties agree that provision of at-home food delivery services is critical to addressing the raging pandemic. Preserving this function is a "significant and legitimate" public purpose. Moreover, though no emergency is required,[161] the fact that the City is responding to an emergency, with temporary legislation, also forecloses Instacart's challenge.[162]

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[158] *See Blaisdell*, 290 U.S. at 439 (specifically approving temporary impositions on contracts "made necessary by a great public calamity…").

[159] *Energy Reserves*, 459 U.S. at 413 (natural gas producers did not have their contracts impaired where state of Kansas, regulated the intra-state prices they could charge because "State authority to regulate natural gas prices is well established" even though Kansas had never before regulated those prices); *see Margola Assocs. v. City of Seattle*, 121 Wn. 2d 625, 653 (1993), *abrogated on other grounds by Yim*, 194 Wn. 2d 651 (holding the City's new restrictions on evictions that impacted existing leases did not violate the contracts clause because the State and the City already regulated the landlord tenant relationship); *see also Gen. Offshore Corp. v. Farrelly*, 743 F. Supp. 1177, 1198 (D.V.I. 1990) (finding working conditions were heavily regulated as defined by *Energy Reserves*, because "[o]ccupational safety, collective bargaining, minimum wages, worker's compensation, and other areas of legislation have left few aspects of the workplace unregulated").

[160] *Energy Reserves*, 459 U.S. at 411-412.

[161] *Id*. at 412.

[162] *See, e.g., Blaisdell*, 290 U.S. 444-447 (finding a Minnesota foreclosure moratorium did not violate the Contracts Clause because, *inter alia*, it was a response to the emergency created by the Great Depression, and it was temporary, tied to the duration of the emergency).

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Further, even if Instacart had met the threshold for this claim, it also would need to show that the City's method of addressing the pandemic is unreasonable or inappropriate. Instacart cannot meet this requirement here. In reviewing a law challenged as impairing contracts, where the law is economic or social regulation "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[163] As discussed above, there is no legal basis for this Court to ignore the legislative findings that underpin the Ordinance clearly establishing the reasonableness and necessity of the challenged law.

Here, too, Plaintiffs seek a ruling from this Court that would supplant the proper legislative function of the City. The United States Supreme Court aptly summarized the issue with this kind of request for relief in the *Hahn* case. There, in analyzing a state law forbidding foreclosures in response to the Great Depression (still in effect in 1944), the Court identified the many factual determinations it would be required to make about "not only the range and incidence of what are claimed to be determining economic conditions… but also to resolve controversy as to the causes and continuity of such [economic] improvements…."[164] The Court properly recognized that "[m]erely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary."[165] The circumstances are similar here—the City Council made legislative determinations about the welfare of the people in Seattle in the context of a global pandemic and passed the challenged Ordinance. Plaintiffs ask this Court to override those determinations; as such, Plaintiffs fail to state a claim upon which relief may be granted.

4. The Ordinance does not violate equal protection guarantees.

[163] *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977) (citing *Hahn*, 326 U.S. 230).
[164] *Hahn*, 326 U.S. at 234.
[165] *Id*.

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The United States Constitution guarantees equal protection of the laws.[166] It does not prevent the government from identifying specific needs and legislating to address them. Here, there is a rational basis for tailoring the Ordinance to apply to FDNCs and their drivers, so Plaintiffs have not, as a matter of law, pled a valid claim.

Choices about whom and how to regulate are fundamentally political choices. Courts therefore review laws challenged as violating equal protection under the highly deferential "rational basis" test.[167] As the U.S. Supreme Court has explained,

> [s]ocial and economic legislation… that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. …. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. .... [S]ocial and economic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." This is a heavy burden….[168]

This test is the "most relaxed form of judicial scrutiny"[169] reflecting a strong preference for resolution of policy differences at "the polls not [in] the courts."[170] In conducting a rational basis review "a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest."[171] Any plausible basis suffices, even if it did not underlie the legislative action,[172] and even if no party raised that basis in its arguments.[173] Because it is "entirely irrelevant

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[166] U.S. Const., amend. XIV.
[167] *Ockletree*, 179 Wn. 2d at 776 & n.4.
[168] *Hodel*, 452 U.S. at 331–332 (internal citations omitted, quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)); *see also Am. Legion Post #149*, 164 Wn. 2d at 609 (2008) (A demarcation between groups "passes rational basis review so long as it bears a rational relation to some legitimate end[;]" and "[s]ocial and economic legislation that does not implicate a suspect class or fundamental right is presumed to be rational …") (internal quotations omitted).
[169] *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 223 (2006).
[170] *Williamson*, 348 U.S. at 488.
[171] *Amunrud*, 158 Wn. 2d at 222.
[172] *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).
[173] *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988).

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for constitutional purpose" whether the rational basis was the actual motivation for a law, "the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis."[174] Put another way, legislative decisions may be based on rational speculation, and may go unsupported by empirical data.[175]

Here, Plaintiffs have not alleged that any classification in the Ordinance is suspect,[176] and there are clear rational bases on which the City might choose to regulate FDNCs but not TNCs or other grocery or food service businesses.[177] The City determined that FDNC workers are critical to supporting social distancing by allowing the public to obtain food without gathering in large numbers. TNC workers and other food service workers do not provide this essential service. Also, as compared to employees who work in grocery stores or other food-related enterprises, FDNCs generally consider their workers "independent contractors"[178] who lack the protections that employees possess, including the right to refuse to work in unsafe conditions without losing their jobs.[179] Thus, the Ordinances' protections and increased pay are critical for retaining FDNC drivers, and permitting drivers to protect themselves, their customers, and the public from the spread of disease.[180] Set against the clear bases for the choice to regulate FDNCs, Plaintiffs' complaint that the Ordinance does not contain certain findings it deems necessary is of no moment.[181] As the U.S. Supreme Court

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[174] *Beach Commc'ns, Inc.*, 508 U.S. at 315 (internal citations, quotation marks and alterations omitted).
[175] *See Vance*, 440 U.S. at 111.
[176] Suspect classes are those that "have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class" such as "[r]ace, alienage, and national origin." *Andersen v. King Cty.*, 158 Wn. 2d 1, 16 (2006), *abrogated on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[177] *Cf.* Amended Complaint, ¶ 27 (alleging that non-FDNC workers face higher risks of infection or spreading disease).
[178] *See* Amended Complaint ¶¶ 7 & n.2, 42, 47, 49, 50 (explaining that Instacart considers its drivers independent contractors).
[179] *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (the Occupational Safety and Health Act allows employees to refuse to work in circumstances where they reasonably believe they are exposed to a risk of death or serious injury without suffering retaliation).
[180] Ordinance, Section 1.B, .M, .L, .P, .S, .T, .U.
[181] Amended Complaint at ¶¶ 29-30.

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has explained "[i]n an equal protection case… those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[182]

Though Plaintiffs have "couched [their equal protection claim] in terms of the arbitrariness of the challenged provisions", they are actually inviting this Court to "substitute its policy judgment for that of" the City's legislative functions.[183] The Court should refrain from violating the separation of powers and providing a legal solution to political issue. In the context of the current emergency, there can be no question that the City had the authority to determine that FDNC workers were entitled to the protections of the Ordinance and that FDNCs should be subject to the Ordinance's restrictions.[184]

E. Instacart is not entitled to damages or attorneys' fees under 42 U.S.C. § 1983.

In order to prevail on its claim for damages under 42 U.S.C. § 1983, Instacart must show that the City "deprived the plaintiff of a federal constitutional or state-created property right without due process of law."[185] Instacart does not allege deprivation of a state-created property right. And, as discussed above, Instacart's allegations that its federal constitutional rights have been violated have no merit.[186] Accordingly, Instacart cannot maintain a claim for damages under Section 1983, and this Court should dismiss this claim.

VI. CONCLUSION

Plaintiffs challenge the allocation of the benefits and burdens of economic life in an Ordinance

[182] *Vance*, 440 U.S. at 111; *see Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015) (in upholding the City's minimum wage ordinance requiring a faster phase-in for franchisees, the Ninth Circuit held "the City's determination [that franchisees could afford a faster phase-in] does not require empirical data… [plaintiff] did not negate every possible rationalization for the classification,") (citing, *inter alia*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))
[183] *Hodel*, 452 U.S. at 331.
[184] *See, e.g.*, Sections V.B.2; V.D.1.a.
[185] *Mission Springs, Inc. v. City of Spokane*, 134 Wn. 2d 947, 962 (1998) (footnote omitted).
[186] Section V.D.

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enacted in response to a global pandemic. In the best of times, the issues Plaintiffs raise do not suffice to invalidate the Ordinance. Under the dire conditions faced by the people of Seattle, the determination as to necessary actions to protect the community must be left to the legislative functions of the state.

For the foregoing reasons, the City respectfully requests that this Court grant the City's motion to dismiss the Amended Complaint.

Dated this 25th day of September, 2020.

Respectfully submitted,

/s/Jeremiah Miller
Jeremiah Miller WSBA #40949
Erica R. Franklin WSBA #43477
Assistant City Attorneys
Attorneys for Defendant,
The City of Seattle

I, Jeremiah Miller, certify that this motion contains 11,975 in compliance with the Court's September 23rd 2020 Order.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed a true and correct copy of the following documents with the Clerk of the Court using the ECR system:

1. City's Motion to Dismiss Plaintiff's Amended Complaint with attached Exhibit A;
2. Proposed Order Granting City's Motion to Dismiss; and
3. Notice for Hearing.

I further certify that on this date, I used the E-Serve function of the ECR system, which will send notification of such filing to the below-listed:

Attorney for Defendant, Jeremiah Miller at: jeremiah.miller@seattle.gov;
Attorney for Defendant, Erica R. Franklin at: erica.franklin@seattle.gov;
Attorney for Plaintiff, Robert M. McKenna at: rmckenna@orrick.com;
Attorney for Plaintiff, Daniel J. Dunne at: ddunne@orrick.com; and
Attorney for Plaintiff, Christine Hanley at: chanley@orrick.com.

DATED this 25th day of September, 2020, at Seattle, Washington.

/s/ Sheala Anderson
Sheala Anderson

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Appendix G

City of Seattle's Motion for Reconsideration or Certification Under RAP 2.3 in the Alternative

The Honorable Michael R. Scott

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

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington corporation, and MAPLEBEAR INC., d/b/a INSTACART, a Delaware corporation Plaintiff vs. CITY OF SEATTLE, a municipal corporation Defendant,	No. 20-2-10541-4 SEA **CITY OF SEATTLE'S MOTION FOR RECONSIDERATION OR CERTIFICATION UNDER RAP 2.3 IN THE ALTERNATIVE**

I. INTRODUCTION AND RELIEF REQUESTED

Used with care, dismissal under CR 12(b)(6) serves a critical gatekeeping function, by preventing needless expenditure of resources by the court and parties when a plaintiff has failed to state a cognizable claim for relief. Rational basis review also serves a vital function, by preserving the independence and integrity of the legislative branch. The Court's partial denial of the City's Motion to Dismiss turns these bedrock principles on their head.

In allowing for fact-finding as to the City Council's motives and the wisdom of its legislation,

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the Court failed to accord the Ordinance the deference to which it is entitled—blurring "the line of demarcation between legislative and judicial functions" and subjecting the parties to needless expense. *City of Seattle v. Webster*, 115 Wn.2d 635, 645 (1990) (cleaned up). The Court further erred by overlooking the appropriate standards for evaluating Plaintiffs' Takings, Contract Clause, and Privileges and Immunities claims, none of which are legally sufficient.

The City respectfully requests that the Court reconsider, under CR 59, the portions of its Order denying the City's Motion to Dismiss, or, in the alternative, grant certification on these issues under RAP 2.3(b)(4).

II. STATEMENT OF FACTS

The key requirement of the emergency Ordinance is that covered Food Delivery Network Companies ("FDNCs") pay covered workers premium pay for each delivery in Seattle. To ensure that workers realize this increased pay, and to prevent disruption of FDNCs' services, FDNCs are prohibited from taking certain actions because of the Ordinance. These requirements sunset when the COVID-19 emergency ends.

The parties agree that services provided by covered workers are essential to public safety and health. Ordinance, Section 1.M; Am. Complaint at ¶¶ 41, 43. Food delivery services allow people to engage in effective social distancing, reducing contact with large groups of people and slowing the spread of COVID-19. Ordinance, Section 1.S.

The City found that the law was immediately necessary to: compensate the workers for hazards they face; ensure retention; and compensate workers for time and expense in protecting themselves, customers, and the public. Ordinance, Section 1.B, .P, .T, .U. Nonetheless, Plaintiffs filed suit. *See generally*, Am. Compl. On September 25, 2020, the City moved to dismiss the Amended Complaint. Motion to Dismiss, Dkt. #39. This Court heard argument on March 26, 2021.

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The Court issued a bench ruling ("Order"), granting and denying the Motion in part. The Court recognized the deference to which the Ordinance was entitled. However, the Court reasoned that because CR 12(b)(6) required it to construe all pleaded facts in the light most favorable to Plaintiffs, including hypothetical facts, this deference could be overcome, and the Court could interrogate Council's motives and policy determinations. The Court thus declined to dismiss Plaintiffs' equal protection and police power claims. RP (Attachment A) 45-46.

The Court cited three allegations it believed entitled Plaintiffs to proceed. First, Plaintiffs alleged that the Ordinance's requirements to pay workers and protect safe access to food were unnecessary given skyrocketing demand for Plaintiffs' services. Second, Plaintiffs alleged that the Ordinance was passed solely to aid unions, although they failed to articulate why a command to pay independent contractors would assist unions. Third, Plaintiffs alleged that the Ordinance's requirements were unduly onerous. RP 46.

The Court further ruled that Plaintiffs had stated a claim for a Takings violation by pleading that their "business model" had been "appropriated," and had stated a claim for a Contracts Clause violation because the Ordinance substantially impaired unidentified contractual relationships. RP 47-48.

III. STATEMENT OF ISSUES

1. Whether the Court should grant reconsideration under CR 59, where (1) Council could have rationally concluded that the Ordinance would advance its stated purposes, and therefore Plaintiffs' equal protection, police power, and Contract Clause claims were legally insufficient; (2) the Ordinance was a valid exercise of the police power, the Ordinance was passed as a temporary emergency measure to address a calamity, and Plaintiffs' driver compensation structure was foreseeably subject to regulation, all precluding a threshold finding of substantial impairment under the Contract Clause; (3) the Ordinance does not appropriate Plaintiffs' contracts within the meaning of the Takings Clause; and (4) the Ordinance does not implicate a fundamental right and thus does not require an independent analysis under Washington's Privileges and Immunities Clause.

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2. Whether, if the Court denies reconsideration, the Court should grant certification under RAP 2.3(b)(4) where (1) the Order involves controlling questions of law as to which there is a substantial ground for a difference of opinion, and (2) immediate appellate review would materially advance ultimate termination of this litigation.

IV. EVIDENCE RELIED UPON

This motion relies on the pleadings and papers filed in this matter.

V. ARGUMENT AND AUTHORITY

A. The Court should grant reconsideration under CR 59.

Under CR 59, a court may vacate a prior order and grant reconsideration where the prior decision is "contrary to law," CR 59(a)(7), or "substantial justice has not been done," CR 59(a)(9), and the decision "materially affect[ed] the substantial rights" of the parties. The portion of the Order denying the Motion to Dismiss readily meet these criteria.

1. A complaint must be legally sufficient to survive a motion to dismiss.

Under CR 12(b)(6), "the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient." *Gorman v. Garlock, Inc*., 155 Wn.2d 198, 215 (2005). "If a plaintiff's claims remain legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Id*.

Although CR 12(b)(6) sets a high bar for dismissal, that standard is not boundless. "The purpose of CR 12(b)(6) is to weed out complaints where, even if that which plaintiff alleges is true, the law does not provide a remedy." *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 839, *reconsideration denied* (Oct. 9, 2019), *review denied*, 195 Wn.2d 1013 (2020). This action falls squarely within that purpose because each of Plaintiffs' claims are insufficient as a matter of law.

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2. The Ordinance is entitled to substantial deference for purposes of Plaintiffs' equal protection, police power, and Contract Clause challenges.

In considering Plaintiffs' equal protection challenge, the Court recognized that the Ordinance is subject to rational basis review. RP 48. Under this highly deferential standard, a legislative classification will survive scrutiny if there are "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the distinction actually motivated the legislature." *Id*. at 315.[1]

Rational basis review does not permit a court to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C.*, 508 U.S. at 313.[2]

The standard for a valid exercise of police power is equally deferential. As the Court recognized, RP 45, "[t]he burden of establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. Every presumption will be in favor of constitutionality." *Webster*, 115 Wn.2d at 645; RP 45. Accordingly, "if 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. These rules are more than mere rules of judicial convenience. They mark the

[1] "The Constitution presumes that, absent some reason to infer antipathy, even improvident decision 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." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (cleaned up).

[2] "These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing…Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *F.C.C.*, 508 U.S. at 315-16 (cleaned up).

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line of demarcation between legislative and judicial functions." *Id*.

Legislation is also entitled to considerable deference under the second prong of the Contract Clause analysis.[3] "Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose." *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.,* 940 F.2d 766, 771 (2d Cir. 1991) (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)). "As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co*., 431 U.S. at 22.

As the Court further recognized, a public health emergency enlarges the scope of the required deference. RP 47. In the face of a public health emergency, "the authority to determine for all what ought to be done" rests with political decision makers. *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 27 (1905). "It is no part of the function of a court" to second-guess a legislature's determination as to the course of action "likely to be the most effective for the protection of the public against disease." *Id*. at 30.

3. The Court failed to apply the appropriate level of deference in considering Plaintiffs' equal protection, police power, and Contract Clause claims.

Given the deference required, the appropriate inquiry is whether *any* rational bases could have motivated the Council to adopt this legislation. *F.C.C.*, 508 U.S. at 313-15; *Cf. Webster*, 115 Wn.2d at 645; *Ass'n of Surrogates*, 940 F.2d at 771. Rational bases abound for requiring hazard pay for workers engaged in dangerous work and ensuring that such a requirement will not impact community access to food. *See, e.g.*, Ordinance, Section 1; *see also* Motion to Dismiss, Dkt. #39 at 10, 32-33.

[3] *See infra*, section V.A.5.

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The Court should have ended its inquiry there.

Instead, the Court permitted Plaintiffs to test their allegation that the stated basis for the Ordinance was pretextual. RP 46. These allegations are immaterial, as Council's actual motives have no bearing on Plaintiffs' entitlement to relief. *See, e.g., RUI One Corp. v. City of Berkeley*, 371 F. 3d 1137 (9th Cir. 2004) (rejecting equal protection challenge to minimum-wage law despite plaintiff's contentions that city's stated reasons "were not the real reasons" and that city council "was instead motivated by a desire to help in the unionization campaign"); *Shepard v. City of Seattle*, 59 Wash. 363, 374 (1910) (upholding city ordinance over plaintiff's objection that it was enacted at the behest of interested parties because, "[w]e are not permitted to inquire into the motives of the city council. If the ordinance is valid on its face, the reasons or arguments that may have moved the city council to act are not pertinent here").

Nor could the Court second-guess Council's determination of necessity. RP 46. *See, e.g., Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 466 (1981) ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives."); *see also State v. Smith*, 93 Wn. 2d 329, 338–39 (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). Hazard pay is a recognized mechanism for retaining workers in dangerous occupations, and it permits workers to purchase PPE or forgo working when it is unsafe. Council "could rationally have decided" that premium pay for FDNC drivers during the public health emergency would accomplish these goals. *See Clover Leaf Creamery Co*, 449 U.S. at 466. Moreover, it is beyond dispute that hazard pay compensates these workers for the risks they incur to protect the

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community—a rational basis in and of itself.[4] And even if increased demand had already resulted in some degree of increased compensation for FDNC workers, the Court must defer to Council's determination that an additional increase was necessary—particularly given the impossibility of putting a price tag on potentially fatal risks.

4. The Court misunderstood the interplay between CR 12(b)(6) and rational basis review.

Even if Plaintiffs could prove that the Ordinance was unnecessary and pretextual, their equal protection, police power, and Contract Clause claims would remain "legally insufficient," given the easily articulable commonsense rationale for this legislation. *See Gorman*, 155 Wn.2d at 215. Plaintiffs cannot overcome this conclusion through fact-finding because the wisdom of legislative policy determinations and the actual motives of legislators are not before the Court. *See supra*, section V.A.2-3. Notwithstanding the high bar for dismissal under CR 12(b)(6), the Court should have dismissed these claims.

Paradise, Inc. v. Pierce County is instructive. 124 Wn. App. 759 (2004). There, the appellate court reversed the trial court's denial of a motion to dismiss a variety of constitutional and other claims after the matter had proceeded to a full trial and jury verdict in favor of the plaintiff. *Id.* at 766. The plaintiff had challenged an ordinance that banned certain types of gambling. Plaintiff alleged, *inter alia*: "that the ordinance violated equal protection because it exempted bona fide charitable or nonprofit gaming" businesses, *id.* at 778; that "the County had no legitimate interest in enforcing the ordinance," implicitly alleging that the ordinance's "passage [was] not a valid exercise

[4] In determining whether Council rationally could have concluded that the Ordinance was necessary, the Court should look beyond the willingness to work under pre-Ordinance pay structures, which may speak more to a need for income than to the adequacy of existing pay. The Court should reject Plaintiffs' invitation to adopt this *Lochner*-era view of minimum compensation requirements. *See, e.g., Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 532 (2020) (acknowledging that minimum pay laws protect from the hazards of low pay and long hours).

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of the police power by the County[,]" *id.* at 769, 772; and that the "the economic impact of the ordinance substantially destroyed the value of [plaintiff's] investment" in expanding its physical property, *id.* at 769. The court held that none of these allegations were sufficient to overcome the county's motion to dismiss. It did not read the CR 12(b)(6) standard to permit challenges to the necessity or propriety of the law in the face of the deference due to exercises of legislative powers.[5]

Under the Order, a bare allegation of pretext, or a mere disagreement with legislative policy determinations, would entitle a plaintiff to discovery—resulting in wasteful expenditures of judicial and public resources and potentially grinding the legislative process to a halt. In contrast, a faithful application of rational basis review in the CR 12(b)(6) context would not preclude a meaningful challenge to purely arbitrary legislation lacking an articulable rational basis. *Cf. Fowler Packing Company, Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (law failed rational basis review because court "*could conceive of no other reason* why …legislature would choose to [adopt challenged legislation] other than to respond to the demands of a political constituent.") (emphasis added). This Court should follow *Paradise, Gorman,* and *RUI*, and dismiss Plaintiffs' claims in full.

5. <u>The Court misconstrued the threshold inquiry for a Contract Clause challenge.</u>

The Court also erred in concluding that Plaintiffs had stated a claim under the Contracts Clause of the state and federal constitutions. The term "impairment" in this context is a misnomer, as "the prohibition against any impairment of contracts is not an absolute one and is not to be read

[5] The decision in *Gorman* also supports this understanding of the proper balance between allegations in a complaint and valid exercises of police power. There, plaintiffs alleged that entitlement to relief under Washington's worker's compensation law despite an exclusion for individuals covered by the federal Longshore and Harbor Worker's Compensation Act (LHWCA). *Gorman v. Garlock*, 121 Wn. App. 530, 537-38 (2004) *aff'd* 155 Wn. 2d. 198 (2005). Plaintiffs opposed motions to dismiss on the basis of "hypothetical" facts that would establish that they were not covered by the LHWCA. *Id*. The appellate court upheld the trial courts' granting of the motions to dismiss, noting that, to credit "hypothetical facts" to overcome a CR 12(b)(6) motion, "the hypothetical facts must be reasonable…." *Id*. at 539. Though hypothetical facts could have established a lack of coverage, the court refused to credit those facts in the face of valid state and federal laws.

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with literal exactness." *Tyrpak v. Daniels*, 124 Wn.2d 146, 151 (1994) (cleaned up). To determine whether a contract has been *unconstitutionally* impaired, a court engages in a three-part inquiry. First, the court inquires whether the challenged law "has in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power and Light Co*., 459 U.S. 400, 411 (cleaned up). If this threshold condition is satisfied, a court determines whether the legislation has "a significant and legitimate public purpose," *id.*, and "whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying the legislation's adoption." *Id*. at 412 (cleaned up).

The Court's ruling ignored the second and third prongs of this inquiry. Citing only the impact of the Ordinance on Plaintiffs' business, the Court concluded that Plaintiffs had pled sufficient harm to establish "substantial impairment" and thus state a claim under the Contracts Clause. RP 48. In so ruling, the Court overlooked three considerations that preclude Plaintiffs from satisfying even the threshold condition for a Contracts Clause violation. First, where, as here, a challenged law is a valid exercise of the police powers, it does not constitute substantial impairment. *Optimer Intern., Inc. v. RP Bellevue, LLC,* 151 Wn. App. 954, 966 (2009); *see* Motion to Dismiss, Dkt. # 39 at 28; *supra* section V.A.1.

Second, additional workplace regulations do not amount to substantial impairment because the payment of wages generally, and the business operations of FDNCs specifically, are already subject to regulation. *See Energy Reserves*, 459 U.S. at 413 (natural gas producers did not have contracts impaired where the state regulated the intra-state prices they could charge because "State authority to regulate natural gas prices is well established" despite the state having never before regulated those prices).

Third, the Court did not properly credit the temporary, emergency nature of the Ordinance in

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the context of a Contract Clause analysis. As Judge Posner explained, "[e]ven big, totally unpredictable impairments of the obligation of contracts can survive challenge under the contracts clause if they are responsive to economic emergencies… and even to considerably less exigent needs…." *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 896–97 (7th Cir. 1998) (citing, *inter alia*, *Home Building Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425–28 (1934)). Indeed, in *Blaisdell*, the Court categorically excluded emergency laws from those that could "substantially impair" contracts, recognizing "[t]he reservation of state power appropriate to such extraordinary conditions may be deemed to be… a part of all contracts…." 290 U.S. at 439.

Because Plaintiffs cannot satisfy the threshold test for a Contract Clause violation, the Court erred in declining to dismiss their Contracts Clause claim.

6. The Court applied an incorrect standard for the appropriation of a contract under the Takings Clause.

In declining to dismiss Plaintiffs' Takings Claim, the Court ruled that Plaintiffs had stated a claim for the appropriation of their "business model." RP 47. But Plaintiffs have fashioned their Takings claim as an alleged taking of their *contracts*. Pls.' Opp'n to City's Mot. to Dismiss, Dkt. #40 at 21. As a matter of law, no such taking occurred here.

The Supreme Court has narrowly circumscribed the circumstances constituting a "taking" of a contract. In *Omnia Commercial Co., Inc. v. United States*, the appellant was the owner of a contract allowing it to purchase steel. 43 S. Ct. 437, 507 (1923). Before the steel was delivered, the government requisitioned the steel company's annual production of steel. *Id.* In rejecting appellant's Takings claim, the Court explained that "[i]f under any power, a contract or other property is taken for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the government is not liable." The Court held that the appellant's contract had not been taken.

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> The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Plainly here there was no acquisition of the obligation or the right to enforce it.

Id. at 510-11 (cleaned up). Similarly, the Ordinance did not effect a taking of Instacart's contracts because the City did not acquire any of the rights or obligations under these contracts.

The Order conflates the separate standards for Contract Clause and Takings violations. It effectively nullifies Contracts Clause requirements, as any contract impairment could be refashioned as a compensable Taking. Plaintiffs' Takings claim was legally insufficient.

7. Plaintiffs' Privileges & Immunities claim fails for lack of a fundamental right of state citizenship.

The Court erred in declining to dismiss Plaintiffs' Privileges and Immunities claim because Plaintiffs did not, as a matter of law, allege the implication of a fundamental right.[6] The threshold question for an independent analysis of a state action under Article I, Section 12 is whether that action implicates a fundamental right of state citizenship. *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc*., 196 Wn.2d 506, 518-19 (2020). Here, Plaintiffs have alleged that their "fundamental right" to "carry on business" is implicated by the Ordinance. Am. Compl. at ¶ 84; Pls.' Opp'n to City's Mot. to Dismiss, Dkt. #40 at 26-27.

"Washington courts have been hesitant to broadly apply the right to carry on a business in any legislative act that happens to harm a single aspect of a business." *Blocktree Properties, LLC v. Public Utility Dist. No. 2 of Grant Cty, Washington*, 380 F. Supp.3d 1002, 1124 (E.D. Wash. 2019) (citing Washington cases). Where a law does not "prevent any entity from engaging in business" but

[6] In its oral ruling, the Court did not explicitly discuss Plaintiffs' Privileges and Immunities Clause claim, perhaps believing—correctly—that Instacart's allegations did not warrant an independent analysis under this provision. RP 48.

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rather only regulates the business, the law does not implicate the right to carry on business for purposes of Article I, Section 12. *Am. Legion Post #149 v. Dep't of Health*, 164 Wn. 2d 570, 608 (2008).

Plaintiffs have never alleged, nor could they, that the Ordinance precludes them *in toto* from engaging in business in Seattle. Accordingly, the Amended Complaint is insufficient to support a request for relief on this ground. *Compare Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644 (1949) (a law that wholly prohibited non-residents from plying their trade implicated the Washington Privileges and Immunities clause). The Court should reconsider its ruling on Plaintiffs' Privileges and Immunities claim.[7]

B. If the Court declines to grant reconsideration under CR 59, it should grant certification under RAP 2.3(b)(4).

"[A] party may seek discretionary review of any act of the superior court" not otherwise appealable as of right. Rule of Appellate Procedure ("RAP") 2.3(a). The reviewing court may accept discretionary appeal where the "superior court has certified… that the [challenged action] involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4). Here, there is no question that the Order involved controlling questions of law, with a substantial ground for a difference of opinion. If a reviewing court were to agree with the City, the litigation would be terminated. Therefore, if the Court does not grant reconsideration, it should certify the issue for immediate appeal.

VI. CONCLUSION

In its partial denial of the City's Motion to Dismiss, the Court erred in applying the CR

[7] Because all of Plaintiffs' constitutional claims are legally insufficient, the Court should also dismiss Instacart's 42 U.S.C. § 1983 claims.

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12(b)(6) standard; failed to accord the Ordinance the required deference; and overlooked appropriate standards for Plaintiffs' Takings, Contract Clause, and Privileges and Immunities Claim. Should the Order stand, these errors will result in needless discovery and expenditure of resources. The City respectfully requests that the Court reconsider, under CR 59, the portions of the Order denying the City's Motion to Dismiss, and in the alternative, grant certification under RAP 2.3(b)(4).

Dated this 5th day of April, 2021.

Respectfully submitted,

/s/ Erica R. Franklin
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CERTIFICATE OF COMPLIANCE

I certify that this Motion for Reconsideration contains 4,196 words in compliance with the Local Civil Rules of the King County Superior Court as amended September 1, 2016.

DATED this 5th day of April, 2021.

PETER S. HOLMES
Seattle City Attorney

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I electronically filed a true and correct copy of **City of Seattle's Motion for Reconsideration or Certification under RAP 2.3 in the Alternative** with the Clerk of the Court using the ECR system.

I further certify that on this date, I used the E-Serve function of the ECR system, which will send notification of such filing to the below-listed:

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DATED this 5th day of April, 2021, at Seattle, Washington.

/s/ Sheala Anderson
Sheala Anderson

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Attachment A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington corporation, and MAPLEBEAR INC., d/b/a INSTACART, a Delaware corporation, Plaintiffs, v. CITY OF SEATTLE, a municipal corporation, Defendant.	No.: 20-2-10541-4 SEA

HEARING - VIA TELEPHONE

The Honorable Michael Ramsey Scott Presiding

March 26, 2021

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I N D E X O F P R O C E E D I N G S

-o0o-

March 26, 2021

THE COURT: Good morning, everyone, this is Judge Scott. Do we have everyone present who is expected to participate in the hearing this morning? It looks from my point of view that we -- and you can hear me fine. I'm seeing nodding heads, very well.

This is Judge Scott. I am in open court and we are on the record. On the calendar this morning is a motion to dismiss in Washington Food Industrial Association v. City of Seattle, Case No. 20-2-10541-4 Seattle designation.

Counsel, please state your appearances, starting with counsel for the plaintiff.

MR. MCKENNA: Your Honor, Rob McKenna appearing for Plaintiffs, Washington Food Industry Association and Instacart.

THE COURT: Good morning.

MR. MCKENNA: Good morning.

MR. RUBENS: Good morning, Your Honor. Daniel Rubens of Orrick Herrington & Sutcliffe also appearing for the plaintiffs.

THE COURT: Good morning.

And for Defendant?

MR. MILLER: Good morning, Your Honor. Jeremiah Miller,

assistant city attorney for the City of Seattle.

THE COURT: Good morning.

MS. FRANKLIN: Good morning, Your Honor. Erica Franklin, assistant city attorney for the City of Seattle.

THE COURT: Good morning.

MR. DE VERA: Good morning, Your Honor. Derrick De Vera, assistant city attorney for the City of Seattle.

THE COURT: Good morning. I understand from correspondence from the plaintiffs that Mr. McKenna and Mr. Rubens will be arguing for the defendants -- excuse me, the plaintiffs.

Who will be arguing on behalf of the City?

MR. MILLER: I will, Your Honor.

THE COURT: All right. Thank you, Mr. Miller.

I'd like you to aim to confine your arguments to 20 minutes per side. I'll be fair. If I pepper you with questions and I've interrupted your flow, I'd add some time using a soccer rule. But I have read everything you submitted. I do appreciate the effort that counsel made to send it to the Court, the bookmarked PDF file with everything that you wanted me to consider.

Having inherited this case from a series of judges, I did not have working papers. And the court file was a little bit confusing as to what exactly was pending this morning. So your submission cleared that up. And I have read

everything you have submitted carefully.

But I always find oral argument helpful. This case raises some very interesting issues and I'm looking forward to hearing from you further this morning.

Mr. McKenna and Mr. Rubens, you'd be entitled to rebuttal, so if you wish to reserve some of your 20 minutes, please let me know. I'll try to remember to give you a three-minute warning if you're approaching that. And as I said, if you need more time, if you think you're entitled to it under a soccer rule, feel free to ask.

With that I'll turn the floor over to Mr. McKenna.

MR. MCKENNA: Thank you, Your Honor. For the record, Rob McKenna appearing for Plaintiffs Instacart and Washington Food Industry Association.

Your Honor, over the next ten minutes I'll discuss how Initiative 1634 prohibits local governments from imposing fees, charges and exactions like Seattle Ordinance $2.50 fee for delivery for groceries.

I'll then explain how the City's police powers do not support the control it is exerting through the ordinance over Instacart's Seattle business operations because the City's exercised its police powers in this case to be demonstrated with discovery but also based on the available records to be pretextual and arbitrary. I'll then hand off the presentation to Mr. Rubens, who will discuss the

constitutional issues.

Your Honor, in Initiative 1634 codified in Chapter 82.84 RCW, the statutory definition of tax, fee or other assessment on groceries is very broad. You can see it in the motion to dismiss at page 14, if you don't have the text in front of you. It says that the definition includes, quote, but is not limited to sales tax, gross receipts tax, business and occupation tax, business license tax, excise tax, privilege tax or any other similar levy, charge or exaction of any kind on groceries for the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use or consumption thereof.

Now, the City argues in its motion to dismiss that Initiative 1634 only prohibits taxes that are collected by the City. They further argue that the state's law prohibiting -- the state law's prohibition of locally imposed taxes, fees and other assessments on groceries only prohibits taxes and that other -- and that, quote: Fees, other assessments, levies, charges and exactions cannot be read separately from taxes.

THE COURT: Well, Mr. McKenna --

MR. MCKENNA: In response to the City --

THE COURT: -- on that score -- thank you. It does say "similar" when it adds those more general types of potential exactions, it says similar levy, charge or exaction.

Doesn't that limit it in some way to the preceding categories?

MR. MCKENNA: Your Honor -- I think, Your Honor, that the word "similar" does modify the phrase levy, perhaps charge.

But it doesn't make sense to read the word "similar" as modifying exaction, because then it would read "or any other similar exaction of any kind." Exaction of any kind is quite broad and I don't think it (inaudible) would be read and limited by "similar" in such a way that "exaction" can only mean a tax.

One of the ways we can tell this is by reading the findings and declarations of the statute, which is clearly concerned -- this is at 82.84.020, by the way, which is clearly more concerned not only with taxes but also with fees, which are distinct from taxes under Washington law, and with any local exaction that would make groceries more expensive.

The defining declarations state that access to food is a basic human need, that keeping the price of groceries as low as possible improves access to food for all Washingtonians, and that no local government entity may impose any new fee, tax or other assessment that targets grocery items, which is defined pretty much -- I mean, really as broadly as --

THE COURT: Mr. McKenna --

MR. MCKENNA: -- you can imagine.

THE COURT: -- would the meaning that you argue for on behalf of your clients prohibit a local government from imposing a minimum wage that would include grocery workers? Would it reach --

MR. MCKENNA: It would not.

THE COURT: Why not?

MR. MCKENNA: We don't believe it would, Your Honor, because a minimum wage targeting grocery workers would be a wage of a more -- more on the lines of a general regulation as -- and would be tied to the amount of time the person works. So they could have -- they could have constructed this ordinance in that way, but they chose not to. Instead, they set up a fee on grocery delivery. They direct that fee revenue to the workers, but they don't set it up as wage legislation.

If you look at the transportation network drivers, Uber and Lyft drivers, who were originally part of this ordinance and were removed from the ordinance at the request of the Teamsters, according to the council members who moved that amendment, they constructed that ordinance differently to be a wage ordinance designed to create a minimum level of income for those drivers.

But here they didn't do that. Here they imposed a grocery delivery fee and then they direct the revenue. And the grocery delivery fee isn't tied to the amount of time that

someone works. It's tied to the number of -- it's a fee per delivery made by that worker.

So, no, we don't believe that it would necessarily prohibit a minimum wage for grocery workers.

Your Honor, we think it's evident from the language in the statute that local grocery delivery fees are prohibited because the statute language goes well beyond the collection of taxes to also prohibit a long list of locally imposed or collected measures. Not just taxes but also fees, assessments, levies, charges of exaction of any kind, whether they produce revenue for the City coffers or not and whether they apply to the sale of groceries or to the manufacturer, distribution, sale, possession, ownership, transfer, transportation, container use, or consumption.

Now, again, why is the statute so broadly drafted? Because its stated goal, codified in 020, is not just to prevent revenue generating local taxes on groceries but also to block any measure that targets groceries, makes them more expensive to consumers, including measures imposing new delivery fees.

The City chooses to ignore much of the law's plain language; we think violates part of the rule's statutory construction.

THE COURT: Mr. McKenna, with apologies, I'd like to break in again. As you know, I tend to have --

MR. MCKENNA: Of course.

THE COURT: -- lots of questions. You've just argued that the core intent of those statutes is to make sure that prices of groceries aren't increased. The ordinance we're talking about, as I understand it, would -- how would it increase the price of groceries?

MR. MCKENNA: It increases the price of the delivery of groceries, when delivery is covered by transfer or transportation.

THE COURT: Well, how would it increase that if -- to the consumer if, by the terms of the ordinance, your clients are not allowed to raise charges to the consumer?

MR. MCKENNA: Well, the statute simply prohibits from adding the fee to the charge to the consumer. You know, every business is going to -- that has to absorb mandated costs is going to find a way to recoup those costs or else it's not going to stay in business.

So it's true they can't put it on the bill along for grocery delivery, even though restaurant deliveries can, but they're not prohibited from recouping those costs in other ways, such as increasing the overall charge for their services that they provide.

THE COURT: Thank you.

MR. MCKENNA: You bet. You know, I think, Your Honor, it's fairly clear that contrary to the City's argument,

taxes aren't the same thing as fees. The Supreme Court has made that clear in cases like in Automated Transit Union and Washington Association for Substance Abuse and Violence Prevention. As we say, under the ordinance this new $2.50 regulatory fee per grocery delivery is a regulatory fee charged and exaction. It's not converted into wage legislation because revenue from the fee is paid to the delivery worker rather than the City.

Third, in addition, the law prohibits any fees or assessments on groceries, including charges and taxes of any kind which extend deeply to transferring or transporting groceries. That is not being disputed.

Your Honor, if I may, I'd like to turn some points about the police powers. And I think, not counting stoppage time, I have about five minutes, so I'll do this -- I'll try to be very efficient here, if that's okay.

The ordinance imposes a grocery delivery fee as part of a comprehensive regulatory scheme targeting new delivery network companies. And as already discussed, increasing the costs of grocery delivery per local ordinance is prohibited by Initiative 1634, which is an express limitation on the City's police power. There is no police power exception in the ordinance.

In addition, the ordinance's regulation of food and delivery network companies is unconstitutional. Mr. Rubens

will discuss it is not permitted under the City's police powers where the underlying emergency is merely a pretext for the City council and its union allies to achieve their longstanding goal of regulating gig economy and its independent contractor workers.

In other words, Your Honor, even under the rational basis standard, the City is not allowed to rely on pretext to justify the ordinance. As courts have repeatedly recognized in cases such as those we cite in our opposition on pages 30 and 31, such as Seattle Vacation Home, Savage v. Mills, DeYoung v. Providence Medical Center and more.

In addition, although the City insists that all hypothetical facts must be drawn in their favor, we're before you today on a 12(b)(6). That means, of course, that all facts must be drawn in Plaintiffs' favor at this stage, and we've (inaudible) allegation that the ordinance is untethered from public health in its rationale against ^ protection.

These alleged facts must be accepted as true at this point. And if they are accepted as true, Plaintiffs are entitled to discovery.

In fact, Your Honor, Plaintiffs here are seeking precisely the same type of discovery sought and permitted by Judge Rogoff in Seattle Vacation Home. And Plaintiffs currently have discovery pending (inaudible) all the information to

challenge the rational basis for the ordinance.

The City pushes back on the very idea that enactments under emergency -- during an emergency under its municipal police powers should be subject to review. But, of course, that isn't the case.

In Seattle Vacation Home, the 2019 case decided by Judge Rogoff, the City was -- the City was denied its motion of summary judgment on a plaintiff's challenge to another city police powers ordinance. Judge Rogoff wrote that courts cannot allow a rational basis review to serve as a rubber stamp. He continued that plaintiffs, quote, have the right to seek discovery that might prove these ordinances were arbitrarily constructed.

Therefore, Your Honor, we believe Plaintiffs should have an opportunity for discovery because rational basis review, which is required for counts 2 through 6: Police power, Takings, contracts and so on, is fact-intensive.

In addition, police power enactments during public health emergencies are not subject to a reduced level of judicial review, as the City suggests. The Supreme Court reminded us of this in Roman Catholic Diocese of Brooklyn v. Cuomo in 2020. Other federal courts such as the federal court in the Eastern District of California, Culinary Studios, Incorporated, this year concluded that, quote: Normal constitutional standards of review shall apply, not a

separate Jacobson standard. A public health emergency does not give rise to an alternative standard of review.

In the present case, Your Honor, we believe the plaintiffs are entitled to discover whether the code 19 emergency was a pretext and whether the ordinance is, in fact, a reasonable exercise of the City's police powers. The available record suggests what Plaintiffs suspect discovery will confirm: That the ordinance is a coordinated effort to achieve a longstanding goal of council members and their allies to organize independent contractors in the gig economy.

One example: The ordinance originally covered Uber and Lyft drivers. That was removed just before adoption of the ordinance by the county council by amendment. And as the council member who moved that amendment explained during their meetings brought on the ordinance, those drivers were removed by the council from the ordinance on the day it was adopted at the behest of the Teamsters who were pushing for separate permanent wage legislation for them.

So what is the standard of judicial review here? Is that emergency legislation must be rationally related to a legitimate stated interest and not impose arbitrary classifications.

Although the City disagrees with the reasonableness requirement and says that -- and argues that public health emergencies enlarge the scope of police power, that the City

should not examine its motives and require factual justification, that is not a basis for dismissing on a 12(b)(6) claim -- motion at this stage.

Sorry, Your Honor, just skipping ahead to make sure I covered the main points. I think, Your Honor, I'll stop there and hand off to Mr. Rubens.

THE COURT: That's good timing. Thank you, Mr. McKenna.

Mr. Rubens.

MR. RUBENS: Good morning, Your Honor. And I'd like to reserve three minutes of our time for rebuttal if that's possible?

THE COURT: Of course.

MR. RUBENS: Thank you.

The ordinance violates four different constitutional provisions, and I'll address each of those briefly in turn. But I wanted to start off by noting a few common reasons why the City's constitutional argument fails.

First of all, and similar to what Mr. McKenna was just saying, the City repeatedly invokes the public health emergency that constitutional rights must be projected even and especially during emergencies. And for the reasons that have been explained, ordinances and provisions are untethered from its public health justification that the City's stated reasons for the ordinance are pretextual under the facts we've alleged.

The City in its constitutional argument makes a lot of analogies to minimum wage and working condition laws that regulate employees, and those laws have been upheld against constitutional challenges. So those comparisons don't hold up here. The workers here are independent contractors, not employees, and the ordinances are more intrusive than those garden-variety wage and working condition regulations.

And the last overarching point is that the City almost entirely ignores the Rule 12(b)(6) standards which list whether there's any facts, alleged or hypothetical, upon which we could obtain relief.

We've alleged plenty of facts that establish this ordinance has a significant economic impact, that the City acted pretextually and its ordinance is disconnected from the City's stated goals. And together that's more than enough to beat this motion.

So with that background in mind, I'll address the particular things, starting with the Taking clause. And there's no question that the ordinance burdens and indeed appropriates Instacart's contractual rights. It doesn't just impose a premium fee requirement, but it prohibits us from modifying the areas to be served and it prevents us from passing along the cost in the form of a customer charge for grocery delivery.

And I think the City now concedes that contracts are a

form of property that can support the Taking claim, so that gets us to the next step, which is the Penn Central framework of regulatory taking. That's a fact-intensive, a case-specific test. And we think clear allegations of a taking under each of the factors of that test, that the City really hasn't proffered any meaningful response to.

In the motion to dismiss, the City seems to take the position that there's no need to consider the Penn Central factors when the government says it's acting to protect health and safety. But current Taking doctrine is clear that all regulatory Taking claims, including the one here, must be considered under Penn Central.

And I'll just very briefly run through the three factors, the first of which is economic impact, which (inaudible) as a serious financial loss. And we've pleaded that here based on the provisions I've mentioned that have a significant impact on our operations and ability to operate profitably, with reasonable investment-backed expectations. This is a novel and disruptive industry. It's just not plausible to describe it as heavily regulated. I think even the City recognizes that it's a new industry and you can't say that Instacart and other food delivery network companies entered and their network anticipating the pandemic or the type of unprecedented regulation.

And the last factor is the character of the government

action, which goes to the finality that the City is trying to draw with minimum wage or working conditions laws. And we have explained the ways it's different. The City has said it's just trying to exercise its police powers to serve the common good. But the whole point of the Taking clause is to identify when certain regulations go too far and single out private parties to take on a burden that really should be borne by the public.

This case doesn't resemble the fact pattern or the procedural posture of many of the cases the City cites which involves condemning properties as to public nuance or shutting down businesses to respond to a dangerous situation like an erupting volcano.

So all the questions under this factor and the Penn Central test as a whole, are intensely factual and we have pleaded more than enough here to survive a motion to dismiss.

I will go next to our contract clause claim, which is pretty closely related. The ordinance altered the terms of our existing contract and diminished their value by requiring us to have that increased pay for shoppers and stripping us of our discretion to limit access to our platform. We've identified in our complaint the specific contractual provisions that the ordinance (inaudible). The City hasn't really disagreed with that.

Under the contract clause analysis, the first test is to look at whether there's been a substantial impairment of the contractual relationship. And (inaudible) similar to the economic impact they talked about, we pleaded that.

The next step of the analysis is to look at the steps between the law's means and its ends. And that factor requires that laws be drawn in an appropriate and reasonable way to advance for a legitimate public purpose. And this goes back to our points about pretext and the lack of rational basis where the ordinance doesn't serve its stated purpose under the facts as we've alleged. And here too the City falls deaf in its assertion that the ordinance's exercise of police powers, there's no role for judicial review or constitutional scrutiny. But it's well established that even otherwise legitimate exercise of the police power -- and we dispute that here -- but even if they're legitimate, they can still violate the contract impairment clause. And the U.S. Supreme Court and the Washington Supreme Court has made clear that the contract clause is a limitation of police power that might otherwise be available.

And there's similar points in argument here about the degree of regulation in the industry. It's not plausible to compare this industry to the industries like (inaudible) questions like pension withdraw liability or energy pricing,

which come up in some of the contract cases the City relies on, which again involves a different procedural posture where there's a much more developed factual record.

And also under the Supreme Court precedent, the narrow focus of the ordinance here targeting food delivery companies alone render this suspect.

So for all those reasons, we've stated a claim for contract impairment.

THE COURT: If you wish to retain three minutes, you've got two minutes to wrap up.

MR. RUBENS: Okay. Well, I'll just briefly address our equal protection and privileges immunities claims, which go hand in hand and, again, connect to some of the points we've already discussed I think. The rational basis standard may be deferential, but here we have alleged there is no connection between what the ordinance did and its stated purpose of providing for public health. And, in fact, it was pretextual and served a longstanding goal that was unrelated to the pandemic.

So under equal protection law, and certainly given where we are in this case, those allegations are not -- you know, to survive the motion to dismiss and for us to develop a record showing that rational basis isn't a rubber stamp, and we're entitled to proceed on that claim.

And the privileges and immunities analysis is similar.

The first step of that test is to look to other -- there's a privilege which -- and Washington courts have recognized that the right to carry on business is fundamental for purposes of the clause. And we pleaded that this is more than an ordinary business regulation with an incidental effect that really goes to the heart of our operation and the ability to operate profitability.

And having identified that privilege, the next step of the test -- again, the step between a means and the end -- but under the privileges and immunity clause, it's a more demanding standard than rational basis. The Court can't hypothesize facts that support the government's justifications.

So for the same reason, the ordinance lacks rational basis, it fails the privileges and immunities clause.

So I'll reserve the remainder of our time for rebuttal.

THE COURT: Thank you, Mr. Rubens.

I'll turn now to Mr. Miller on behalf of the City of Seattle.

MR. MILLER: Thank you, Your Honor.

Plaintiffs' complaint fails to state any claim upon which this Court may grant relief, and that's for four reasons. First, the gig and workers premium pay ordinance is a proper and valid exercise of the City's authority to protect public health, safety, and welfare.

Second, state law limiting the capacity for local governments to tax groceries simply does not preempt the public -- the police power ordinance at issue in this case.

Third, the plaintiffs' private contracts for labor cannot supersede the City's ordinance in acting for the public interest.

And, fourth, the ordinance easily survives rational basis review.

Turning first to the police powers. It is quite clear that it is at the absolute heart of the police powers for governments to regulate working conditions. Properly framed, the plaintiffs' complaint would like to elevate their private arrangements to purchase work from people over -- yes, Your Honor?

THE COURT: I want to tell you what troubles me potentially about this argument so you can address that. It is, as you said, beyond doubt that governmental authorities have regulatory power to regulate workplace conditions and wages and benefits.

But what is unusual about this case, it seems to me, is that not only does the City's ordinance do that, but it precludes the regulatee from modifying its business or raising prices in a way to adjust for or recoup the additional expenses imposed by the regulation. That's a squeeze move that is unlike any other regulation that I can

think of. And combined with the pleaded allegations, which the Court must give great -- must credit at this stage of the case on a motion to dismiss, raise issues as to whether the -- you know, I think there is a question. Tell me how the City responds to that.

MR. MILLER: Thank you, Your Honor.

Yes, so I've been saying, at the core of the law is this minimum compensation, as we've described it. That's the main thing that's passed into law, that there's an additional amount paid to the drivers for each delivery. The law contains other portions that you were just referencing, Your Honor, that include restrictions on changing the compensation structure for those drivers or for restricting their access to work. I mean, both of those are clearly focused on ensuring that they get the minimum compensation that the ordinance requires.

The other two restrictions in the ordinance are on passing on the costs associated -- the per-trip costs associated with groceries only, and then restricting Plaintiffs' ability to change their surface areas in the city.

The first point I would make about all of these restrictions is they are limited to the case where the plaintiffs undertake those actions because of the ordinance going into effect. When other things happen to their businesses that impact the way they operate or create a need

to make changes in those areas, the ordinance would not prohibit that. That would be the first point I would make.

The second point I would make is -- well, I sort of already made it. The restrictions on changing compensation to the drivers and changing their access to work are related to the minimum compensation piece.

The other restrictions are part of the public health aspect of this ordinance. There's no dispute in this case that these drivers are critical to providing safe access to food, as we've seen throughout the course of this pandemic. Congregations of people are dangerous and lead to spread. So having the capacity to purchase this -- to purchase and obtain food without having to go into public and to get into groups -- yes, Your Honor?

THE COURT: Thank you. Granted that, on its face, that is a reasonable and rational measure in response to a public health crisis posed by this pandemic. But what about the argument that it was -- the regulation -- the ordinance was unnecessary because that was all happening anyway? Instacart's business has been booming since the pandemic hit, new drivers have been hired, drivers were making record wages -- compensation -- not wages, but compensation because there was such demand during the pandemic for delivery services to keep that distance.

Was the ordinance -- was there a real need that the

ordinance was to address? Or on this motion, which is at an early stage of litigation and where I must give deference to the pleading and view it in the light most favorable to the plaintiff and even consider hypothetical facts that are consistent with the pleading, can the Court say there's no pretext as a matter of law on these -- on this pleading?

MR. MILLER: Yes, Your Honor. This gets to -- in fact, on the Court's (inaudible) here which is the degree of inquiry that the Court should undertake when it comes to examining the motives or the purposes of the ordinance. It's true we are in a motion to dismiss stage, but it is also true that rational basis review works on -- in such a way that any stated facts that can be articulated that justifies regulation allows the regulation to survive a rational basis review.

Under those circumstances, there are plenty of bases that are articulated both in the ordinance itself and in the pleadings before this Court that explain the basis for this action. That is enough for the Court to dismiss the complaint.

The counterfactual is perhaps helpful, Your Honor. If the Court endorses a rule where any allegation of wrongdoing by a governmental body is sufficient to reach discovery, it's inviting a lot of meritless litigation that ultimately results in nothing.

And this is particularly true when you're looking at something like responding to a global pandemic. I mean, that is -- that's -- you know, through Business Owners Association and Jacobson.

And the thing that's important to understand there is that for those kinds of police power exercises, the courts routinely approve far more far-reaching impacts on business operations.

Coopers Business Owners Association, the entire town was shut down and businesses were physically excluded from the property. In Jacobson, the court --

THE COURT: But the difference, Mr. Miller, I think could be that in those cases there was no facial, logical, reasonable challenge to the need for the regulation.

Here the plaintiffs assert -- and it's a credible assertion if it turns out to be factually supported, but at this point I have to assume it could be factually supported -- that there was no need, that the food delivery services were thriving. It was happening all without governmental intervention. How do you deal with that?

MR. MILLER: Well, Your Honor, the businesses in Cougar Business Association alleged the same thing. They alleged that they no longer needed to be

restricted from access to their properties, that the restriction in access had gone on too long and that there wasn't any further danger from the volcano. And the state Supreme Court was unwilling to credit that, correctly in our opinion.

This is the issue about: Where do you place responsibility for determining what actions are most necessary in the face of great calamity? And the courts have been consistent about placing that duty with legislative bodies, like the City Council.

You know, to the extent that you are to make inferences in favor of the plaintiffs on this motion to dismiss, they still have to make some kind of (inaudible). The plaintiffs' assertion, for instance, this is an organizing tactic, doesn't make a lot of sense since it's not the kind of thing that the workers would necessarily get out of and organizing campaign. I mean, first of all, they're just getting it, whether or not they're organized. And secondly, Plaintiffs consistently take the position that these workers are independent contractors and would not be able to organize under (inaudible) and Aldrich.

If there isn't some level of deference given to the City's capacity to find facts and make determinations about the best way to address crises or problems that

face the public, then you are going to set up a situation where the City cannot manage.

THE COURT: Well, clearly the City, in responding to a public health emergency, is entitled to deference. I think that's beyond dispute.

It's a question of whether at this stage of litigation, on a motion to dismiss, the City can simply invoke that and that's enough to lead to dismissal of allegations that I must accept as true. That's where I'm -- that's where I'm troubled.

MR. MILLER: I understand, Your Honor. And again, I think that the difference is here you're talking about allegations as set against the City's articulable rational basis for what it did.

THE COURT: Okay. But I'm going to take one more run at this, Mr. Miller, and I don't think Cougar really helps you. And that is: Was there a need? Did the legislative body in this case have before it a real problem, a demonstrated need that it was rationally and reasonably trying to address through this ordinance?

MR. MILLER: Yes, Your Honor. That's part of her findings. Again, if you look at the ordinance, the findings conclude that this service is critical to the community and that the law will increase protection of workers, will allow them to take steps to protect

themselves in the community, such as purchasing PPE or, you know, taking care of themselves or others, and will compensate them for the hazards that they face.

I mean, that's another sort of similar and related bases on which this is a proper exercise of police powers. Just like minimum wage laws or other workplace laws, there is an independent public purpose in ensuring that workers receive the minimum compensation amount.

Here there is a public purpose in ensuring that these workers are compensated for their -- the hazards that they face. And that is unequivocal and, in fact, cannot be disputed, I don't think, that paying these workers more money would compensate them for the hazards they face.

So there are a variety of rational bases for legitimate public ends that are available on the face of the ordinance itself and in the argument presented to this Court.

THE COURT: Thank you.

MR. MILLER: So moving on, the next topic I'd like to put forward here is the taxation issue. So Plaintiffs are attempting to rely on a Washington state law that preempts local taxation. It appears in a part of the revised code that it's all about taxation. And, in

fact, its key phrase, as Counsel suggested, the -- let me -- in the prohibition on imposing or collecting any "tax, fee, or other assessment on groceries."

"Tax, fee, or other assessment on groceries" is defined in toto, with that phrase, to be a list of taxes followed by a catch-all that's "any other similar levy, charge, or exaction." On its face this law prevents taxes, not wage regulations.

Now, Plaintiffs have advanced an alternative reading of this language that in the City's view is not plausible. But even if this Court were to consider it to be plausible, at most that creates the possibility that there's ambiguity in the way that this section in the laws have been written.

If the Court thinks that there is ambiguity in this section, then the statutory interpretation require the Court to look at legislative intent. Because this was passed as an initiative, that evidence of that legislative intent is the voter pamphlet, which is attached as Exhibit A to our motion to dismiss. And from that it is unequivocal that the point of this initiative in this law was to prevent taxes. In fact, I believe the proponents for it ended their statement with, "This is a prohibition on local taxes on groceries, period."

Plaintiffs' position that a requirement to pay wages to people delivering groceries constitutes anything like what the initiative or what the law is intended to prohibit is simply not credible.

I'd like to move on now to the constitutional claims. And again here I think the important thing to keep in view is the contracts basis for these claims. Plaintiffs are attempting to return to a much earlier time in American jurisprudence when private contracts for labor superseded regulation and the public interest.

So looking first at their contracts clause claim, the idea that agreeing to pay somebody money for the work that they do can be outside of regulations on what must be paid for that work, has been disclaimed since at least Parrish in the 1930s, which upheld the Washington state Minimum Wage Act.

The same is true under Washington state laws or jurisprudence, including the Optimer case from the Court of Appeals, that found that legislation cannot unconstitutionally impair contracts when it is a valid exercise of police powers.

Plaintiffs have raised the issue that they consider their workers to be independent contractors and suggests that this takes them entirely out of the rubric. That's incorrect. The

fundamental heart of Lochner era decisions on this subject, which were roundly protected and have remained so for the last eight decades, was that a private relationship between two parties is public interest legislation, and that simply isn't the case here.

And, in fact, that is the kind of conclusion that the Western District of Washington reached just last week in the challenge brought against the City's grocery employees hazard pay ordinance.

Another issue in looking at these contract impairment claims is the temporary nature of the law. One of the critical features of this law is that it is temporary. It goes out of existence at the time that the emergency ends.

Under those circumstances, the Supreme Court has held that such laws do not impair contracts. And this is the Blaisdell case from 1934 that upheld an eviction moratorium enacted during the height of the Great Depression, on the basis that it was only temporary and so it could not be said to impair contracts.

But looking further, if you look at the well established contracts clause test, as described by Counsel, there is no substantial impairment to Instacart's contracts for labor. While Instacart may be a relatively new business, it's the food delivery

network company and other platform and equal pay worker businesses that have been the subject of significant action at both the state and local levels of the last five to ten years.

In fact, recently California had turned many of these workers into employees, subject to -- or with access to all of the regular protections for employees. It's not credible for Instacart to claim it could not have foreseen wage regulation under these circumstances.

But even if it had, we're back into the area we were discussing earlier about the relationship between the goals of the law and how it was achieved. Those remain in the rational basis arena and as -- like I said, the City believes that it firmly has a rational basis and that there aren't any (inaudible) facts that really contradict that given the deference due to the legislative fact-finding and to the capacity to express a rational basis for the law.

And this leads nicely into the Takings clause. So Plaintiffs have made it clear -- or, I'm sorry, the Takings claim. Plaintiffs have made it clear that the Takings claim is entirely about their property rights in their contracts. The issue with this is that it is clear, under existing Supreme Court precedent, that you cannot get a Takings claim for the property interest in

your contracts once the contract has been appropriated.

So the seminal case for this is Omnia Commercial Co., from the 1920s, where the Supreme Court held that there was no Takings. And the facts of those cases -- that case -- is that Omnia had contracted to buy steel from Allegheny Steel Works. The government had seized that steel as part of its war effort in the First World War, and Omnia brought a claim for an impairment in its existing contract.

The Supreme Court said that's a mere frustration of the contract; it's not an appropriation. In order for it to be an appropriation, the government would have had to take over the obligations of the contract and the rights to enforce those obligations. Anything less is merely a frustration and is not taking.

And so in Omnia, the government had completely -- had made the contract impossible to fill. Here at most the City's ordinance has some impact on how much money changes hand under the contract. That cannot be a taking.

And you can see this in part because if it were a taking, the further Penn Central Regulatory Test doesn't make a lot of sense. It talks about things like -- or it doesn't make a lot of sense to get to the Penn Central Test, in part because it would completely

obliterate the already existing contract clause test that we were just talking about.

Allowing something that merely has an impact on a contract to become a taking would render every contract clause claim -- or it would never be brought, because they would all be brought as Takings claims, with their different standards and the factual inquiry that goes along with them.

And then I guess for the...

THE COURT: Mr. -- Mr. Miller, you muted yourself accidentally.

MR. MILLER: ...me, Your Honor, I hit my mouth while I was (inaudible).

THE COURT: You found your voice.

MR. MILLER: So the last subject I'd like to address is the equal protection guarantees, broadly stated, that covers both the federal and state constitutional protection guarantees.

Again, this is the rational basis test we discussed at length earlier. I think that that sets out the City's position on this front.

With respect to privileges and immunities, the potentially heightened standard under state law, Plaintiffs have really failed to plead a fundamental right to citizenship. The state court cases made

clear, fundamental rights to citizenship, when it comes to the right to carry on business, effectively has to be framed in terms of an inability to carry on business. That's the Ralphs v. Wenatchee case. Anything less than that does not implicate that fundamental right, and so the proper standard for review is rational bases.

Just to sum up then, you know, Plaintiffs just have not stated a claim upon which really may be granted. The ordinance is a valid exercise in the City's police powers to regulate working conditions and it simply isn't a tax because it is that kind of a regulation.

It cannot be overwritten by the private contracts for labor. That view of the law has been roundly rejected for decades. And there's unequivocal rational bases, both on the face of the law itself and easily articulated by the parties in this courtroom.

This Court should reject the plaintiffs' invitation to set (inaudible) legislative response to the pandemic and override a critical health and safety law.

THE COURT: Thank you, Mr. Miller. I'll return to counsel for Plaintiffs for rebuttal arguments.

MR. MCKENNA: Thank you, Your Honor. I'll just take one minute on the 6034 and police powers, and then hand

it off to Mr. Rubens.

Your Honor, the City insists again in the argument today that the statute and inititiave only prohibit taxes. That simply isn't true. The statute refers to taxes, fees, and other assessments. Under Washington law fees are not taxes. And it goes on to define tax, fees, or other assessment very broadly, as we've already discussed.

Number 2 comes back to a point or a question you asked earlier about the fact that the ordinance attempts to -- the ordinance prohibits charges being added to customers' bills as an additional grocery delivery fee. The statute doesn't prohibit fees only that are passed through to the customers in charges. It prohibits the imposition of the fees on grocery deliveries, and it applies.

On police powers, Your Honor, as you know, that we are here on 12(b)(6). The cases that the City is relying on range from decisions arrived at after full trials to decisions arrived at on summary judgment. And here we think we're entitled to discovery in order to, you know, reach trial or at least summary judgment to substantiate our claim that the ordinance is pretextual.

Yes, the City can enact ordinances that are a valid

exercise of police powers, but the police power exercise cannot be pretextual. We think that's what discovery is going to further demonstrate. That's why we believe that we should be allowed to proceed.

Mr. Rubens.

MR. RUBENS: Thank you.

The same claims apply to the constitutional analysis where, as some of Your Honor's questions recognize, their separation of powers deference concerns are somewhat premature. We're not asking the Court here to overrule Jacobson or revise Lochner. We're just asking for the normal 12(b)(6) standard that requires our pleaded facts to be credited.

We've raised two key questions here of: Was there a need for this ordinance and was the ordinance pretextual. And we've pleaded facts on both of their points. The City disagrees but its arguments turn on (inaudible) inferences or evidence that just can't be resolved on the pleadings alone.

Was this a squeeze move, does the provision for changes that aren't as a result of the ordinance actually give us the ability to recoup some of this? This is the proper time to answer those questions.

And similar points reverberate throughout the constitutional claim. This is temporary, but how long

is temporary? It's been a year now. Were the contracts appropriated? Unlike (inaudible) the ordinance here really targets our contracts and appropriates them. It doesn't just affect them incidentally.

On the privileges and immunities, we've pleaded that this goes beyond garden-variety regulation and really cuts to the ability to carry on our business at a profit.

So that's what distinguishes our allegations here from a minimum wage for independent contractors or the type of hazard pay that just adds an increased amount to workers' pay. That was an issue in Washington Northwest Groceries case that was decided recently, but it's completely distinguishable from the combination of features here.

The City is really leaning on the rational basis standards, you know, that we've pleaded that (inaudible) claim under those standards, and many of our claims don't even depend on that standard. They are -- don't allow a hypothesized tax or they require a tighter fit and a more searching inquiry under the Takings contract (inaudible) clause.

So for all those reasons we've stated claims on which relief should be granted and the City's motion should be denied.

THE COURT: All right. Thank you, Counsel, all of you, for very carefully, thoroughly, and scholarly briefing an argument on these issues.

I want to begin with the standard of review that applies to a motion such as this, which is a Civil Rule 12(b)(6) motion to dismiss at the very earliest stage of the case, before discovery has gotten underway.

The standard, as counsel know, is that dismissal is warranted only if the Court concludes beyond a reasonable doubt that the plaintiffs cannot prove any set of facts which would justify recovery. The Court must presume all facts alleged in the plaintiffs' complaint to be true, and I may consider hypothetical facts supporting the plaintiffs' claims, hypothetical facts that are consistent with the facts alleged.

A motion to dismiss on this kind of motion is granted, as our Court has noted, and I quote, sparingly and with care. And as a practical matter, quote, only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

However, I must note that conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion.

So with that framework in mind, the standard of

review -- and as counsel well know, but I want to make sure the parties and the public know -- this Court is not ruling on the merits today. A motion to dismiss does not invoke the merits. I don't have evidence in front of me. I have allegations in a pleading that I must accept as true.

I'm going to start with the motion as applied to RCW Chapter 82.84 The plaintiffs allege that the ordinance is prohibited by that law which was passed by initiative of the people, Initiative 1634.

As the City has argued, the statement in the voters pamphlet in support of that initiative focused on taxation of groceries and pointed to -- similar to -- it's ironic, as the plaintiffs here allege that there's a pretext, so did the opponents of the grocery tax. They claimed that it was a pretext because it was supported by big soda. It was meant to oppose the imposition on taxes of sweet -- soft drinks.

But in any event, the voters pamphlet and the title given to the ordinance state that it's a "concerning taxation of certain items intended for human consumption" and that the code reviser who codified the initiative when it passed entitled it "The local grocery tax restrictions."

Now, of course, those aren't binding on the Court,

but they do kind of foreshadow what is in the substance of the law itself.

That law prohibits governments from, quote, imposing or collecting any fee -- any tax, fee, or other assessment on groceries. And that phrase, "tax, fee, or other assessment on groceries" is specifically defined as "a sales tax, a gross receipts tax, a business and occupation tax, a business license tax, an excise tax, a privilege tax, or any other similar levy, charge, or exaction of any kind on groceries or the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption thereof."

The Court must give that language, the language of the statute, its usual and customary meaning. And if there is ambiguity in that language, the Court may look to the legislative intent, which is, in this case, expressed in the voters pamphlet.

I find that the plain language of Chapter 82.84 confirms that the statute prohibits taxes and similar fees and assessments, fees and assessments that would go to the governmental entity.

There is nothing in the language of the statute, or for that matter in the voters pamphlet, which describes the intent of the initiative that would prohibit a

local government from regulating worker compensation or working conditions, which is what the Seattle ordinance here does.

So I find that as a matter of law, the ordinance does not violate Chapter 82.84, and the City's motion to dismiss that count is granted.

Turning to the other issues brought by this motion to dismiss. Really the bedrock question is, underlying all of the others and related to all the others, is whether the ordinance is a proper exercise of the City's regulatory authority known in the law as its "police powers."

And it's well established that the City has brought authority to enact legislation to promote and protect public health, safety, and welfare. And that broad authority clearly extends to regulation of working conditions, including setting minimum wages, maximum hours, and other types of employment regulations.

Furthermore, it's well established that in addressing the exigencies of a public health emergency, the City's regulatory authority is given greater deference by the courts.

Ordinarily -- well, not ordinarily. When there is a public health emergency, it's the political branches of government, in this case the City Council and the mayor,

who are given the authority to determine what must be done to protect the general, health, safety, and welfare. It is not a function of the Court to second guess the policy decisions of the political branches.

A challenge to the exercise of the City's police powers will only be sustained by a court if the regulation is palpably unreasonable or arbitrary. As the Washington Supreme Court said in the City of Seattle vs. Webster case:

> "For an ordinance to be void for unreasonableness, it must be clearly and plainly unreasonable. The burden of establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. Every presumption will be in favor of constitutionality. And if the 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.
>
> "These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions."

So that's the overview. But this case is not a

simple case. First, it's the setting in which the motion is brought, which is a Rule 12(b)(6), and which I must give credit to the well-pled allegations. I must accept them as true. All reasonable inferences must be viewed in the light most favorable to the plaintiffs, and even hypothetical facts must be assumed to test the challenge to the complaint at this stage.

And that high bar on a motion to dismiss under Rule 12(b)(6), combined with the allegations about the unique nature of this ordinance, which not only regulates compensation to drivers but also precludes the plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses, combined with the allegations of pretext, which are supported by allegations that there was no real need here since delivery services were thriving, compensation to drivers was at record highs, all of that must be accepted as true, I'm not ruling on the merits -- but based on the fact that I must accept those all as true, I find that the claim of pretext of unreasonable regulation in the face of those alleged facts -- they're not proven, they're alleged -- cannot be dismissed on a motion for -- a motion to dismiss, on a Rule 12(b)(6) motion.

So turning then to the constitutional challenges. Just as the existence of broad powers under police -- broad authority under police powers and authority made even broader by the exigencies of a pandemic can't foreclose a court from reviewing a challenge to a regulation, similarly, constitutional rights cannot be -- cannot be infringed just because there's an emergency situation.

The right to regulate is given greater leeway in an emergency, as the City persuasively argues, but again we're at the pleading stage here.

So with respect to whether the ordinance affects a taking under the Fifth Amendment of the U.S. Constitution and Article 1 Section 16 of the Washington Constitution, the issue here is that the plaintiffs have pled that their business model is being appropriated by being required to deliver services at higher costs to the plaintiffs and an inability to adjust their business model in response to those regulations.

I cannot rule as a matter of law that that does not meet the threshold requirement of stating a claim under the Takings clauses, and so I'm denying the City's motion to dismiss under Rule 12(b) under the Takings clauses of both constitutions.

Similar analysis applies to the contracts clause claims under both the federal and state constitution. As the City notes and its position is well supported, prohibition under the contract clause must be accommodated to the inherent police power of the state, and, in general, contracts can be regulated.

But the issue here is whether there's a substantial impairment. And the plaintiffs have alleged -- again, they have not yet proven, we're not at the proof stage -- but they have alleged a substantial impairment caused by the unique nature of this ordinance, which imposes burdens and restricts the ability to adjust a business model to accommodate the increased burdens. So the City's motion to dismiss the contracts clause claim is denied.

Turning to the equal protection clause. Equal protection challenges are reviewed under the rational basis test, which is the lowest threshold for review. But this is intertwined with the police power analysis. And at this stage of litigation, at the pleading stage and a motion to dismiss, where I must accept the allegations as true and all inferences in favor of the plaintiffs, I cannot as a matter of law say that the City's ordinance must be upheld as rational.

If the plaintiffs are able to establish through

evidence that this was a pretext, that it was not a reasonable exercise of the City's police power, that it was arbitrary, then the plaintiffs may be able to overcome the deference given to the City under the equal protection clause. We're not at that stage yet, so I deny the City's motion to dismiss the equal protection clause claims.

And for all the reasons I've just explained under the constitutional claims, the City's motion to dismiss the Section 1983 claim must be denied at this stage.

I reiterate, this is not a decision on the merits of litigation. I'm deciding only whether the plaintiffs have well-pled claims that survive this early challenge, and with the exception of the statute I have ruled that the claims do survive that challenge at this stage.

So the City's motion is granted in part, denied in part. The RCW 82.84 claim is dismissed with prejudice. It seems to me that any amendment would be futile. The other claims remain.

And as I recall, there's a stay on discovery in place. Is that correct, Counsel? And so the stay is lifted as part of this order.

I will be getting a written order out hopefully this afternoon. Are there any questions or is there

anything else we should address at this time?

MR. MILLER: Your Honor, I have one question about lifting the stay. The order that Judge Rogoff had in place gave the City 20 days past the date of ruling on its motion to respond to discovery. Does that deadline remain in place?

THE COURT: Does that meet your -- will that work for you? Are you asking for something different?

MR. MILLER: No, Your Honor. That would work for us. The stay order included the 20 days. I wanted to be sure that it remained in place.

THE COURT: Oh, I think it should. And I'm seeing Mr. McKenna nod, so, yes, that will remain in place. Yes.

Any other questions? Very well. Again, thank you for a very thorough, thoughtful briefing and argument. That will conclude our hearing this morning. Take care, everyone.

MR. MCKENNA: Thank you, Your Honor.

(March 26, 2021 hearing concluded)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or other legal recordings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the electronic recording directly from the trial court conducting the hearing; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

In WITNESS WHEREOF, I have hereunto set my hand this 2nd day of April, 2021.

Bonnie Reed
_____

s/ Bonnie Reed, CET
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Appendix H

Order Denying City of Seattle's Motion for Reconsideration or Certification Under RAP 2.3 in the Alternative

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR, INC. d/b/a INSTACART, a Delaware corporation, Plaintiffs, v. CITY OF SEATTLE, Defendant.	Case No. 20-2-10541-4 SEA **ORDER DENYING CITY OF SEATTLE'S MOTION FOR RECONSIDERATION OR CERTIFICATION UNDER RAP 2.3 IN THE ALTERNATIVE** Honorable Michael R. Scott Noted for April 21, 2021

This matter came before the Court on the City of Seattle's Motion for Reconsideration or Certification Under RAP 2.3 in the Alternative. Having reviewed the parties' filings and the record, THE COURT HEREBY ORDERS that:

The Motion for Reconsideration is DENIED and Certification under RAP 2.3 is DENIED.

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Orrick, Herrington & Sutcliffe LLP
701 5th Avenue, Suite 5600
Seattle, Washington 98104-7097
tel+ 1-206-839-4300

IT IS SO ORDERED.

DATED this 22nd day of April, 2021.

Electronic signature attached

The Honorable Michael R. Scott

Presented by:

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: */s/Robert M. McKenna*

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King County Superior Court
Judicial Electronic Signature Page

Case Number:	20-2-10541-4
Case Title:	WASHINGTON FOOD INDUSTRY ASSN ET ANO vs CITY OF SEATTLE
Document Title:	ORDER RE DENYING MTN FOR RECON

Signed By:	Michael R. Scott
Date:	April 22, 2021

Judge: Michael R. Scott

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	B5A3B5FE79E17714D2D0890F5E0D5DD2F97A50F5
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Appendix I

Notice of Discretionary Review to Supreme Court

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

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR INC. d/b/a INSTACART, a Delaware corporation Plaintiffs, vs. CITY OF SEATTLE, Defendant.	No. 20-2-10541-4-SEA NOTICE OF DISCRETIONARY REVIEW TO SUPREME COURT

Defendant City of Seattle seeks review by the Washington State Supreme Court of the Order Denying Defendant's Motion to Reconsider, or in the Alternative Certify for Appeal the Order Denying Defendant's Motion to Dismiss, entered on April 22, 2021. A copy of the decision is attached to this notice.

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Peter S. Holmes
Seattle City Attorney
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Respectfully submitted May 14th, 2021.

PETER S. HOLMES
Seattle City Attorney

_/s *Jeremiah Miller*_____
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I electronically filed a true and correct copy of **Defendant's Notice Of Discretionary Review To Supreme Court** with the Clerk of the Court using the ECR system.

I further certify that on this date, I used the E-Serve function of the ECR system, which will send notification of such filing to the below-listed:

Attorney for Defendant, Jeremiah Miller at: jeremiah.miller@seattle.gov;

Attorney for Defendant, Derrick De Vera at: derrick.devera@seattle.gov;
Attorney for Defendant, Erica Franklin at: erica.franklin@seattle.gov;
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Attorney for Defendant, Casey Pitts at: cpitts@altber.com
Attorney for Plaintiffs, Robert M. McKenna at: rmckenna@orrick.com;
Attorney for Plaintiffs, Daniel J. Dunne at: ddunne@orrick.com; and
Attorney for Plaintiffs, Daniel A. Rubens at: drubens@orrick.com

DATED May 14, 2021, at Seattle, Washington.

s/Marisa Johnson
Marisa Johnson, Legal Assistant

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR, INC. d/b/a INSTACART, a Delaware corporation, Plaintiffs, v. CITY OF SEATTLE, Defendant.	Case No. 20-2-10541-4 SEA **ORDER DENYING CITY OF SEATTLE'S MOTION FOR RECONSIDERATION OR CERTIFICATION UNDER RAP 2.3 IN THE ALTERNATIVE** Honorable Michael R. Scott Noted for April 21, 2021

This matter came before the Court on the City of Seattle's Motion for Reconsideration or Certification Under RAP 2.3 in the Alternative. Having reviewed the parties' filings and the record, THE COURT HEREBY ORDERS that:

The Motion for Reconsideration is DENIED and Certification under RAP 2.3 is DENIED.

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IT IS SO ORDERED.

DATED this 22nd day of April, 2021.

Electronic signature attached

The Honorable Michael R. Scott

Presented by:

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: */s/Robert M. McKenna*

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King County Superior Court
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Case Number:	20-2-10541-4
Case Title:	WASHINGTON FOOD INDUSTRY ASSN ET ANO vs CITY OF SEATTLE
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Judge: Michael R. Scott

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Appendix J

Plaintiffs' Opposition to City of Seattle's Motion to Dismiss

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR, INC. d/b/a INSTACART, a Delaware corporation,

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant.

Case No. 20-2-10541-4 SEA

PLAINTIFFS' OPPOSITION TO CITY OF SEATTLE'S MOTION TO DISMISS

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I. INTRODUCTION

The City's Motion to Dismiss should be denied. Accepting Plaintiffs' allegations as true and drawing reasonable inferences in Plaintiffs' favor, the Complaint adequately alleges that the City's "Premium Pay for Gig Workers Ordinance" violates a voter-approved initiative, oversteps the City's police powers—even during an emergency—and infringes federal and state constitutional rights. When Mayor Durkan declared a COVID-19 emergency, the City Council and certain labor organizations quickly seized a rare opportunity to achieve a long-standing union goal—to regulate contractual relations between companies and non-union independent contractors in the "gig economy"—by mandating "premium pay" and imposing new operating restrictions, none of which rationally relates to the COVID-19 emergency. Under CR 12(b)(6), Plaintiffs are entitled to proceed to discovery to support their claims that the COVID-19 emergency was used as a pretext to enact arbitrary legislation in violation of state and federal law.

As a threshold matter, and regardless of the City's asserted public-health justifications, the Complaint alleges a valid claim that the Ordinance is void under voter-approved I-1634. It violates the statute by imposing a prohibited local "fee" or "other assessment" on the transportation of groceries. RCW 82.84.040(1). The City's argument that I-1634 applies only to "taxes" collected by local governments ignores the law's plain language and violates cardinal rules of statutory construction.

Under the guise of "emergency" legislation, the challenged Ordinance requires Food Delivery Network Companies ("FDNCs")—businesses that facilitate online ordering and delivery of food and groceries to customers' homes—to provide independent contractors "premium pay" for each delivery in the city. But then the Ordinance goes much further, effectively commandeering FDNCs' management prerogatives and contractual rights by prohibiting FDNCs from (1) reducing or modifying the areas in the city they currently serve, (2) reducing drivers' compensation or earning capacity, or (3) adding charges for premium pay to customers' grocery delivery fees.

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Attempting to justify this unprecedented legislation as a valid exercise of its police powers, the City argues that the "methods [it] select[s]" to navigate a declared emergency in a public health crisis should not be "second guess[ed]" in court. The argument that an emergency frees legislators from judicial scrutiny, however, has never been endorsed by the judiciary. While a public health emergency supplies the context in which to assess government action, all legislation—including emergency legislation—must "reasonably" promote *and* be "rationally related" to the governmental interest in protecting health and safety. Implicit in the "rational relationship" test is that there actually be a substantial relationship between the objective and the legislation.

The Ordinance fails this test because the duties and restrictions it imposes are *unrelated* to public health on their face. For example, as to compensation, the Ordinance does not require drivers to spend premium pay to undertake COVID-19-safe practices, like purchasing protective equipment or disinfecting delivered packages. Moreover, it arbitrarily excludes similarly situated ride-hailing companies like Uber and Lyft whose drivers are in direct contact with the public in closed compartments and face greater risks of infection than FDNC drivers making contact-free deliveries. Even though gig drivers are not employees under state law or represented by unions, labor organizations such as Working Washington and the Teamsters have been aggressively lobbying local governments to regulate their pay and working conditions since long before the COVID-19 emergency. Based on their well-pled allegations, Plaintiffs are entitled to discover whether the COVID-19 emergency was a pretext and whether the Ordinance is a reasonable exercise of the City's police powers.

For similar reasons, the Ordinance violates several provisions of the federal and state constitutions. By mandating uneconomical premium pay while prohibiting Instacart from reducing driver compensation, passing higher costs on to customers, or modifying its areas of service, the Ordinance takes and impairs Instacart's intangible contractual rights in violation of the Takings and Contract Clauses of the U.S. and Washington Constitutions. Further, by treating FDNCs less favorably than other similarly situated businesses, such as transportation network

companies like Uber and Lyft ("TNCs") and non-FDNC grocery delivery businesses, the Ordinance violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment and the Washington Constitution's Privileges and Immunities Clause.

For these reasons, the City's motion should be denied in its entirety.

II. STATEMENT OF FACTS

A. Instacart Offered Seattle Residents Delivery Services That Remained Safe And Available During the COVID-19 Pandemic Even Without The City's Intervention.

FDNCs operate online networks that facilitate ordering and delivering food and groceries directly to customers by independent contractors, thus enabling customers to obtain groceries without going into a grocery store. All parties agree that FDNCs' services are important for consumers in higher-risk populations during the pandemic. Plaintiffs' First Amended Complaint ("FAC" or "Complaint") ¶ 41. The FDNCs have helped reduce overall traffic in retail food outlets, thereby promoting social distancing and helping slow the virus's spread. *Id.*

During the pandemic, market forces operated to ensure those services remained available, without the City's intervention. When providing services through a delivery network, delivery persons and businesses who contract with FDNCs are typically paid through a mix of service fees and customer tips. *Id.* ¶ 44. As a result of increased demand for grocery deliveries that enhanced efficiencies, drivers using the Instacart platform enjoyed a 50 percent increase in earnings on average—earning approximately $30 per hour worked as of May 2020, including tips, nearly double the $16.39 Seattle minimum wage, all before the premium payments were mandated under the Ordinance. *Id.* ¶¶ 32, 45. To meet higher demand, Plaintiff Instacart also had no trouble *tripling* the number of delivery persons with whom it contracts in Seattle, from approximately 1,000 to well over 3,000—all *before* the Ordinance was enacted. *Id.* ¶ 43.

Similarly, before the City intervened, Instacart had already implemented numerous measures to promote the health and safety of independent contractors in Seattle (and the broader Seattle community) on the Instacart platform during the COVID-19 emergency, such as providing free health-and-safety kits with face masks and sanitizer. *Id.* ¶ 47. Instacart supports Apple Pay

and Google Pay to minimize shoppers' need to touch store keypads. *Id.* And the default is contactless "Leave at My Door" grocery deliveries. *Id.* ¶ 46. Drivers diagnosed with COVID-19 automatically receive a payment equal to their earnings for the last 14 days (exclusive of tips) and are suspended from new deliveries for that period. *Id.* ¶ 48. None of these health and safety protections was, or is now, mandated by the Ordinance.

B. The City Enacts An Ordinance That Exceeds The City Council's Powers And Violates FDNCs' Constitutional Rights.

On June 15, 2020, the Seattle City Council enacted a law—Council Bill 119799 (Ordinance 126094, the "Ordinance" or "Ord.")[1]—that imposes massive burdens on FDNCs, supposedly in response to the COVID-19 pandemic. FAC ¶¶ 2, 28; *see generally* Ord. § 1. The Ordinance mandates that FDNCs provide their "gig workers" with "premium pay" for each "online order that results in . . . a work-related stop in Seattle" of at least $2.50 per delivery. Ord. § 100.025(A). While purportedly intended to ensure drivers earn at least $15 per hour, the Ordinance simply assumes the premium pay will defray the expense of buying protective equipment, Ord., §§ 1.P, 1.T, I.U, but nowhere does it require they actually do so. FAC ¶ 29.

The Ordinance is targeted at just a segment of similarly situated delivery and transportation workers. The Ordinance contains no findings that food delivery persons are at a greater risk for contracting COVID-19 than drivers for TNCs such as Uber or Lyft, or other workers providing similar services during the COVID-19 emergency such as taxi drivers, private for-hire drivers, grocery-store workers, food-service workers, or restaurant workers. *Id*. ¶ 30. Many of those workers are independent contractors who are not covered by emergency health legislation, and the Ordinance does not require premium pay for any of them. In addition to the premium-pay mandate, the Ordinance makes unprecedented intrusions into FDNCs' most fundamental management and operational decisions. *Id.* ¶¶ 2, 34. The Ordinance prohibits FDNCs from: (1) "reduc[ing] or otherwise modify[ing]" the areas they currently serve;

[1] Ordinance 126094 was enacted on June 26, 2020. Ordinance 126122, which made "technical corrections" to Ordinance 126094 in response to certain allegations in the Complaint, was enacted on August 14, 2020. *See* FAC App'x A. Herein, "Ordinance" refers to Ordinance 126094 as amended by Ordinance 126122.

(2) reducing a delivery person's compensation; (3) limiting a delivery person's earning capacity including by "restricting access to online orders"; and (4) "[a]dd[ing] customer charges to online orders for delivery of groceries." Ord. § 100.027(A).

The Ordinance imposes steep penalties for violations up to $5,462.70 per aggrieved party. FAC ¶¶ 5, 36; Ord. § 100.200(E). The Office of Labor Standards may impose other relief, including corrective action, liquidated damages, civil penalties, fines, and interest—and may request that the City's Department of Finance deny, suspend, refuse to renew, or revoke the business license of an FDNC for non-compliance. FAC ¶¶ 36, 37; Ord. §§ 100.200, 100.240. Finally, the Ordinance creates a private right of action for damages and attorneys' fees. FAC ¶ 38; Ord. § 100.260(A).

C. <u>The Ordinance Was Enacted At The Behest Of Labor</u>.

As Plaintiffs' First Amended Complaint alleges, the Ordinance came about not due to public health concerns, but as an accommodation to labor interests. The available record already suggests what Plaintiffs expect discovery to confirm: that the Ordinance was a coordinated effort by the City Council and labor organizations to jointly achieve their longstanding goal of organizing independent contractors in the so-called "gig economy," independent of the present COVID-19 crisis. FAC ¶¶ 20, 33; *see generally* Eli Lehrer, *The Future of Work*, National Affairs (Summer 2016) (describing union efforts to regulate gig workers).[2] For example, in a May 20, 2020 email, the labor organization Working Washington declared that the goal of the legislation was to ensure that "people classified as essential workers can at least support themselves at the well-established baseline level of $15/hour." FAC ¶ 23. Working Washington was instrumental in crafting Council Bill 119799, and Council members also solicited input from Service Employees International Union and United Food Commercial Workers Union. *Id.* ¶¶ 20, 22–23. The Council worked closely with Working Washington to determine the industries to be

[2] https://www.nationalaffairs.com/publications/detail/the-future-of-work.

regulated, which independent contractors to cover, the amount of premium pay, and other key details. *Id.* ¶ 21.

In addition to regulating FDNCs, Council Bill 119799 also originally applied to TNCs like Uber and Lyft that "offer[] prearranged transportation services for compensation using an online-enabled application or platform." *Id.* ¶ 27. FDNC drivers and TNC drivers are both part of the "essential workforce" designated by the Governor's March 23, 2020 Proclamation.[3] Moreover, the FAC alleges that TNC drivers face greater risks of contracting and spreading the virus to their passengers (including those most vulnerable to COVID-19) than FDNC drivers, who deliver groceries but do not transport passengers. *Id.* ¶ 27. However, at the behest of the Teamsters, who purported to be drafting *separate* permanent wage legislation for TNCs unrelated to an emergency, the City Council removed TNCs from the bill. *Id.*

The promised Teamster-drafted TNC legislation was introduced several months later as Council Bill 119876, which established permanent compensation and workplace standards for TNC drivers, and was passed on September 29, 2020. Ordinance 126189 ("TNC Ordinance"). Closely echoing the original goal for FDNC workers expressed in the Working Washington email, the TNC Ordinance institutes the City's 2019 "policy" to establish "a minimum compensation standard for TNC drivers that is comprised [sic] of at least the equivalent of the 'hourly minimum wage' . . . plus 'reasonable expenses.'" *Id.* § 1.D. Its mandated permanent rate increases take effect on January 1, 2021—nearly ten months into the declared emergency. *Id.* §§ 2, 9. The TNC Ordinance's sole operative provision related to COVID-19 is its requirement that TNCs provide personal protective equipment to drivers for the duration of the declared emergency—a requirement omitted from the FDNC Ordinance. *Id.* § 2. Unlike the FDNC Ordinance, the TNC Ordinance does not restrict TNCs from reducing or modifying the areas they serve, reducing drivers' earning capacity or compensation, or adding customer charges to offset compliance costs. *Compare* Ord. § 100.027.

[3] Mot. 11 n.56 (citing Governor's Proclamation 20–25 and Appendix).

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D. The Ordinance Was Enacted Despite Washington Voters' Approval Of Initiative 1634, The Keep Groceries Affordable Act.

In enacting the FDNC Ordinance, the City Council was not writing on a blank slate. To the contrary, Washington's voters had already made known their opposition to local government taxes and charges on groceries, including grocery delivery charges. Washington voters approved Initiative 1634, the Prohibit Local Taxes on Groceries Measure (codified as the Keep Groceries Affordable Act of 2018, RCW Chapter 82.84) on November 6, 2018. The Initiative includes the finding that "keeping the price of groceries as low as possible improves the access to food for all Washingtonians," and declares that "no local governmental entity may impose any new tax, fee, or other assessment that targets grocery items." RCW 82.84.020(2), (5); FAC ¶¶ 1, 18.

E. Plaintiffs File Suit And The Court Stays Discovery.

Plaintiffs filed their original complaint on June 26, 2020. In light of the "technical corrections" to the FDNC Ordinance made in Ordinance 126122, Plaintiffs amended their complaint on September 2, 2020. The City then filed the Motion to Dismiss the First Amended Complaint.

On September 4, 2020, this Court granted the City's motion for a protective order and stayed discovery until 20 calendar days after a ruling on this Motion or 30 days after the City files an answer to the First Amended Complaint.

III. STATEMENT OF THE ISSUES

1. Should the Court DENY the City's Motion to Dismiss for failure to state a claim for violation of RCW 82.84, the Keep Groceries Affordable Act of 2018, where the complaint alleges the Ordinance's premium pay mandate is an unlawful "tax, fee, or other assessment on groceries," as those terms are defined under RCW 82.84.030? **Yes.**

2. Should the Court DENY the City's Motion to Dismiss for failure to state a claim for exceeding the City's police powers and violating the Washington and United States Constitutions where the complaint alleges the City used the Mayor's emergency declaration as a pretext to enact longstanding policy goals to legislate gig worker compensation, denies Instacart

equal protection by arbitrarily excluding TNC businesses, takes and impairs Instacart's intangible property and contracts, and denies Instacart's privileges and immunities? **Yes.**

IV. ARGUMENT AND AUTHORITY

A. Standard Of Review.

On a CR 12(b)(6) motion, "[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962 (2014) (citation omitted). "All facts alleged in the complaint are taken as true, and [courts] may consider hypothetical facts supporting the plaintiff's claim." *Id.* Accordingly, CR 12(b)(6) motions should be "granted sparingly and with care and . . . only in the unusual case in which plaintiff 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 (2007) (internal quotation marks and citation omitted).

B. RCW 82.84 Forbids The City From Enacting The Ordinance's Premium Pay Requirement For FDNCs' Grocery Delivery Services.

Initiative 1634, as codified at RCW Chapter 82.84, forbids local governments from imposing not only "tax[es]," but also "fee[s]" or "other assessment[s]" on groceries. RCW 82.840.040(1). Yet the Ordinance imposes a mandate that FDNCs provide "premium pay" of at least $2.50 in connection with each "stop" in Seattle to transport and deliver groceries from store to consumer. That is precisely the kind of imposition that RCW 82.84 targets and prohibits. The Ordinance is preempted by RCW 82.84.

The City's argument to the contrary centers entirely on a false premise: that RCW 82.84 prohibits only "taxes" that are collected by local governments. *See* Mot. 14–15. But RCW 82.84.040's prohibition is not limited to taxes; the statute's operative provision states that "local governmental entit[ies] may not *impose* or collect any tax, *fee*, *or other assessment* on groceries." RCW 82.84.040(1) (emphasis added). And the statute broadly requires that prohibited charges—"[t]ax[es], fee[s], or other assessment[s] on groceries"—must "include[], but . . . not [be] limited to . . . charge[s], or exaction[s] of any kind." *Id.* 82.84.030(5).

Where, as here, the statutory language is "plain and unambiguous," "the [voters'] intent is gleaned from the language of the measure," and the court's "conclusion must be based . . . upon the plain language of the initiative." *SuperValu, Inc. v. Dep't of Labor & Indus. of State of Washington*, 158 Wn.2d 422, 430, 432 (2006) (internal quotation marks and citation omitted); *see also City of Seattle v. State, Dep't of Labor & Indus.*, 136 Wn.2d 693, 698 (1998). RCW 82.84 is unambiguous: it prohibits not only taxes on groceries, but also "fee[s]" and "assessment[s]", including "charge[s]" and "exaction[s] of any kind." RCW 82.84.040(1); *id.* 82.84.030(5). The City's argument focusing on the word "tax" impermissibly reads these other words out of the statute. "This result . . . runs directly contrary to the settled practice of construing statutes to avoid superfluous language." *City of Seattle v. McCready*, 123 Wn.2d 260, 280 (1994).

It is entirely unsurprising that RCW 82.84 prohibits local government measures beyond taxes, because "[n]ot all demands for payment made by a governmental body are taxes." *City of Snoqualmie v. King Cnty. Exec. Dow Constantine*, 187 Wn.2d 289, 299 (2016) (internal quotation marks and citation omitted). Taxes are not the same as fees. As the Washington Supreme Court has previously noted in construing a ballot initiative, "[a] common understanding of the term 'fee' is 'a charge fixed by law … for certain privileges or services." *Washington Ass'n for Substance Abuse &Violence Prevention v. State*, 174 Wn.2d 642, 664 (2012) (quoting Webster's Third New International Dictionary). The common meaning of "tax," by contrast, is a "pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government." *Amalgamated Transit Union Local 587 v. Stat*e, 142 Wn.2d 183, 219 (2000); *see also Franks & Son, Inc. v. State*, 136 Wn.2d 737, 749 (1998) ("A tax is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power."). The Ordinance violates RCW 82.84 because the premium pay mandate, although not a "tax," fits within this common understanding of a "fee" as a charge fixed by the City for the service of grocery delivery.

If RCW 82.84's plain text left any doubt as to the statute's scope, the definitional provision further underscores its breadth. *Cf. Amalgamated Transit*, 142 Wn.2d at 226 (noting

the "exceedingly broad definition" of a term in an initiative). The statutory definition of "[t]ax, fee, or other assessment on groceries" "includes, but is not limited" to a list of charges and exactions. RCW 82.84.030(5). "Washington courts have consistently interpreted the statutory language, 'including but not limited to' to indicate . . . an illustrative, not exhaustive, list." *State v. Joseph*, 3 Wn. App. 2d 365, 372 (2018). The statute repeatedly uses the disjunctive "or" to separate different types of prohibited charges, a choice that is meaningful because it "indicates alternatives and requires that they be treated separately." *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975). Moreover, the illustrative list provided in RCW 82.84.030(5) expressly includes "exaction[s] of *any kind*."

The statute's use of illustrative lists and the word "any" clearly connote that the relevant definitional provisions have a "broad meaning" and should be read "expansively." *Amalgamated Transit*, 142 Wn.2d at 220. The ordinary meaning of those terms easily embraces the Ordinance's premium-pay mandate. *See* Webster's Third (2002) (defining "charge" as an "expenditure or incurred expense," (a) "a pecuniary liability" and (b) "the price demanded for a thing or service"); *Id*. (defining "exaction" as "the act or process of exacting: compulsion to furnish: a levying . . ."); Black's Law Dictionary 679 (10th ed. 2014) (defining "exaction" as "[a] fee, reward, or other compensation, whether properly, arbitrarily, or wrongfully demanded"); *see also Activate, Inc. v. Wash. State Dep't of Revenue*, 150 Wn. App. 807, 824 (2009) (looking to the Webster's Third definition of "charge" to interpret the statutory phrase "separate charge"); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891 (1990) ("A fee, like a tax, is a fixed charge, automatically applied to a designated activity. A charge is an obligation or a price.").

The City agrees that the "key phrase" in RCW 82.84 is "tax, fee, or other assessment on groceries," but claims that the "examples" given in defining that phrase "are all taxes, and the more general categories (levy, charge, or exaction) are limited to those that are 'similar' to the list of taxes prohibited." Mot. 15. It is implausible to read the word "similar" in the definitional provision as limiting "tax, fee, or other assessment" to taxes collected by a government, when that

provision is by its terms not "limit[ing]," and refers to "*any* other similar levy, charge, or exaction *of any kind* on groceries." RCW 82.84.030(5) (emphasis added).[4]

Thus, the City misses the point by framing the question as whether the premium-pay requirement is a "tax" and by emphasizing that the premium "is *not* collected by the City or any other governmental agency." Mot. 13–14. In effect, the City seeks to limit RCW 82.84 to taxes both imposed and collected by a local government, but courts must "decline to insert additional language or requirements in an unambiguous statute when the legislature chose not to do." *State v. Peeler*, 183 Wn.2d 169, 180–81 (2015). RCW 82.84 prohibits local governments not only from "collect[ing]" any tax, fee, or other assessment on groceries, but also from "impos[ing]" the same. If RCW 82.84 were solely concerned with charges collected by a governmental entity, it would be superfluous to prohibit local governments from "impos[ing] *or* collect[ing] any tax, fee, or other assessment on groceries." RCW 82.84.040(1) (emphasis added); *see also City of Seattle v. Williams*, 128 Wn.2d 341, 349 (1995) (Courts are "are duty-bound to give meaning to every word . . . include[d] in a statute."). By its terms, the statute clearly contemplates a scenario like the Ordinance where a local government imposes, but does not collect, a fee or assessment.[5]

The City's flawed argument on RCW 82.84 relies principally on a single authority: an inapposite California ruling concerning a county ordinance requiring retail stores to charge $0.10 per paper bag (and prohibiting plastic bags). *Schmeer v. Cnty. of Los Angeles*, 213 Cal. App. 4th 1310, 1329 (2013). In *Schmeer*, the California intermediate appellate court held that this charge was not a "'tax' . . . imposed by a local government" under Article XIII C of the California

[4] Unable to ground its reading on the statutory text, the City attempts to invoke the initiative's history and purposes as limited to taxes on groceries. *See* Mot. 15–16. Legislative history cannot supersede the statute's plain meaning, but the findings codified at RCW 82.84.020 are not limited to concerns about taxation of groceries; they emphasize the need to "keep[] the price of groceries as low as possible," and declare that local governments should not "impose any new tax, fee, or other assessment that targets grocery items."

[5] Applying the plain meaning of the statutory language to give effect to every word in RCW 82.84 does not portend "absurd" consequences such as a "general prohibition on regulating working conditions" in the grocery industry. Mot. 16–17. The statute is clear—it extends to "fees," and "other assessments," including "charges" and "exactions." The City posits that a "local law requiring personal protective equipment for grocery workers . . . would be forbidden under Plaintiffs' interpretation of the law." *Id.* But such a mandate would not be a "fee" or "charge" in the same way that the Ordinance's premium pay requirement operates here.

constitution, as amended by California Proposition 26, because in the court's view, "taxes" within the meaning of that constitutional provision must be limited to "charges payable to, or for the benefit of, a local government." *Id.* at 1329. *Schmeer* reached that conclusion only after finding the language of the California constitution "ambiguous as to whether a levy, charge or exaction must be payable to a local government in order to constitute a tax." *Id.* at 1327.

Here, the City presents *Schmeer* as involving "nearly identical legal commands" to those of RCW 82.84, but that comparison does not withstand scrutiny. The relevant enactments, as well as their purposes, differ in several fundamental ways. Importantly, the court in *Schmeer* was interpreting the meaning of the term "tax" as used in a different State's constitution, and noted the ordinary meaning of "tax" is "a compulsory payment made to the government or remitted to the government." *Id.* at 1326. Although the California constitution defined "tax" to include "any levy, charge, or exaction" subject to certain exceptions, the court also found relevant that those exceptions "all relate to charges ordinarily payable to the government." *Id.* at 1327. RCW 82.84.040 is distinct in several important respects. First, RCW 82.84.040 prohibits local governments from enacting not just "any tax" but also any "fee[] or other assessment[s] on groceries." Second, RCW 82.84.040 refers to charges "impose[d]" by local governments, not just those that are also "collect[ed]" by local governments. Third, RCW 82.84.030 defines the entire textual unit—"[t]ax, fee, or other assessment on groceries"—extremely expansively as "includ[ing], but . . . not limited to . . . any other similar levy, charge, or exaction of any kind on groceries or the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption thereof." There is thus no relevant ambiguity here, as there may have been in *Schmeer*, about whether the standalone term "tax" is limited to charges payable to the government, because here the question to be decided is not whether the premium-pay requirement is a "tax" as that term is defined in the constitution. RCW 82.84.040 prohibits the Ordinance's premium-pay requirement by its terms as a "charge[] or exaction of any kind on groceries or the . . . consumption thereof," and *Schmeer*'s constitutional textual analysis is therefore inapposite.

Moreover, California's Proposition 26 was inspired by concerns entirely different than those that motivated I-1634, and that difference in purpose further undermines the City's attempt to treat *Schmeer* as on point. *Schmeer* observed that Proposition 26 was "an effort to curb the perceived problem of a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed by local governments without the voters' approval." 213 Cal. App. 4th at 1326. I-1634, in contrast, reflected a desire to prevent any measure by local governments that would make groceries more expensive. *See* RCW 82.84.020; Mot., Ex. A at 19. (Voter's Pamphlet) (public health motivated Seattle to levy tax that raised the *cost* of sugary beverages to deter consumption). And the voters judged that the best way to ensure groceries would remain affordable was to prevent localities from imposing taxes, fees, assessments, charges, or exactions "of any kind," whether or not those charges were collected by or generated revenue for the locality. The Ordinance thus fits squarely within the category of prohibited local government activity and must be preempted.

C. The Ordinance Exceeds The City's Police Powers.

1. Even during emergencies, legislation enacted under the police power must be "rationally related to a legitimate state interest" and not impose "arbitrary" classifications.

Washington's Constitution gives municipalities the power to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. That power is not unlimited: An ordinance is a valid exercise of police power only if it "reasonably tend[s] to correct some evil or promote some interest of the state." *Teter v. Clark Cnty.*, 104 Wn.2d 227, 233 (1985). Laws enacted under the police power may not be "arbitrary, unjust, [or] oppressive." *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 642 (1949) (citation and quotation marks omitted). Thus, "[l]egislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonabl[e]" on lawful activities. *State v. Spino*, 61 Wn.2d 246, 250 (1963). In expressing its "respectful disagreement" with a "reasonableness" requirement, Mot. 10 nn.49–50, the City necessarily acknowledges that

established Washington precedent requires courts to review exercises of the police powers for "unreasonableness."[6]

The City argues that even if it is bound by reasonableness restrictions in the "normal exercise of its police powers," "public health emergencies necessarily enlarge the scope of [its] police powers," and the Court should not "examine [its] motives," "require factual justification," or "second guess [its] decisions" in times of emergency. Mot. 7, 9, 13 (citing *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466 (1982)). In other words, rather than offer any justification for the Ordinance as a reasonable public health measure, the City maintains that its mere invocation of a public health emergency forecloses judicial review of whether the Ordinance was a proper exercise of its police powers.

That remarkable contention is squarely foreclosed by the City's own principal authority: *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905). In upholding Massachusetts' compulsory vaccination law during a smallpox outbreak, the U.S. Supreme Court explicitly recognized the obligation of courts to review emergency public health legislation for reasonableness and arbitrariness. *See id.* at 31, 38 (emphasizing that "it is the duty of the courts" to judge where a public health statute has "no real or substantial relation" to a legitimate state interest, is "a plain, palpable invasion" of fundamental rights, or is "arbitrary and oppressive"). *Jacobson* stands for the proposition that even during a public health crisis, courts must still evaluate whether legislation is a valid exercise of legislative power. *See id.*; *see also Cougar*, 97 Wn.2d at 479–80 (evaluating whether emergency restrictions were "reasonable" exercises of policy power); *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-CV-0210-TOR, 2020 WL 3979661, at *5 (E.D. Wash. July 14, 2020) (under *Jacobson*, emergency public health laws that are

[6] The City's sole citation to authority that an ordinance is an improper exercise of police power only if it was enacted "in a mistake, or in a spirit of fraud or wantonness" is *City of Walla Walla v. Ferdon*, 21 Wash. 308, 311 (1899), *see* Mot. 10, which substantially predates cases applying a reasonableness standard. In any event, Plaintiffs' factual allegations here would satisfy that standard, given the evidence of pretext as well as a complete disconnect between the Ordinance's requirements and its stated goals.

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"unreasonable, overly broad, or unequally applied" exceed police powers). Courts reviewing challenges to COVID-19-related restrictions agree on this fundamental point.[7]

2. The Ordinance is pretextual, arbitrarily targets FDNCs, and is not reasonably related to the goal of protecting public health.

As the Complaint details, the City Council took advantage of the Mayor's declared emergency to implement preexisting City policy to mandate enhanced *compensation* for gig workers, while failing to address the health crisis in any direct, substantial or rational way. FAC ¶¶ 22, 33, 63. Such allegations, presumed to be true on a CR 12(b)(6) motion, together with "hypothetical facts" that Plaintiffs may prove through discovery, are sufficient to state a claim that the Ordinance exceeds the City's police powers. *See FutureSelect*, 180 Wn.2d at 962.

As an initial matter, a legislative body may not invoke police powers as a pretext to achieve other ends. *Cf. Ketcham v. King Cnty. Med. Serv. Corp.*, 81 Wn.2d 565, 569–70 (1972) (police powers do not justify legislation that "appears prima facie to affect fiscal matters only and thus to impair the obligation of existing contracts, and burdens the right to extend such contracts in the future," rather than actually further "health and safety"). Here, the pretextual nature of the Ordinance is evident from the City Council's close pre-existing working relationship with Working Washington and other labor groups on regulating relations in the "gig economy," and its willingness to accede to the Teamsters' requests to remove TNC drivers from the draft bill, thereby excluding them from the "emergency" relief it claims is critical for food delivery drivers. As taxi and TNC drivers are all members of the "essential workforce"[8] declared by the Governor, their exclusion from the Ordinance is arbitrary and undermines the Ordinance's purported purposes to compensate essential workers and promote health. *See* Ord. § 1.U. Taxi and TNC drivers face greater risks of contracting and spreading the virus to their passengers (including

[7] *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (applying *Jacobson* and holding that "restrictions inexplicably applied to one group and exempted from another do little" to reduce spread of COVID-19); *Cnty. of Butler v. Wolf*, __ F. Supp. 3d __, 2020 WL 5510690, at *6 (W.D. Pa. Sept. 14, 2020) ("[E]ven under the plain language of *Jacobson*, a public health measure may violate the Constitution.").

[8] Mot. 11 and n.56 (citing Governor's Proclamation 20–25 and Appendix, March 23, 2020, https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf).

those most vulnerable to COVID-19) than drivers who deliver groceries and other food but who do not transport passengers. FAC ¶ 27. While the City attempts to defend its exclusion of TNC drivers from the Ordinance by pointing to the later-adopted TNC Ordinance, the rate increases in that ordinance will not take effect until January 2021, approximately ten months into the declared emergency. This chronology thus suggests that responding to the emergency was not the Ordinance's purpose; implementing organized labor's wage goals was.

For similar reasons, the City cannot excuse its enactments from judicial review simply by claiming the ordinance is "related to public health and safety." Mot. 10; *see Jacobson*, 197 U.S. at 31, 38; *Slidewaters LLC*, 2020 WL 3979661, at *5. Emergencies do not expand government's power to regulate in a vacuum; they expand the government's power, if at all, only to address the emergency. *See Jacobson*, 197 U.S. at 38. And while courts may presume the existence of facts that justify the need for *some* regulation in response to an emergency, they still must evaluate whether the actual regulation in question is "reasonably necessary in the interest of the public health [and] safety," "substantially related to the evil sought to be cured," and "reasonably related to the legitimate object of the legislation." *Cougar Bus. Owners Ass'n*, 97 Wn.2d at 477–78 (internal quotation marks omitted).

Viewed in light of the facts Plaintiffs have alleged, the Ordinance flunks that test. Its provisions have no rational relationship to its purported goals. First, the Ordinance fails to promote health and safety of Instacart's drivers, as it does not require delivery persons to purchase protective equipment, disinfect their vehicles, or take other steps to reduce transmission of COVID-19. FAC ¶ 29. Second, its purported goal to raise pay to ensure adequate supply of delivery persons ignores the fact that Instacart had no trouble *tripling* its independent contractors to meet demand because delivery persons were "already experiencing a large increase in demand for their services—and therefore [were] working and earning more—as a result of the pandemic." *Id.* ¶¶ 31–32. Normal market forces had already balanced supply and demand for grocery delivery services, and the Council's failure to consider whether *actual* driver compensation already substantially exceeded—by *double*—the City's target minimum wage was arbitrary and

unreasonable. Third, as discussed above, the Ordinance is woefully underinclusive regarding emergency compensation to "frontline" workers. *Id.* ¶¶ 27, 30, 46, 63. The City's contention that the Complaint makes "bald assertions" that the Ordinance is "an arbitrary and irrational response" to the pandemic, Mot. 10, simply ignores the Complaint's well-pleaded facts.

At the same time, the Ordinance places significant burdens on Instacart's business activities. Although the City claims the Ordinance's provisions are "not extreme," Mot. 12, those assurances provide cold comfort. In order to escape severe penalties, a FDNC must prove the Ordinance was not even a "motivating factor" for any operational adjustment. In practice, any action FDNCs take during the emergency that increases prices, modifies their service areas, or reduces drivers' "compensation" or "earning capacity," Ord. § 100.027(B) —including inadvertent mistakes such as a failure to pay a single $1.25 bonus or an app outage that "restrict[s] access to online orders"—puts them at risk of having to prove the outcome would have occurred absent the Ordinance or be subject to steep penalties. FAC ¶¶ 5, 36–38; Ord. §§ 100.027(B), 100.260. The City argues that this is no big deal because "if demand for their services were to *collapse*, changes in compensation to drivers, service areas or fees for customers could be made on that basis without violating the Ordinance." Mot. 12 (emphasis added). But in the absence of a total "collapse," the extent of the intrusion is substantial because Instacart's cost and service structure is frozen at pre-COVID levels and hypothetically the emergency may continue for 1-2 years or more. *Id.* ¶¶ 25, 35. Drawing all inferences in Plaintiffs' favor, it would be difficult for Instacart to establish this affirmative defense to avoid potentially crushing liability imposed under the penalty and civil liability provisions of the Ordinance. Therefore, the Ordinance consigns Instacart to subsidizing "essential services" to the City at a large loss for the indeterminate duration of the emergency.

For similar reasons, the Ordinance's provisions differ in kind from minimum wage, workplace safety, and antidiscrimination legislation that the City invokes by analogy. *See* Mot. 12–13. Those generally applicable provisions scarcely resemble the provisions of this Ordinance, which narrowly target a specific industry, preclude FDNCs from shifting any of the Ordinance's

costs to their consumers, and effectively compel the FDNCs to continue operating even when the Ordinance makes it far more unprofitable to do so.

The City also points to assorted cases upholding emergency public health measures as valid exercises of police power, but those measures were temporary prohibitions, not open-ended appropriations like those imposed by the Ordinance. *See* Mot. 9, 10 n.52. For example, in *Cougar Business Owners Association*, the appellate court upheld access restrictions around Mount St. Helens during a period of ongoing volcanic activity as a valid exercise of the police power. 97 Wn.2d at 471. The court rejected the challenge to the Governor's "restricted zones" under tests that require exercises of the police power to be "reasonably necessary in the interest of the public health, safety . . . and general welfare," and "substantially related to the evil sought to be cured." *Id.* at 477-78. Likewise, in *United States v. Chalk*, the appellate court determined that a mayor had acted within his police powers by declaring a four-day, citywide curfew to quell mass violence. 441 F.2d 1277, 1280 (4th Cir. 1971).[9]

The Ordinance is categorically distinct because it is not a *prohibition* on Instacart's business activities for the purpose of protecting public health. Instead, the City is legislating an *appropriation* of Instacart that has already gone on for months, with no end in sight. While the City's police powers may allow it to close or restrict businesses temporarily as a means to limit the spread of COVID-19, the Ordinance here forces Plaintiffs absorb all the costs of subsidizing delivery drivers, consumers, and retailers, and to maintain that unprofitable service throughout all areas served by Plaintiffs at the time that the Ordinance went into effect. Even accepting the presumption that the COVID-19 emergency permits some public health measures, Plaintiffs still state a claim that by imposing these significant burdens on FDNCs alone, the Ordinance is arbitrary and not rationally related to a legitimate end.

[9] *Cougar* and *Chalk* arose from markedly different procedural postures in which the standard of review is far more stringent than on a CR 12(b)(6) motion. *See Cougar*, 97 Wn.2d at 467 (affirming decision on summary judgment); *Chalk*, 411 F.3d at 1283 (affirming convictions and denying motions for new trial). The same can be said about many of the City's citations. *See, e.g.*, Mot. 7 n.33 (citing, inter alia, *Ketcham*, 81 Wn.2d at 579 (affirming judgment of trial court following witness testimony)); Mot. 8 n.38 (citing *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (denying application for emergency injunction)).

D. The Ordinance Violates The Federal And State Constitutions.

1. The Ordinance takes private property in violation of the federal and state constitutions.

Plaintiff Instacart alleges that the Ordinance effects an unconstitutional taking of its property under Art. I, sec. 16 of the Washington State Constitution and the Fifth Amendment of the United States Constitution.[10] As a "network" company, Instacart's value inheres in multiple sets of contractual relationships that together constitute its "food delivery network": contracts with independent contractors who shop for and deliver goods (Instacart refers to the individual contractors as "Shoppers"), contracts with customers who purchase grocery delivery services, and contracts with food and grocery retailers who sell goods. These contracts include critical provisions that allow Instacart essential flexibility to manage the contractual relationships to align its business with a changing environment. The Ordinance imposes new restrictions and duties on Instacart's contractual rights: it forbids changes in pay and network access for Shoppers, prohibits pass-through charges to customers, and precludes Instacart from modifying the areas of the city that it serves. These restrictions operate in tandem to commandeer Instacart's network for the public benefit of providing below-cost food delivery—indefinitely. Plaintiffs have stated a claim that the Ordinance effects a taking without just compensation under the fact-intensive balancing test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and the City's arguments for dismissal are without merit.

a. The pandemic emergency does not exempt the Ordinance from scrutiny as a regulatory taking.

The City's lead argument on the takings claim is, once again, that different rules apply during an emergency. But the fact that other "courts have rejected takings challenges to government actions protecting health and safety," Mot. 18, does not preclude a takings challenge here, and certainly does not suggest this Court should resolve that claim on a CR 12(b)(6) motion.

[10] Washington state courts use the same standard when analyzing takings claims under the Washington Constitution as federal courts use when considering takings claims under the United States Constitution. *Yim v. City of Seattle*, 194 Wn.2d 651, 659 (2019).

Virtually all of the "emergency" cases the City cites involved either preliminary injunctions requiring plaintiffs to prove they were likely to succeed on the merits, or summary judgment.[11] They provide no guidance under the liberal pleading standards of CR 12(b)(6), accepting all allegations as true and drawing all inferences in Plaintiffs' favor.

Further, the City does not explicitly argue, and none of its cases hold, that constitutional takings provisions are suspended when the government declares an emergency. Even when an emergency is involved, courts look to the well-established balancing test introduced in *Penn Central* to determine whether a regulatory taking has occurred. *See, e.g.*, *McCarthy v. Cuomo*, No. 20-CV-2124 (ARR), 2020 WL 3286530, at *5 (E.D.N.Y. June 18, 2020) (analyzing Takings Clause challenge to COVID-19 shutdown order under *Penn Central*); *Elmsford Apartment Associates, LLC v. Cuomo*, 2020 WL 3498456, at *9–11 (S.D.N.Y. June 29, 2020) (same, with respect to landlords' challenge to COVID-19-related eviction moratorium).

As explained, *see supra* IV.C.2, the City fails to appreciate the distinction between the exercise of police powers in the cases it cites (which prohibit activities to respond to a dangerous situation), as compared to the conscription of a private business to provide its services to the public at reduced cost. For example, this case bears no resemblance to a government's "destruction of property which is itself a public nuisance." *Mugler v. Kansas*, 123 U.S. 623, 669 (1887); *see also* Mot. 18–19 (discussing cases where businesses were closed due to dangers to safety posed by proximity to erupting volcano or unexploded artillery shells). Here there is no claim that Instacart is dangerously located or contributes to spreading COVID-19. To the contrary, all agree that Instacart's grocery-delivery services help *mitigate* the effects of the pandemic, but here the City is appropriating Instacart's contractual relationships and forcing Instacart to spread desirable benefits to workers (guaranteed and enhanced pay), consumers (artificially low grocery delivery prices) and retailers (guaranteed low-cost delivery). This is a

[11] *E.g.*, *Cougar Bus. Owners Ass'n*, 97 Wn.2d at 467 (decided on motion for summary judgment); *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 60 (3d Cir. 2013) (same and involving gun regulations—a different and unquestionably heavily regulated industry). *But see McCutchen v. United States*, 145 Fed. Cl. 42, 45 (2019) (decided on a motion to dismiss but distinguishable given the context and question presented, which was whether federal government's prohibition of firearm "bump stocks" could constitute a taking).

classic example of a regulatory taking of private property for the public benefit of local citizens and businesses. *See, e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (owners of private laundry business were entitled to just compensation when Army took business during World War II and operated it to benefit military personnel); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318, 322 (1987) (citing *Kimball Laundry* and holding that governments must pay just compensation for temporary regulatory takings). At a minimum, the Ordinance's effects must be analyzed under the *Penn Central* test.

b. Contracts are property protected under the Takings Clause.

The City next argues that Instacart's takings claim should be dismissed "for lack of legally cognizable 'property,' as a reduction in business assets, revenues, profits, or profitability does not give rise to a taking." Mot. 19. That contention appears to misunderstand and mischaracterize Instacart's takings claim, which is not based on an alleged right to profits or revenues, but on contracts. Instacart itself does not sell goods (food, groceries), or provide delivery services to consumers. Rather, as a "food delivery *network* company," the foundation of Instacart's business is a unique "network" of relationships in which its rights are created by interlocking sets of contracts with Shoppers (defining compensation and access to orders), consumers (authorizing charges), and grocery retailers (allowing termination). It is the rights defined by pre-existing contracts, not revenues or profits, that the City has taken and impaired through regulation.

It is beyond dispute that the Takings Clause applies to intangible property, such as contract rights, and that "regulatory" takings may be unlawful even where they do not directly appropriate real or tangible property. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (listing a range of "intangible interests," including contract rights, that are "property for purposes of the Fifth Amendment's Takings Clause"). Even the City's cases acknowledge as much. *See* Mot. 20–21 (citing *Classic Cab, Inc. v. D.C.*, 288 F. Supp. 3d 218, 227 (D.D.C. 2018) ("[v]alid contracts are property" for purposes of the Takings Clause).

c. Instacart has stated a viable Takings claim under *Penn Central*.

The U.S. Supreme Court has established a three-factor standard to evaluate whether a government regulation effects a taking, which considers: (1) the economic impact of the regulation, (2) the extent to which it interferes with the business's reasonable investment-backed expectations, and (3) the nature of the government action. *Penn Central*, 438 U.S. at 124. The City's motion never even addresses the *Penn Central* test, which calls for a fact-intensive balancing analysis. *See id.* at 124 (describing analysis of regulatory takings claims as "essentially ad hoc, factual inquiries" that depend on "the particular circumstances in [the] case"); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 523 (1992). In any event, such fact-based questions are not typically susceptible of resolution on summary judgment, *see Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 466 (2009), let alone on a motion to dismiss.

Instead of applying relevant factors to show a failure to state a claim, the City sidesteps *Penn Central* and likens the Ordinance to "garden-variety business regulations," Mot. 21, asserting categorically that such regulations do not result in compensable takings. The City's premise is mistaken. As explained, the Ordinance is not akin to "accepted practices as minimum wage laws, workers' compensation programs, rent control laws, and taxes." Mot. 22 (footnotes omitted). The Ordinance does much more than mandate a minimum wage or regulate working conditions: it mandates that food delivery businesses subsidize services throughout Seattle for public benefit. It treats FDNCs like public utilities, but cannot do so—constitutionally—without just compensation.[12] The City's argument proves too much because it would authorize local government to impose "premium" worker compensation and service mandates, subject to price controls, on *any* "essential business."

The City's reliance on two inapposite cases, *Connolly v. Pension Benefit Guaranty Corp.* 475 U.S. 211 (1986), and *Elmsford Apartment Associates v. Cuomo*, NO. 20-cv-4062 (CM), 2020 WL 3498456 (S.D.N.Y. June 29, 2020), falls far short of demonstrating that no set of facts exists

[12] Contrary to the City's apparent assumption, *see* Mot. 22, Instacart's takings claim is not limited to the Ordinance's premium-pay requirement.

upon which the Ordinance could effect a regulatory taking.[13] Those cases, to be sure, endorse the uncontroversial proposition that not all laws adjusting the "benefits and burdens of economic life," 475 U.S. at 225, require just compensation. But it is equally axiomatic that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). The question of whether this Ordinance "goes too far" is not one that can be resolved on a motion to dismiss. At a minimum, Instacart's allegations raise substantial questions under each of the *Penn Central* factors that merit discovery:

Economic impact. While the City may dispute the economic effects of the Ordinance on Instacart, that impact certainly cannot be determined to be minimal on a motion to dismiss where all reasonable inferences are drawn in Instacart's favor. *Cf. Cienega Gardens v. United States,* 331 F.3d 1319, 1340 (Fed. Cir. 2003) ("What has evolved in the case law is a threshold requirement that plaintiffs show 'serious financial loss' from the regulatory imposition in order to merit compensation."). The FAC alleges the Ordinance essentially freezes Instacart's contractual relationships with retailers, drivers, and consumers at pre-Ordinance levels, destroying Instacart's ability to manage its Seattle operations to economic viability. FAC, ¶¶ 7, 15–16, 40, 80. The Ordinance consigns Instacart to subsidizing "essential services" to the City at a large economic loss for the indeterminate duration of the emergency, which could last years.

Reasonable investment-backed expectations. This *Penn Central* factor operates to "limit recoveries to property [holders] who can demonstrate that they [acquired] their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Cienega Gardens*, 331 F.3d at 1346 (quotation marks and citation omitted). The City cannot credibly claim that Instacart, when investing in its platform, could have foreseen the COVID-19 pandemic

[13] Both *Connolly* and *Elmsford* involved "highly regulated" forms of property—respectively, ERISA pension-plans and residential leases—and the courts treated that fact as central to their takings analysis. *Connolly*, 475 U.S. at 227; *Elmsford*, 2020 WL 3498456, at *10–11.

and the passage of this unprecedented Ordinance. Although the City asserts that Instacart is operating "in a heavily regulated industry," it provides no statutory or regulatory authority for its contention—patently untrue—that the gig economy has long been a highly regulated industry. Under Washington law, gig workers are not employees but independent contractors, and those relationships have not been the subject of extensive regulation, unlike the businesses in many of the cases Defendant cites. *Cf. Classic Cab*, 288 F. Supp. 3d at 228 (describing "dense and rapidly changing regulatory environment" in which taxicab companies operate). At best there is a factual dispute, but even when an industry is heavily regulated, courts still provide plaintiffs an "opportunity to present evidence" to support their "reasonable investment-backed expectations." *Huntleigh USA Corp. v. United States*, 63 Fed. Cl. 440, 449 (2005).

Character of the governmental action. This factor looks to the "purpose and importance of the public interest reflected in the regulatory imposition." *Cienega Gardens*, 331 F.3d at 1338. For reasons already discussed, those questions raise hotly disputed issues that cannot be resolved at this early stage. For one thing, Plaintiffs have alleged that the City's claimed purpose—addressing a public health emergency—is a pretext for other ends. *See Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) (considering under this *Penn Central* factor whether government action was "unfair, unreasonable, and in bad faith"). Even crediting the City's stated justification, the Ordinance is different in kind from the sorts of emergency measures carried out in the takings cases the City cites, which typically involve prophylactic mandates that protected citizens from health hazards or other harms: i.e., shutting down businesses near an erupting volcano, or closing down a flea market after unexploded artillery shells were discovered. They do not conscript private businesses to provide beneficial services to the public by imposing unprofitable terms on their contracts without just compensation. In that regard, the Ordinance is analogous to the government commandeering a private enterprise to support a wartime effort, or subjecting a public utility to a rate so low as to be confiscatory—both scenarios that require just compensation. *See Kimball Laundry*, 338 U.S. 1; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

2. The Ordinance violates the Contracts Clauses in the federal and state constitutions.

The Ordinance violates the Contracts Clauses of both the U.S. Constitution and the Washington Constitution. *See* U.S. Const. art. I, § 10, cl. 1; Const., art. 1, § 23.[14] To determine whether a law unconstitutionally impairs a contractual obligation, courts consider whether the enactment results in a "substantial impairment of a contractual relationship," and if so, they evaluate the "means and ends of the legislation" to determine whether the law was "drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018) (citations omitted). The preceding discussion of takings applies equally to the impairment claim. Contrary to the City's claims, Mot. 29, Instacart has sufficiently pleaded that the Ordinance substantially impaired its contracts[15] and is not sufficiently tailored to advance a legitimate public purpose. *See Ketcham*, 81 Wn.2d at 576 (following extensive discovery, holding statute unconstitutionally impaired doctors' contracts with health care program).

In its motion, the City relies principally on employer-employee cases. Although contracts "between employer and employee" can be restricted, Mot. 28 (quoting *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937)), there is no dispute that Instacart Shoppers are independent contractors (Ord. § 1.L), and the City offers no similar authority outside the employment context. Not only do employment cases not help the City, the "extremely narrow focus" of the Ordinance on FDNCs renders it suspect. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248 (1978) ("extremely narrow focus" renders legislation suspect). And while the City urges deferential review because, it contends, Instacart operates in a "heavily

[14] The standard for assessing a Contracts Clause violation is the same under both the federal and state constitutions. *Sloma v. State Dep't of Ret. Sys.*, 12 Wn. App. 2d 602, 619 (2020).

[15] For example, Section 100.027(A)(3) directly impairs provision 5.4 of Instacart's contracts with Shoppers by abrogating Instacart's right to "stop providing access to the Instacart Platform services" whenever it deems "necessary." Section 100.027(A)(3) abrogates provision 6.6, which states that "Instacart does not guarantee the availability of the Instacart Platform" to shoppers. Section 100.027(A)(1) may prohibit Instacart from exercising rights to terminate retailer contracts lest doing so "modify" the areas of the City it serves, and Section 100.027(A)(4) prohibits Instacart from charging consumers for the added cost of premium pay. These impairments are neither ancillary nor insignificant; rather, they strike at the core benefits of the contracts.

regulated industry," Mot. 29, it cites nothing to demonstrate that FDNCs have (until now) been subject to significant regulation.

The City argues that its "police powers" are "paramount to any rights under contracts between individuals." Mot. 27 (quoting *Allied Structural Steel Co.*, 438 U.S. at 241). First, the City has exceeded its police powers, as explained above. *See supra* IV.C. Even if it hasn't, *Allied Structural Steel Co.* instructs that "the Contract Clause . . . impose[s] *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Id.* at 242–43 (emphasis in original) (citing cases invalidating exercise of police powers under Contracts Clause). The City then argues that courts may not "override [legislative] determinations," Mot. 30, but courts must determine whether impairments are reasonable "*[d]espite* the customary deference courts give to state laws directed to social and economic problems." *Allied Structural Steel Co.*, 438 U.S. at 244 (emphasis added). Instacart has sufficiently alleged that the Ordinance impairs the contractual rights and responsibilities of Instacart vis-a-vis Shoppers, consumers, and retailers in ways not reasonably and appropriately tailored to the COVID-19 emergency.

3. The Ordinance violates the Privileges and Immunities Clause under the Washington Constitution.

Art. I, sec. 12 of the Washington Constitution provides, "No law shall be passed granting to any . . . corporation . . . privileges or immunities which upon the same terms shall not equally belong to all . . . corporations." An ordinance violates Washington's Privileges and Immunities clause if (1) it "involves a privilege or immunity," and (2) the legislature lacks "reasonable ground" for infringing the privilege or immunity. *Ockletree v. Franciscan Health Sys*., 179 Wn.2d 769, 776 (2014). The Complaint pleads facts alleging a violation of Washington's Privileges and Immunities Clause.

As an initial matter, the Ordinance interferes with the right to "carry on business," FAC ¶ 84, which has long been recognized as a "fundamental right of citizenship" protected by Art. I, sec. 12. *Am. Legion Post #149 v. State Dep't of Health*, 164 Wn.2d 570, 608 (2008). In *Ralph v. City of Wenatchee*, the Washington Supreme Court held that a municipal ordinance imposing

substantial licensing fees on itinerant photographers and prohibiting them from soliciting work within the city violated the Privileges and Immunities Clause because it discriminated in favor of similarly situated resident photographers, who were left "to ply their trade without restriction." 34 Wn.2d at 644. Likewise here, Plaintiffs' Complaint pleads that the Ordinance discriminates in favor of TNCs and other similarly situated businesses by excluding them from the Ordinance's regulations without a reasonable ground. At the same time, the Ordinance uniquely disadvantages Plaintiffs by significantly increasing their costs of doing business in Seattle and their losses on each delivery, while prohibiting them from passing those costs to customers, reducing driver access to their networks, reducing the areas of service, and taking other self-help measures to offset the costs of compliance. FAC ¶¶ 16, 84.

Again focusing solely on premium pay, the City argues the Ordinance is merely an "ordinary business regulation" that "happens to harm a single aspect of a business." Mot. 24. But the Ordinance does not merely incidentally impact a "single aspect" of Instacart's business. Rather, it uniquely squeezes Instacart from *three* directions—by significantly increasing costs, prohibiting cost recovery in pricing, and prohibiting loss avoidance through service area mandates—thereby destroying Instacart's ability to make viable use of their network in Seattle. *See supra* IV.C.2. The Ordinance's wholesale attack on FDNCs' core operations sets it apart from regulations impacting just one peripheral aspect of a business, such as those that prohibit smoking. *Am. Legion Post* #149, 164 Wn.2d at 608. *See also Int'l Franchise Ass'n. v. City of Seattle*, 803 F.3d 389, 410 (9th Cir. 2015) (subjecting franchisees to faster phase-in period under minimum wage ordinance did not implicate their right to carry on business).[16]

The City argues that Plaintiffs overstate the Ordinance's impact on FDNCs' operations because the Ordinance only prohibits them from taking the actions in Section 100.027(A) of the

[16] Plaintiffs' Privileges and Immunities claim here is quite unlike that of certain liquor distributors in *Association of Washington Spirits & Wine Distributors v. Washington State Liquor Control Board*, where the Supreme Court emphasized that "[l]iquor is different" than other types of businesses, in that selling liquor is a business that one may engage in "only as a matter of grace of the state." 182 Wn.2d 342, 362 (2015). Here, FDNCs are not subject to a comparable licensing scheme. The provision of grocery delivery services fits well within the right to "carry on business" that Washington courts have long recognized. *See State v. Vance*, 29 Wash. 435, 458 (1902).

Ordinance "as a result of this ordinance going into effect." Mot. 25. As explained, however, *see supra* IV.C.2, the City fails to appreciate the disruptive effect these prohibitions will have on FDNCs' businesses. The City's assurances aside, how this "but-for" condition will apply is uncertain given the difficult burden of defense under Section 100.027(B), so Plaintiffs are entitled to the reasonable inference that the prohibitions will apply broadly. Nor is it a point in the City's favor that the Ordinance compels the FDNCs to continue to operate even when unprofitable to do so. *See* Mot. 25. At bottom, singling out FDNCs for this disfavored treatment is akin to the discriminatory license fees imposed on nonresident photographers in *Ralph*, which was held to violate the Clause.

The City fares no better in claiming that the Ordinance does not implicate the "anticompetitive concerns" animating the Clause. *Id.* at 26. Plaintiffs *have* alleged that FDNCs bear "greater expense or costs," *Ockletree*, 179 Wn.2d at 782, than do similarly situated businesses—namely, TNCs and non-FDNC grocery delivery businesses—as a result of the Ordinance. The role of labor organizations in formulating the Ordinance and exempting TNCs and non-FDNC grocery delivery businesses also suggests the Ordinance "serv[es] the interest of special classes of citizens to the detriment of the interests of all citizens," *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806–07 (2004), and thereby implicates the Clause's fundamental concerns. *See supra* IV.C.2. Further, while the City maintains that it has "reasonable grounds" to single out FDNCs for disfavored treatment, that fact-intensive question cannot be resolved at the pleadings stage. *See infra* IV.E; *see also Schroeder v. Weighall*, 179 Wn.2d 566, 574 (2014) ("Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction. Rather, the court will scrutinize the legislative distinction to determine whether it in fact serves the legislature's stated goal.") (internal citation omitted).

4. The Ordinance violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment.

For reasons similar to those just stated, the Ordinance violates the Equal Protection Clause, as it singles out FDNCs for disfavored treatment without placing similar burdens on

similarly situated businesses like taxis, TNC drivers and non-FDNC grocery delivery businesses. In attempting to dismiss this claim, the City relies solely on the deferential rational-basis standard of review, which requires showing only "a rational relation" between the challenged law and "some legitimate end." *Am. Legion Post #149*, 164 Wn.2d at 609; *see* Mot. 31. But the City's asserted justifications for differential treatment of FDNCs during the COVID-19 emergency fail to meet even this deferential standard of review. At a minimum, further factual development is needed to evaluate those justifications. *See infra* IV.E.

The City alleges two bases for subjecting the FDNCs to disfavored treatment: (1) that FDNCs are supposedly unique in providing an "essential service" supporting social distancing; and (2) that FDNCs tend to treat their workers as independent contractors who lack protections employees have. These distinctions are implausible, and in light of the facts that Plaintiffs have pleaded, they cannot justify dismissal for failure to state a claim. Importantly, TNCs and non-FDNC grocery delivery businesses (e.g., Amazon Fresh, etc.) certainly provide essential services during the pandemic, such as transportation to medical appointments and grocery deliveries to high-risk populations. And TNCs, like FDNCs, tend to use independent contractors as drivers. Thus, considering the pleadings alone—prior to any further discovery or fact development—the City's asserted rational basis for differential treatment of FDNCs is absent. Even assuming that the Ordinance reflects a genuine attempt to further public health during the pandemic (rather than a convenient opportunity to increase gig workers' pay), "restrictions inexplicably applied to one group and exempted from another do little to further these goals." *Maryville Baptist Church*, 957 F.3d at 615.

Recent events only underscore the questions raised by the City's disparate treatment of TNC drivers. After Plaintiffs filed the First Amended Complaint, the City enacted a separate ordinance mandating minimum compensation and benefits and regulating workplace conditions for TNC drivers. Ordinance No. 126189 ("Transportation Network Company Minimum Compensation Ordinance"). Unlike the Ordinance here, the TNC Ordinance is not tied to the COVID-19 pandemic and will not go into effect until January 1, 2021—ten months into the

emergency. These facts suggest that the City's true motive behind the FDNC Ordinance was not to respond to a public health emergency, but to use it as an excuse to accomplish unrelated labor policy goals.

Once again, the City seeks dismissal of this claim on the theory that constitutional scrutiny and judicial review are inapplicable when public health is claimed as a justification. The rational basis standard is no doubt deferential, but it does not "violat[e] the separation of powers," Mot. 33, for this Court to undertake that review even during the present emergency. At a minimum, the Equal Protection Clause does not permit state action that is "malicious, irrational or plainly arbitrary," *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990), or where the government's stated rationale "was merely a pretext," *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996). *See also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir. 2008) ("[O]ur circuit has allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose."). Here, Plaintiffs have alleged exactly that. Those allegations must be credited on this motion, and Plaintiffs should accordingly be permitted to test the City's stated justifications for the extraordinary burdens it has imposed on FDNCs alone.

E. Plaintiffs Should Have An Opportunity To Obtain Discovery In Support Of Their Claims.

As explained, Counts 2 through 6 of the Complaint all require an evaluation of whether the Ordinance is a reasonable exercise of the City's powers, in light of its stated purposes. That fact-specific assessment cannot be conducted on a CR 12(b)(6) motion, before Plaintiffs even have an opportunity to obtain discovery. In *Seattle Vacation Home LLC v. City of Seattle*, this Court held that plaintiffs challenging City ordinances regulating short-term rentals under rational basis review had "the right to seek discovery that might prove [the] ordinances were arbitrarily constructed." Observing that rational basis review is not a "rubber stamp," the Court found that "emails or other documents indicat[ing] that the ordinance was passed for reasons other than those given in court filings . . . could have an impact on the Court's finding" of the ordinances' constitutionality. Order on Cross-Motions for Summary Judgment at 4–5, Case No. 18-2-15979-

2-SEA (July 11, 2019); *see also Savage v. Mills*, No. 1:20-CV-00165-LEW, 2020 WL 4572314, at *5 (D. Me. Aug. 7, 2020) (holding "*Jacobson* [is not] a *de jure* immunity talisman" that defendants can invoke to perfunctorily dismiss constitutional challenges); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144 (1998) ("As relaxed and tolerant as the rational basis standard is . . . the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.").

Plaintiffs seek precisely the same type of discovery sought in *Seattle Vacation Home*, and they currently have discovery pending to develop relevant information to challenge the rational basis for the Ordinance, including: (1) which entities doing business in Seattle are subject to the Ordinance and which are not (Interrogatories 1–2; RFP 1); (2) who the City consulted regarding the Ordinance, actual or potential legislation concerning food delivery drivers, and regulations relating to the health, safety, and welfare of gig workers (Interrogatories 3–10, 12; RFP 2, 4–17); and (3) data, studies, and analysis concerning the Ordinance (Interrogatory 11; RFP 3).[17] Those topics are relevant to evaluating Plaintiffs' constitutional claims. The City does not seriously contend otherwise.

F. Plaintiffs Have Sufficiently Alleged Claims Under 42 U.S.C. § 1983.

42 U.S.C. § 1983 prohibits any State from depriving any citizen of the United States of any of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States. The City's only argument on the Section 1983 claims is that Instacart failed to allege any underlying deprivation of a federal constitutional property right. For the reasons set forth above, Instacart has stated a claim for several federal constitutional violations. Because the City has not demonstrated the existence of any "insuperable bar to relief" on the Section 1983 claims, the Court should deny its Motion to Dismiss. *See Fondren v. Klickitat Cnty.*, 79 Wn. App. 850, 854 (1995).

[17] Decl. of Christine Hanley in Support of Pls.' Opp'n to City of Seattle's Mot. for Protective Order, Ex. 1 (Aug. 31, 2020).

V. CONCLUSION

Dismissal is not appropriate because the City cannot establish "beyond a reasonable doubt, the [Plaintiffs] cannot prove any set of facts which would justify recovery." *FutureSelect*, 180 Wn.2d at 962 (internal quotation marks and citation omitted). For the foregoing reasons, Plaintiffs respectfully request that the Court deny the City's Motion to Dismiss.

If the Court grants the Motion to Dismiss any of Plaintiffs' claims in whole or in part, Plaintiffs respectfully request that dismissal be without prejudice and that Plaintiffs be granted leave to amend the Complaint. *See* CR 15(a) ("[L]eave [to amend] shall be freely given when justice so requires.").

I, Robert M. McKenna, certify that this memorandum contains 11,722 words, in compliance with the Local Civil Rules and the Court's September 23, 2020 Order Granting City of Seattle's Motion to File Overlength Motion.

DATED this 2nd day of November, 2020.

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Appendix K

Plaintiffs' First Set of Interrogatories and Requests for Producton

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

The WASHINGTON FOOD INDUSTRY ASSOCIATION, a Washington Non-Profit Corporation, and MAPLEBEAR INC. d/b/a INSTACART, a Delaware corporation MAPLEBEAR INC. d/b/a INSTACART, Plaintiffs, v. CITY OF SEATTLE, Defendant.	Case No. 20-2-10541-4 SEA **PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION**

TO: DEFENDANT CITY OF SEATTLE AND ITS COUNSEL OF RECORD

Plaintiffs the Washington Food Industry Association ("WFIA") and Maplebear Inc. d/b/a Instacart ("Instacart") propound their first Interrogatories and Requests for Production to Defendant City of Seattle pursuant to Rules 26, 33, and 34 of the Superior Court Civil Rules of the State of Washington ("CR"). Unless otherwise agreed, answers to these Interrogatories and Requests for Production shall be made within 30 days of service.

I. DEFINITIONS

As used in these Interrogatories and Requests for Production, the following terms have the meanings described below:

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1. The terms "AND" and "OR" shall be understood as either disjunctive or conjunctive, whichever is necessary to bring within the scope of the Interrogatory or Request for Production any information that might otherwise have been understood to be outside its scope.

2. "COMMUNICATION" or "COMMUNICATE" means or refers to any transmittal of information including without limitation in-person conversations or meetings, telephonic or other electronic communications or messages, instant or text messages, online video and/or audio communications, correspondence, facsimile transmissions, email, all attachments and enclosures thereto, recordings in any medium of oral communications, telephone logs, message logs, and notes and memoranda concerning written or oral communications, and any translations thereof.

3. "COVID-19 PANDEMIC" means the pandemic declared by the World Health Organization on March 11, 2020 and caused by the virus formally known as severe acute respiratory syndrome coronavirus 2 or SARS-CoV-2.

4. "DOCUMENT" includes all materials within the scope of CR 34(a).

5. "FOOD DELIVERY NETWORK COMPANY" has the meaning as defined by the Ordinance, § 100.010: "an organization whether a corporation, partnership, sole proprietor, or other form, operating in Seattle, that offers prearranged delivery services for compensation using an online-enabled application or platform, such as an application dispatch system, to connect customers with workers for delivery from one or more of the following: (1) eating and drinking establishments, (2) food processing establishments, (3) grocery stores, or (4) any facility supplying groceries or prepared food and beverages for an online order. 'Food delivery network company' includes any such entity or person acting directly or indirectly in the interest of a food delivery network company in relation to the food delivery network company worker."

6. "GIG WORKER" means a person or business operating for compensation using an online-enabled application or platform, such as an application dispatch system, to connect customers with workers. For the avoidance of doubt, the term "gig worker" as used herein is broader than the definition provided in the Ordinance, § 100.010.

7. "I-1634" means Initiative 1634, the "Prohibit Local Taxes on Groceries Measure" (codified as the "Keep Groceries Affordable Act of 2018," RCW 82.84.010 et seq.), which Washington voters approved in the general election on November 6, 2018.

8. "IDENTIFY" means:

a. When used with respect to a Person, to state the Person's full name; present or last known address; occupation, employer, and business address at the date of the event or transaction to which the request refers; and present occupation, employer, and business address;

b. When used with respect to a thing or event, to describe the thing or event with reasonable particularity and identify each Person believed to have knowledge with respect to the thing or event; and

c. When used with respect to a document, to describe the document with sufficient particularity so as to provide the basis for a motion to compel production pursuant to CR 37. In lieu of identifying a document in this manner, You may produce all copies of the document in Your possession, custody and control.

9. "INCLUDING" shall be construed as "including without limitation."

10. "ORDINANCE" means Council Bill 119799, which the Seattle City Council passed on June 15, 2020 and Seattle Mayor Jenny Durkan signed on June 26, 2020.

11. "PERSON" means any natural person or any business, legal, governmental, or non-governmental entity, association, or organization.

12. "RELATING TO" or "RELATED TO" means concerning, referring to, describing, evidencing, interpreting, reflecting, and/or constituting.

13. "SEIU" means the labor organization Service Employees International Union, including any local affiliate or subsidiary thereof, and the organization's officers, employees, representatives, lobbyists and agents.

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14. "TEAMSTERS" means the labor organization the International Brotherhood of Teamsters, including any local affiliate or subsidiary thereof, and including the organization's officers, employees, representatives, lobbyists and agents.

15. "TRANSPORTATION NETWORK COMPANY" has the meaning as defined by the original bill introduced for Council Bill 119799 by Councilmembers Lisa Herbold and Andrew Lewis (but was subsequently removed in later drafts and the ultimate legislation that passed): "an organization whether a corporation, partnership, sole proprietor, or other form, licensed or required to be licensed under Seattle Municipal Code Chapter 6.310, operating in Seattle, that offers prearranged transportation services for compensation using an online-enabled application or platform, such as an application dispatch system, to connect passengers with drivers using a 'transportation network company (TNC) endorsed vehicle,' as defined in Seattle Municipal Code Chapter 6.310."

16. "WORKING WASHINGTON" means and refers to the Washington-based statewide workers' 501(c)(4) organization, including the organization's officers, employees, representatives, lobbyists and agents.

17. "YOU," "YOUR," or "YOURSELF" means the City of Seattle and its officials, agents and/or representatives, or any other Person acting or purporting to act on behalf of the City of Seattle, including, but not limited to, members of the Seattle City Council and their staff.

18. Use of the singular includes the plural and vice versa.

II. INSTRUCTIONS

1. The instructions set forth in CR 26, 33, and 34, together with applicable Washington judicial decisions interpreting and applying these rules, are adopted and incorporated by reference herein.

2. If You object to answering any Interrogatory or responding to any Request for Production, in whole or in part, state the objection and factual and legal basis for Your objection. Describe the nature of the documents, communications, or things not produced or disclosed with sufficient detail to allow Plaintiffs to assess the applicability of the asserted privilege, doctrine,

or immunity. You must fully and completely respond to any portion of the Interrogatory or Request for Production to which You do not object.

3. If you withhold any documents that respond to a Request for Production on the basis of the attorney-client privilege, the work-product doctrine, or any other privilege, exemption or immunity, produce a log of such documents that identifies: (1) the document; (2) the author, custodian, and recipient(s) of the document; (3) the document's subject matter; (4) the document's date; and (5) the privilege, exemption, or immunity that forms the basis of your objection.

4. Unless otherwise stated, the relevant time period for the Requests for Production is from **MAY 1, 2018 THROUGH THE PRESENT**.

III. INTERROGATORIES

INTERROGATORY NO. 1: IDENTIFY all PERSONS doing business in the city of Seattle who currently meet the definition of FOOD DELIVERY NETWORK COMPANY in the ORDINANCE.

RESPONSE:

INTERROGATORY NO. 2: IDENTIFY all PERSONS doing business in the city of Seattle who currently meet the definition of TRANSPORTATION NETWORK COMPANY, as defined by the original bill introduced for Council Bill 119799 by Councilmembers Herbold AND Lewis.

RESPONSE:

INTERROGATORY NO. 3: IDENTIFY all PERSONS who are not employed by the City of Seattle OR any of its departments AND agencies with whom members of the Mayor, Seattle City Council OR their staff COMMUNICATED about the ORDINANCE – INCLUDING drafts,

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substitutes, OR amendments thereto – AND the dates AND substance of such COMMUNICATIONS.

RESPONSE:

INTERROGATORY NO. 4: IDENTIFY all PERSONS who are not employed by the City of Seattle OR any of its departments AND agencies with whom Mayor, the Seattle City Council OR their staff COMMUNICATED about proposed legislation to mandate that TRANSPORTATION NETWORK COMPANIES OR FOOD DELIVERY NETWORK COMPANIES pay defined compensation AND/OR provide defined benefits to GIG WORKERS, AND the dates AND substance of such COMMUNICATIONS.

RESPONSE:

INTERROGATORY NO. 5: IDENTIFY all COMMUNICATIONS between the TEAMSTERS AND the Mayor, Seattle City Council OR their staff RELATED TO proposed OR actual legislation concerning the compensation, benefits, AND/OR working conditions, INCLUDING working conditions RELATED TO health, safety, and welfare, of GIG WORKERS.

RESPONSE:

INTERROGATORY NO. 6: IDENTIFY all COMMUNICATIONS between WORKING WASHINGTON AND the Mayor, Seattle City Council OR their staff RELATED TO proposed OR actual legislation concerning the compensation, benefits, AND/OR working conditions, INCLUDING conditions RELATED TO health, safety and welfare, of GIG WORKERS.

RESPONSE:

INTERROGATORY NO. 7: IDENTIFY all COMMUNICATIONS between SEIU AND the Mayor, Seattle City Council OR their staff RELATED TO proposed OR actual legislation concerning the compensation, benefits, AND/OR working conditions, INCLUDING conditions RELATED TO health, safety and welfare, of GIG WORKERS.

RESPONSE:

INTERROGATORY NO. 8: IDENTIFY all COMMUNICATIONS between the TEAMSTERS AND the Mayor, Seattle City Council OR their staff RELATED TO actual OR potential legislation concerning FOOD DELIVERY NETWORK COMPANIES AND/OR TRANSPORTATION NETWORK COMPANIES.

RESPONSE:

INTERROGATORY NO. 9: IDENTIFY all COMMUNICATIONS between WORKING WASHINGTON AND the Mayor, Seattle City Council OR their staff RELATED TO actual OR potential legislation concerning FOOD DELIVERY NETWORK COMPANIES AND/OR TRANSPORTATION NETWORK COMPANIES.

RESPONSE:

INTERROGATORY NO. 10: IDENTIFY all COMMUNICATIONS between SEIU AND the Mayor, Seattle City Council OR their staff RELATED TO actual OR potential legislation concerning FOOD DELIVERY NETWORK COMPANIES AND/OR TRANSPORTATION NETWORK COMPANIES.

RESPONSE:

INTERROGATORY NO. 11: IDENTIFY all data, studies, OR analyses RELATING TO, relied upon, OR performed in support of OR in connection with the ORDINANCE.

RESPONSE:

INTERROGATORY NO. 12: IDENTIFY all of YOUR COMMUNICATIONS with third parties, INCLUDING but not limited to the TEAMSTERS, SEIU, WORKING WASHINGTON, OR other labor organizations AND their agents AND representatives, RELATED TO proposing, introducing, drafting, amending OR adopting the ORDINANCE or any of its provisions.

RESPONSE:

IV. REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce all DOCUMENTS identified, required to be identified, OR responsive to the First Set of Interrogatories above.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 2: Produce all DOCUMENTS RELATING TO the ORDINANCE OR any drafts of the ORDINANCE, INCLUDING correspondence, emails, text AND instant messages, social media OR other online postings, analyses, discussions, proposals for legislation, drafts, substitutes, OR amendments thereto.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Produce all data, reports, studies, testimony, written statements, AND analyses relied upon by the Mayor, the City Council OR any of its members as factual OR evidentiary support in approving the ORDINANCE.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Produce all DOCUMENTS AND COMMUNICATIONS concerning the purported health risks faced uniquely or acutely by GIG WORKERS in comparison to other workers in the city, during the COVID-19 PANDEMIC considered by the Mayor, City Council OR any of its members in connection with the ORDINANCE.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Produce all DOCUMENTS AND COMMUNICATIONS concerning the automatic repealer provision in Section 5 of the ORDINANCE.

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RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Produce all DOCUMENTS AND COMMUNICATIONS concerning Section 100.027(A)(1) of the ORDINANCE, concerning reducing OR otherwise modifying the areas of the City that are served by any hiring entity.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Produce all DOCUMENTS AND COMMUNICATIONS concerning Section 100.027(A)(4) of the ORDINANCE, barring subject companies from adding customer charges to online orders for delivery of groceries.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Produce all DOCUMENTS RELATING TO COMMUNICATIONS of the Mayor, Seattle City Council members AND staff with any persons RELATED TO the ORDINANCE, INCLUDING proposals for legislation, drafts, substitutes, OR amendments thereto.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Produce all DOCUMENTS RELATING TO COMMUNICATIONS of the Mayor AND Seattle City Council members concerning whether

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the ORDINANCE, INCLUDING any drafts of OR substitutes OR amendments thereto, would comply with OR violate any provision of the Washington State Constitution, the United States Constitution, OR I-1634.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Produce all DOCUMENTS RELATING TO COMMUNICATIONS of the Mayor AND Seattle City Council members concerning whether the ORDINANCE, INCLUDING any drafts of OR substitutes OR amendments thereto, would be within OR exceed the City's power to enact legislation concerning the public health, welfare, OR safety.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between the TEAMSTERS AND the Mayor, Seattle City Council OR their staff RELATED TO legislation concerning the compensation, benefits, AND/OR working conditions, INCLUDING conditions RELATED TO health, safety and welfare, of GIG WORKERS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between WORKING WASHINGTON AND the Mayor, Seattle City Council OR their staff RELATED TO legislation concerning the compensation, benefits,

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AND/OR working conditions, INCLUDING conditions RELATED TO health, safety and welfare, of GIG WORKERS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between SEIU AND the Mayor, Seattle City Council OR their staff RELATED TO legislation concerning the compensation, benefits, AND/OR working conditions, INCLUDING conditions RELATED TO health, safety and welfare, of GIG WORKERS.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between agents OR representatives of FOOD DELIVERY NETWORK COMPANIES AND/OR TRANSPORTATION NETWORK COMPANIES AND the Mayor, City Council OR their staff RELATED to the ORDINANCE, including any drafts, substitutions or amendment thereto.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between WORKING WASHINGTON, the TEAMSTERS OR SEIU and the Mayor, City Council OR their staff or the City of Seattle RELATED TO actual OR potential legislation concerning FOOD DELIVERY NETWORK COMPANIES AND/OR TRANSPORTATION NETWORK COMPANIES.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: Produce all DOCUMENTS RELATING TO COMMUNICATIONS between third parties, INCLUDING but not limited to the TEAMSTERS, SEIU AND WORKING WASHINGTON AND the City of Seattle RELATED TO defense of the ORDINANCE in litigation.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: Produce all DOCUMENTS RELATING TO contracts between the City of Seattle and any lawyers in private practice or private law firms RELATING TO representation of the City of Seattle in litigation over the ORDINANCE.

RESPONSE:

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Dated: July 2, 2020.

ORRICK, HERRINGTON & SUTCLIFFE, LLP

By 

Robert M. McKenna, WSBA #18327
Daniel J. Dunne, WSBA #16999
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Telephone: (206) 839-4300
Facsimile: (206) 839-4301
Email: rmckenna@orrick.com
ddunne@orrick.com
chanley@orrick.com

CERTIFICATION

The undersigned attorney has read the foregoing Interrogatories, Requests for Production, and any responses and objections thereto, and certifies that the responses and objections are in compliance with CR 26(g).

Dated _____.

By:_____

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VERIFICATION

STATE OF _____)
) ss.
COUNTY OF _____)

I am the _____ for defendant City of Seattle, and as such am authorized to verify on its behalf the responses to discovery requests set forth above. I certify that I have read the foregoing discovery requests and the responses thereto and believe them to be true and correct.

_____

Name:_____

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2019

_____
(Signature of Notary)

_____
(Print or stamp name of Notary)

NOTARY PUBLIC in and for the State of _____

My Commission Expires:_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington that on the 25th day of May 2021, I caused the foregoing Motion for Discretionary Review to be served on the following in the manner indicated:

Robert M. McKenna Daniel J. Dunne, Jr. Orrick, Herrington & Sutcliffe LLP 701 5th Avenue, Suite 5600 Seattle, WA 98104-7045	Via e-mail and the Court's electronic service
Daniel A. Rubens Orrick, Herrington & Sutcliffe LLP 51 West 52nd Street New York, NY 10019	Via e-mail and the Court's electronic service

SEATTLE CITY ATTORNEYS' OFFICE - REEJ

May 25, 2021 - 9:46 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99771-3
Appellate Court Case Title:	Washington Food Industry Assoc. et al. v. City of Seattle

The following documents have been uploaded:

- 997713_Motion_Discretionary_Review_20210525094112SC164555_2727.pdf
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- mherbert@altshulerberzon.com
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Filing on Behalf of: Jeremiah Miller - Email: jeremiah.miller@seattle.gov (Alternate Email: Jennifer.Litfin@seattle.gov)

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