No. 99771-3

SUPREME COURT
OF THE STATE OF WASHINGTON

THE WASHINGTON FOOD INDUSTRY ASSOCIATION; et al.

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

CITY OF SEATTLE'S REPLY BRIEF

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I. INTRODUCTION

In urging this Court to affirm the trial court's decision denying dismissal of their police power, equal protection, Contract Clause, and Takings claims, Respondents misconstrue well-settled legal standards governing these claims. If accepted, the *Lochner*-era legal theories espoused in Respondents' brief would allow courts, at the behest of private litigants, to interrogate the motives and second-guess the policy determinations of democratically elected legislators—thwarting efforts to protect the public health, safety, and welfare of the community. And if embraced by this Court, Respondents' antiquated views would allow courts, in service of private business interests, to elevate private contracts over community well-being.

At its heart, this lawsuit concerns the role of business interests vis à vis elected representatives of the community in establishing standards for the protection of workers and the public. For decades, courts have declined to adopt Respondents'

laissez-faire approach to economic regulation, which leaves the well-being of workers and other members of the public to the whims of the market. In keeping with longstanding precedent, this Court should reverse the trial court's denial of the City's motion to dismiss Respondents' police power, equal protection, Contract Clause, takings, and 42 U.S.C. § 1983 claims and affirm the trial court's dismissal of Respondents' claim under Chapter 82.84 RCW.

II. ARGUMENT

Controlling precedent squarely forecloses each of the claims in Respondents' Amended Complaint. Consequently, the trial court should have dismissed each of these claims under Civil Rule ("CR")12(b)(6).

Respondents' arguments in defense of their police power and equal protection challenges are unavailing, as they reflect a fundamental misunderstanding of the deferential standard modern-day courts apply to social and economic legislation. This Court should also reject Respondents' arguments in support of

their Contract Clause claim, which privilege private contracts over valid exercises of the police power. And it should reject Respondents' novel and ill-founded attempt to shoehorn a meritless claim for an impairment of contracts into a Takings framework. In so doing, this Court should reaffirm that economic legislation that merely frustrates a private party's contractual expectations cannot be attacked as a 'taking.' Finally, this Court should apply settled principles of statutory interpretation to affirm the trial court's dismissal of Respondents' claim under Chapter 82.84 RCW.

A. Respondents' police power claims fail as a matter of law.

Respondents' defense of their police power claim is unavailing. Although Respondents studiously avoid any mention of *City of Seattle v. Webster* throughout much of their discussion of their police power claim, they cannot escape *Webster's* well-settled holding: "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."[1] By its very nature, this standard is inconsistent with the more searching inquiry Respondents urge the Court to adopt, relying on language they pluck out of context from prior decisions.[2] For example, Respondents cite *Cougar Business Owners Association v. State*[3] for the proposition that exercises of the police power must be "reasonably necessary," but they ignore the language caveating that requirement:

> In applying this test, courts utilize the presumption mentioned earlier-if a state of facts justifying the legislation can be conceived to exist, the existence of these facts will be presumed. This presumption severely limits judicial review at this stage, because in order to fail this first test there must be no reasonably conceivable state of facts creating a public need for regulation.[4]

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[1] *City of Seattle v. Webster*, 115 Wn.2d 635, 645, 802 P.2d 1333 (1990) (emphasis supplied).

[2] Br of Resp'ts ("Resp. Br.") at 32.

[3] 97 Wn.2d 466, 647 P.2d 481 (1982) *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

[4] *Id.* at 478.

This Court went on to explain that "[t]he courts 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."[5]

In short, rather than second-guessing policy determinations underlying legislative enactments, this Court has routinely subjected exercises of the police power to rational basis review.[6] The Court should reject Respondents' attempt to

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[5] *Id.*

[6] *See, e.g., City of Seattle v. Montana*, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996), *abrogated on other grounds by Yim*, 194 Wn.2d 682 ("It is presumed that the legislation was passed with respect to any state of facts which could be reasonably conceived to warrant the legislation."); *State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493, 504-05, 816 P.3d 725 (1991), *abrogated on other grounds by Yim*, 194 Wn.2d 682 (recognizing that courts "must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts" and that courts "will not weigh the wisdom of the particular legislation" in determining whether it is a valid exercise of the police power) (cleaned up); *State v. Spino*, 61 Wn.2d 246, 250, 377 P.2d 868 (1963) (striking down law prohibiting any willful burning of certain structures

mischaracterize precedent and turn back the clock to an era in which courts conducted a more searching inquiry of economic legislation.[7]

Respondents' arguments in support of their police power claim amount to nothing more than policy disagreements. Respondents maintain that it was "wholly arbitrary" to require hazard pay when worker pay had already "spiked," the number of delivery drivers had reached "record highs," and workers were

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because "[n]o *conceivable public purpose* can be served by the prosecution and punishment of those who set fires for innocent and beneficial purposes") (emphasis supplied).

[7] *Compare State ex. rel. Richey v. Smith*, 42 Wash. 237, 84 P. 851 (1906) ("*Richey*") (invoking economic liberty framework in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), to strike down law requiring licensing of plumbers as invalid exercise of the police power), *with City of Tacoma v. Fox*, 158 Wash. 325, 331-33, 290 P. 1010 (1930) (overruling *Richey* on grounds that court must credit any "state of facts [that] can reasonably be presumed to exist which would justify the legislation" and "the questions of fact as to the wisdom, necessity, and policy of the law are conclusively determined if a state of facts could exist which would justify the legislation in question").

already receiving free personal protective equipment ("PPE").[8] They point to "problems that did not exist,"[9] assert that "there was no real need" for Ordinance No. 126094 (the "Ordinance"),[10] and maintain that the Ordinance went "beyond the degree necessary" to address health and safety conditions.[11]

Such policy disputes have no place under rational basis review. "[T]he wisdom, necessity, and expediency of the law are not for judicial determination."[12] Rather, the question of "[w]hether the terms of an ordinance are wise or unwise is a question addressed solely to the city council."[13]

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[8] Resp. Br. at 37.

[9] *Id.* at 4.

[10] *Id.* at 35.

[11] *Id.* at 56.

[12] *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 159, 579 P.2d 1331 (1978), *abrogated on other grounds by Yim*, 194 Wn.2d 682.

[13] *Ragan v. City of Seattle*, 58 Wn.2d 779, 786, 364 P.2d 916 (1961), *abrogated on other grounds by Yim*, 194 Wn.2d 682.

It was up to the City Council to decide what kind of price tag to put on the potentially fatal risks these workers faced in doing their jobs. It was the City Council's job to determine whether the market would sustain the initial pay increases over the life of the pandemic, whether those pay increases were sufficient, and, as a separate matter, whether to place these workers solely at the mercy of the market.[14] And it was within the discretion of the City Council to decide whether current rates of pay would be sufficient for retention and recruitment of workers in this newly hazardous industry and to determine how best to ensure access to PPE among these workers.[15] In short, there were myriad conceivable bases for the City Council to take

[14] While Respondents disavow a *Lochner*-era approach to the Ordinance, their insistence on leaving worker pay to market forces echoes the prevailing rhetoric of the *Lochner* era. *See, e.g.*, Resp. Br. at 10 ("And all of this happened without government intervention.").

[15] Ensuring access to PPE was only one of many stated bases for the Ordinance. *Compare* Resp. Br. at 34 (suggesting that ensuring access to PPE was primary purpose of Ordinance).

action to ensure hazard pay for hazardous work and to craft the legislation in the way that it did—any of which would support a lawful exercise of the police power under governing precedent.[16]

Contrary to Respondents' assertions, the City Council also acted within the scope of its police power in enacting the "consumer protection" provisions restricting Food Delivery Network Companies ("FDNCs") from taking certain actions in response to the hazard pay requirement. Respondents' assertion that these "unique"[17] features of the Ordinance warranted further fact-finding evince a misunderstanding of the nature and purpose of these provisions.

The Ordinance prohibits four categories of actions taken "as a result of" the Ordinance's passage.[18] Far from "seiz[ing]

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[16] As this Court has noted, Washington has a long and proud tradition of being at the forefront of governmental efforts to protect workers. *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760, 426 P.3d 703 (2018) (cleaned up). The Ordinance is in keeping with that tradition.

[17] Resp. Br. at 34.

[18] CP at 106 (Ordinance at Section 2, 100.027.B).

control"[19] of Respondents' contracts, these provisions are, on their face, limited in scope and effect. Two of the consumer protections ensure that delivery drivers receive an actual increase in pay: FDNCs may not alter their compensation systems to undercut the pay requirement[20] or restrict a worker's access to work[21] because of the Ordinance. These provisions serve the same purpose as the Ordinance's core hazard pay provisions. The other two consumer protections prevent companies from restricting community access to the critical services provided by the FDNCs: FDNCs may not change service areas or pass on the costs of groceries (but not other food) to consumers as a result of the Ordinance going into effect.[22] Respondents readily concede that ensuring community access to these services promotes public health; thus they cannot credibly dispute the validity of

[19] Resp. Br. at 43.

[20] CP at 105 (Ordinance at Section 2, 100.027.A.2).

[21] CP at 106 (Ordinance at Section 2, 100.027.A.3).

[22] CP at 105-06 (Ordinance at Section 2, 100.027.A.1, A.4).

these provisions as an exercise of the police power.[23] Importantly, any of these prohibited actions may be taken if the reasons for doing so are independent of the Ordinance going into effect.[24]

Respondents further contend that the trial court did not second-guess the wisdom or necessity of the Ordinance because it did not issue a ruling on the merits.[25] Respondents misunderstand both the City's position and the purpose of CR 12(b)(6). The trial court's error was not in issuing an erroneous ruling on the merits but in laying the groundwork for one. CR 12(b)(6), together with rational basis review, required the trial court to dismiss Respondents' police power claim given the unassailable rational bases for the Ordinance.[26] Instead, the trial

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[23] Resp. Br. at 10.

[24] CP at 106 (Ordinance at Section 2, 100.027.B).

[25] Resp. Br. at 38.

[26] *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005) ("If a plaintiff's claim remains legally insufficient even

court permitted gratuitous fact-finding as to the wisdom and necessity of the Ordinance, overlooking the gatekeeping function of CR 12(b)(6) and subjecting the City to costly and unnecessary discovery.[27]

Finally, in urging the Court to permit an inquiry into the actual motives of the City Council, Respondents fail to grapple with binding authority to the contrary,[28] and resort, as they must, to hyperbole. While they raise the specter of "invidious

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under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.").

[27] The City is not seeking any "special solicitude on a motion to dismiss," *see* Resp. Br. at 72, but rather a faithful application of CR 12(b)(6). The gatekeeping function of CR 12(b)(6) protects all defendants from meritless litigation.

[28] *See, e.g., Cougar Bus. Owners Ass'n,* 97 Wn.2d at 478; *accord Shepard v. City of Seattle*, 59 Wash. 363, 375, 109 P. 1067 (1910). In contrast, Respondents' position rests on non-binding authority from the federal circuit courts. Resp. Br. at 41-42.

discriminatory purposes"[29] and "pernicious motives,"[30] the facts they allege amount to nothing of the sort.[31] Instead, Respondents allege a mere triumph of labor interests over business interests in the political process, an unremarkable occurrence with no legal significance.[32]

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[29] Resp. Br. at 66. Indeed, if the Ordinance did implicate suspect classes such that "invidious" discrimination was a likely result, more searching review might be appropriate. *See Medina v. Pub. Util. Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 313, 53 P.3d 993 (2002) ("Statutes and ordinances that do not affect fundamental rights or create suspect classifications such as race or alienage are generally reviewed with minimal judicial scrutiny" and "[u]nder minimal scrutiny, a classification will be upheld against an equal protection challenge if there is any conceivable set of facts that could provide a rational basis for the classification.").

[30] *Id*. at 40.

[31] In any event, rational basis review is not the only bulwark against nefarious conduct on the part of legislators. For example, if Councilmembers committed ethical transgressions, they could be prosecuted or disciplined. *See generally* Ch. 4.16 Seattle Munic. Code (Code of Ethics).

[32] While Respondents bill the Ordinance as a ruse to help organize gig workers, Resp. Br. at 13, it is unclear how an ordinance that provides a benefit to all gig workers—regardless of union membership—aids in such organizing efforts. Nor would such a purpose be unlawful or invidious.

Respondents also fail to explain how the trial court is to discern the motives of the City Council—a body comprised of nine separate individuals. Even if, under certain circumstances, courts permit "some inquiry"[33] into the actual motives of a legislative body, Respondents' bare allegation of pretext does not warrant a fishing expedition into the hearts and minds of Councilmembers.[34]

B. Respondents' equal protection claim is insufficient.

Respondents' equal protection arguments are equally unpersuasive. While the City does not contend that rational basis review is a "rubber stamp,"[35] or that deference equates to

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[33] *Lazy Y Ranch Ltd v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008).

[34] *See, e.g., City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (preventing the deposition of individual legislators to determine their motives in enacting a law challenged under the First Amendment because "such inquiries are a hazardous task" given the "impossibility of penetrating the hearts of men and ascertaining the truth…") (cleaned up).

[35] Resp. Br. at 61.

"unreviewable authority,"[36] the degree of rigor Respondents invite the Court to apply is at odds with modern-day rational basis review.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[37] "A legislative choice is not subject to courtroom factfinding and may be based on rational speculation

[36] *Id*. at 64.

[37] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 211 (1993). Contrary to Respondents' suggestion, Resp. Br. at 65 n.12, the procedural posture in *Beach Communications* has no bearing on its applicability to this case. *See also Gossett v. Farmers Ins. Co. of Washington*, 133 Wn.2d 954, 979, 948 P.2d 1264, 1277 (1997) (under the Washington Constitution, "[a] classification will be upheld against an equal protection challenge if there is any conceivable set of facts that could provide a rational basis for the classification.").

unsupported by evidence or empirical data."[38] In fact, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[39] This standard leaves no room for the policy disagreements at the heart of Respondents' challenge, nor for an inquiry into the City's actual motives.

Contrary to Respondents' assertions, there are myriad conceivable bases for the City Council's decision to distinguish between FDNC drivers and other essential workers. For example, it made sense to distinguish between FDNC drivers and grocery employees because the former are independent contractors, and as such, lack basic employment protections.

As a separate matter,[40] there were ample bases for distinguishing between FDNC drivers and other gig workers,

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[38] *Beach Commc'ns*, 508 U.S. at 315; *Gossett*, 133 Wn.2d at 979-80.

[39] *Beach Commc'ns*, 508 U.S. at 315.

[40] *See* Resp. Br. at 62 (conflating conceivable bases for distinguishing between FDNC drivers and grocery workers with

such as TNC drivers, who faced COVID-19-related risks at work.[41] Legislative efforts to increase pay for TNC drivers were already underway at the time of the Ordinance's passage,[42] and so the City Council, which "must be allowed leeway to approach a perceived problem incrementally,"[43] could have rationally chosen to focus on FDNC drivers.

Furthermore, TNC drivers and FDNC drivers play a different role in the community, and the City Council could have rationally viewed food delivery services as a necessity in a way that rideshare services were not. After all, "[d]efining the class of persons subject to a regulatory requirement…inevitably

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conceivable bases for distinguishing between FDNC drivers and other gig workers).

[41] The City does not contend that FDNC drivers face greater risks of contracting COVID-19 than TNC drivers. *Compare* Resp. Br. 62-63.

[42] City's Opening Br. ("Opening Br.") at 32.

[43] *Beach Commc'ns*, 508 U.S. at 316; *cf. Griffin v. Eller*, 130 Wn.2d 58, 66, 922 P.2d 788 (1996) ("the Legislature may constitutionally approach the problem of employment discrimination one step at a time.").

requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."[44]

Respondents argue that the City is "fighting the pleaded facts, including that TNC drivers were removed from the Ordinance's scope as a political favor for special interests."[45] But by definition, the purported *actual* bases for the Ordinance alleged in the Complaint do not negate the *conceivable* bases. Only the latter is relevant to rational basis review.[46]

Relying on *Lazy Y Ranch Ltd. v Behrens*[47] and other non-binding circuit court decisions, Respondents invite the Court to

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[44] *Beach Commc'ns*, 508 U.S. at 315-16 (cleaned up, second alteration in original).

[45] Resp. Br. at 63.

[46] *Beach Commc'ns*, 508 U.S. at 313; *Seeley v. State*, 132 Wn.2d 776, 795–96, 940 P.2d 604 (1997).

[47] 546 F.3d 580.

permit a searching inquiry into the City Council's actual motives.[48] The Court should decline to do so for the same reasons it should decline this invitation in the police power context.[49]

Moreover, *Lazy Y Ranch* does not support Respondents' position. There, the Ninth Circuit explained that it was not bound by *Beach Communications* because the dispute before it concerned "the nature of the classification—i.e., what line Defendants drew."[50] Specifically, although the defendants had contended that they distinguished between bidders on the basis of expected administrative costs, the plaintiffs there alleged that the defendants had in fact distinguished between bidders "associated with conservationists" and those who were not.[51] In contrast, "[i]n *Beach Communications*…there was no dispute over what line Congress had drawn: it drew a distinction between

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[48] Resp. Br. at 41-42.

[49] *See* section II.A, *supra*.

[50] 546 F.3d at 590.

[51] *Id.* at 590–92.

[cable television] facilities that serve separately owned and managed buildings and those that serve one or more buildings under common ownership or management," and "[t]he question was whether this distinction survived rational basis review."[52]

In this case, as in *Beach Communications*: there is "no dispute over what line" the City Council has "drawn."[53] It is undisputed that the City Council drew a line between FDNCs and other entities. The only question is whether that distinction was rational. Thus, *Lazy Y Ranch* is irrelevant on its own terms, and this Court need not concern itself with whether the conceivable bases for the Ordinance "actually motivated" the City Council.[54]

C. Respondents' claim under the Privileges and Immunities Clause fails.

Respondents' arguments in support of their Privileges and Immunities claim fare no better. An independent analysis under

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[52] *Id.* at 589-90 (cleaned up; first alteration in original).

[53] *Id.*

[54] *Beach Commc'ns*, 508 U.S. at 315.

Article I, section 12 of the Washington Constitution is warranted only when the legislation at issue implicates a fundamental right.[55] The Ordinance implicates no such right.

In arguing otherwise, Respondents liken this case to *Ralph v. City of Wenatchee*,[56] reasoning that the licensing fee at issue in *Ralph* implicated a fundamental right even though it did not "force the [plaintiffs] to shut down their businesses."[57] While that statement is technically accurate, this Court has recognized that the fee in *Ralph* "*effectively prohibited* nonresidents from engaging in the photography business."[58] In contrast, Instacart has made no allegation that the Ordinance would have the effect of driving it out of business and in fact has conceded that its

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[55] *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518-19, 475 P.3d 164 (2020).

[56] 34 Wn.2d 638, 209 P.2d 270 (1949).

[57] Resp. Br. at 68.

[58] *Am. Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (emphasis supplied).

business is thriving,[59] foreclosing a finding that the Ordinance implicates a fundamental right within the meaning of Article I, section 12.

D. Respondents do not state a claim upon which relief may be granted under the Contract Clause.

Respondents' Contracts Clause claim fails. First, Respondents' pleaded facts do not establish substantial impairment of their current contracts by the City's lawful exercise of its police powers.[60] Second, even if Respondents could establish substantial impairment, there is an irrefutable

[59] CP at 78-79 & 83 (Am. Compl. at ¶¶ 31-32 & 50).

[60] Indeed, Respondents do not identify impairment of any existing contracts; they only allege impairment of *future* rights that are subject to Respondents' unilateral change. CP at 81-83 (Am. Compl. at ¶¶ 42 & 49) (identifying Instacart's right to change "the Full Service Shopper Account Access Guidelines"); *see also id*. at 86-87 (Am. Compl. at ¶ 73) (referencing Instacart's purported contractual right to not "guarantee the availability of the Instacart platform"). Instacart could not have had a constitutionally protected expectation that its drivers would provide future deliveries on specific terms.

"rational connection between the purpose of the [Ordinance] and the method the [Ordinance] uses to accomplish that purpose."[61]

As an initial matter, Respondents mischaracterize the requirements of the Ordinance. For purposes of this analysis, the minimum payment is no different from any minimum wage requirement, and as detailed above, *supra* section II.A., the scope of the consumer protections is far more limited than Respondents would have the Court believe. These consumer protections hardly "seize[ ] control"[62] of Respondents' contracts. Rather, they prohibit only certain, narrowly circumscribed action and leave FDNCs' ability to react to market forces otherwise intact. Contrary to Respondents' contentions,[63] the Ordinance contains no blanket prohibition on FDNCs adjusting their business practices to account for the increased payments to workers. For

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[61] *Optimer v. RP Bellevue, LLC*, 151 Wn. App. 954, 970, 214 P.3d 954 (2009), *aff'd*, 170 Wn.2d 768, 246 P.3d 785 (2011).

[62] Brief at 43.

[63] Resp. Br. at 30.

example, nothing in the Ordinance would prevent FDNCs from increasing the costs of their services to food providers.

The consumer protections are hardly distinguishable from commonplace prohibitions on employers. For example, employers may not take money from employee benefit funds,[64] require employees to kickback their wages,[65] or refuse to pay their taxes[66] to offset requirements to pay wages.

Against this backdrop, Respondents have not pleaded a substantial impairment of any existing contract, and so their claims fail at the threshold. First, the Ordinance is consistent with the expectation, implicit in all private contracts, that the government may alter contracts in the exercise of its police powers.[67] Respondents' claim that the City cites no authority for

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[64] 29 U.S.C. §1106(a).

[65] RCW 49.52.050; 29 C.F.R. 531.35.

[66] U.S. Code Title 26.

[67] *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241, 98 S.Ct. 2716, 57 L. Ed.2d 727 (1978) (the

this proposition[68] is at odds with the briefing in this matter.[69] Moreover, Respondents acknowledge the centrality of the police power analysis to the Contract Clause claim.[70]

The principle that private contracts must yield to exercises of the police power applies with particular force in the context of temporary[71] laws passed in response to emergencies; the emergency powers of the state are deemed to be a part of all

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government's police powers are "paramount to any rights under contracts between individuals").

[68] Resp. Br. at 57-58.

[69] *See, e.g.*, Opening Br. at 55-56 and cases cited; CP at 186-87 (Mot. to Dismiss Am. Compl. at 27-28) (citing, *inter alia*, *In re Estate of Hambleton*, 181 Wn.2d 802, 830, 335 P.3d 398 (2014) for the proposition that the Contract Clause "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people") (cleaned up)).

[70] *See* Resp. Br. at 54 (stating that the law impairing contracts must satisfy the test for a valid exercise of the police powers and citing *Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 575-76, 502 P.2d 1197 (1972)); *see also* Resp. Br. at 56 (arguing that the Ordinance is not "necessary" to address public safety and health and therefore substantially impairs contracts).

[71] The Court should reject Respondents' illogical suggestion that the Ordinance is not a temporary measure because it remains in effect. Resp. Br. at 58.

contracts between private parties.[72] By their terms, the obligation to provide hazard pay and the consumer protections in the Ordinance will terminate when the current COVID-19 emergency is declared over.[73]

Second, the City's authority to regulate working conditions precludes an impairment of contracts in this context. Courts have recognized that a law does not cause a substantial impairment of a business' contracts where a business is already subject to regulation or even potential regulation.[74]

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[72] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

[73] CP at 105 (Ordinance Section 2, 100.025.D) & 130-39 (Ordinance No. 126122).

[74] *See Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413, 103 S. Ct. 697, 705, 74 L. Ed. 2d 569 (1983) (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); *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (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

Even if the Ordinance did work a substantial impairment on some contract held by Respondents and thus require the Court to proceed to the second and third steps of the Contract Clause inquiry, the Contracts Clause claim would be subject to dismissal because the Ordinance reasonably advances a legitimate governmental aim.[75] Because the Ordinance only impacts contracts between private parties, the second and third steps of the analysis under the Contract Clause amount to nothing more

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tenant relationship); *Gen. Offshore Corp. v. Farrelly*, 743 F. Supp. 1177, 1198 (D.V.I. 1990) (finding working conditions at a business 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").

[75] Respondents' claim that the Ordinance is different from other exercises of the police power that have been upheld because it does not prohibit any conduct, Resp. Br. at 59, is unsupported and unpersuasive. The Ordinance contains a variety of prohibitions, and even if it did not, this distinction is one of semantics: the requirement to pay hazard pay might just as easily be read as a prohibition against paying less than that amount per delivery or work-related stop.

than rational basis review:[76] courts defer to legislative determinations of reasonableness and necessity, and courts must presume that, if a conceivable set of facts exists to justify challenged legislation, the legislation promotes the welfare of the people.[77] Respondents fault the City for offering no argument on this point,[78] but because the standard is identical, the same rational bases for the Ordinance that defeat Respondents' police

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[76] Respondents' citation to *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) is inapposite. Resp. Br. at 60. The Court there held that the Contract Clause analysis *as a whole* is different than the less searching standards under the Due Process Clause. *R.A. Gray*, 467 U.S. at 733. The test for the second and third steps of the Contract Clause analysis remains a rational basis inquiry. *Cf.* Resp. Br. at 60 (quoting this Court's statement in *Ketcham*, 81 Wn.2d at 576 that the commands of the law must be "rationally connected" to the public health, safety, and welfare goals of the law).

[77] *Optimer*, 151 Wn. App. at 969-70 (quoting, *inter alia*, *Energy Reserves*, 459 U.S. at 413 and *Faulk*, 117 Wn.2d at 504).

[78] Resp. Br. at 59.

powers and equal protection claims doom their Contract Clause claim as well.[79]

E. Respondents' Taking Clause claim fails.

Respondents Takings Clause theory is anything but "classic."[80] Instead, Respondents have pleaded that a requirement to pay hazard pay, coupled with narrow consumer protections, "nullif[ies]" their contracts for labor with delivery drivers.[81] These allegations do not entitle Respondents to relief under well-established Takings Clause jurisprudence.[82]

First, Respondents seek to short-circuit the Takings Clause analysis by ignoring the prerequisite that *property must be taken*

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[79] *See* Sections II.A-B *supra; see also* Opening Br. at 18-40.

[80] Resp. Br. at 43.

[81] *Id*. at 46.

[82] Respondents' attempt to avoid long-overruled cases involving economic liberty falls flat. It is true that Respondents did not allege a violation of substantive due process (the claim at issue in cases like *Lochner*). However, their formulation of their Takings Clause and Contract Clause claims is reminiscent of nineteenth-century substantive due process arguments. *See* Petitioner's Opening Resp. Br. at 43 & n.97.

to trigger further inquiry. On their face, the Takings Clauses in the United States Constitution and the Washington Constitution require both property and a taking of that property to trigger the obligation for a government to provide compensation.[83] Respondents allege that the "property" giving rise to their Takings claim is their "contract rights" in their "previously agreed to contracts" for labor with delivery drivers.[84]

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[83] *See* U.S. Const. Am. V ("nor shall private property be taken for public use, without just compensation"); *see also* Wash. Const. Art. I, § 16 ("[n]o private property shall be taken… for public… use without just compensation…").

[84] Resp. Br. at 45-46. It is not clear that Respondents have identified any present, existing, contracts that are impaired. *See* note 60, *supra*. To the extent that the losses of which they complain are business expectations, such losses are not subject to the Takings Clause. *See* Opening Br. at 47-50. For example, in *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988), the Federal Circuit upheld dismissal of a takings claim on the pleadings where the nature of the contract rights was ambiguous. There, the President's imposition of sanctions on Libya ended employment contracts for plaintiffs. *Id.* at 898. The court remarked that "the contracts were not for a fixed period, and each contract could be terminated at the option of the employee or upon the failure or inability to maintain the necessary Libyan work or residence visas." *Id.* Further, the court noted that it was critical that "plaintiffs do not complain that the sanctions resulted

To the contrary, Instacart and other FDNCs, not the City, continue to be the sole possessors of all rights and obligations arising from their contractual relationships with drivers, customers, and merchants. The only impact of the Ordinance on those contracts is a requirement to pay certain minimum amounts and a limitation on FDNCs' ability to make certain changes in response to that requirement to pay.

Respondents maintain that the limitations in the Ordinance conflict with their purported contractual right "to modify the terms of its agreements with shoppers and control access to its platform."[85]

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in a loss of income for services previously provided but not yet paid for, merely the loss of the contingent right to future income for services yet to be rendered." *Id.* Accordingly, the court held that "[s]uch future damages are speculative and merely consequential to the valid exercise of governmental power" and so did not implicate a compensable taking. *Id.*

[85] Resp. Br. at 55–56. Instacart rightly does not contend that the premium pay requirement itself constitutes a "taking." *See, e.g.*, *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("[T]he takings analysis is not an appropriate analysis for

The problem with this novel theory is that Respondents' inchoate "rights" in their contracts are not "taken" for constitutional purposes. As the United States Supreme Court has recognized, contract rights are rarely taken for constitutional purposes. In *Omnia Commercial Co., Inc. v. United States* the Court required that for contract rights to be taken in a manner requiring compensation, the government must entirely appropriate the contract, not simply pass a law impacting the contract.[86] There, the appellant was the owner of a contract allowing it to purchase steel plating for ships. Before the steel was delivered, the government requisitioned the steel company's annual production of steel.[87] 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;

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the constitutional evaluation of an obligation … merely to pay money.").

[86] 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923).

[87] *Id.* at 507.

but if injured or destroyed by lawful action, without a taking, the government is not liable."[88] The Court held that, although the contract had been entirely frustrated (*i.e.* no steel plate could be acquired or paid for by the appellant), no taking had occurred.

> 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*.[89]

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[88] *Id*. at 510.

[89] *Id.* at 510-511 (cleaned up, emphasis supplied); *see, e.g.*, *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 486–87, 51 S. Ct. 229, 75 L.Ed. 473 (1931) (takings claim arising from government's "requisitioning … of [plaintiff's] contracts for the construction of two vessels"); *see also Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 120, 44 S. Ct. 471, 68 L.Ed. 934 (1924) (takings claim stated where government "took from claimant and appropriate to the use of the United States all the rights and advantages that an assignee of the contract would have had").

This principle remains current.[90] Indeed, the United States Supreme Court has relied on *Omnia* in cases involving the frustration of a business expectation.[91]

Here, the City took nothing of the contract for itself, and at most impacted a portion of the purported contracts. Such

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[90] *See, e.g., Acceptance Ins. Companies, Inc. v. United States*, 84 Fed. Cl. 111, 117-118 (Fed. Cl. 2008), *aff'd*, 583 F.3d 849 (Fed. Cir. 2009) (collecting cases). Contrary to Respondents' suggestion (Resp. Br. at 47 & n.7), *Omnia* was decided by the Court after it had already recognized the possibility of regulatory takings. *See, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322 (1922).

[91] *See, e.g., United States v. Grand River Dam Auth.*, 363 U.S. 229, 236, 80 S. Ct. 1134, 4 L. Ed. 2d 1186 (1960) (in holding that a state power district, deprived of the ability to operate a hydroelectric plant by the federal government's building of a project in an area where the power district had a franchise to build a power plant, had not stated a takings claim, the Court quoted *Omnia's* admonition that "[f]rustration and appropriation are essentially different things"); *see also Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1379, 1381 (Fed. Cir. 2008) (inchoate property rights in a contract were not taken, per *Omnia*, where the "government did not actually assume [plaintiff's] contracts" but rather plaintiff merely "saw its business interests frustrated by governmental regulation….").

actions do not constitute a taking.[92] In fact, Respondents' contracts are far less "frustrated" than those in *Omnia*; Respondents' contracts continue to operate, with the private parties to the contracts reaping the benefits and suffering the obligations of those agreements. The minimal change in terms related to pay or operations does not even end the contracts, as the government's action in *Omnia* did.

The City is unaware of any decision recognizing such a limited interference with contractual rights as a *per se* taking or a "regulatory taking" subject to the multifactor test announced in *Penn Central Transportation Co. v. City of New York*.[93] The only

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[92] *See Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) (holding that a statute overriding a contractual provision establishing monetary liability among parties to the contract was not a taking as "the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose").

[93] 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978). Because Respondents have failed to identify a legally cognizable taking to sustain their Takings claim, no *Penn Central* analysis is

decision Respondents cite in which a court applied the *Penn Central* analysis to a purported taking of contract rights is

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necessary. However, if such an analysis were proper, Respondents' pleadings still would not state a claim. *See* CP at 345. First, Respondents pleaded a booming business, foreclosing any possibility of sufficient economic impact. *Penn Central*, 438 U.S. at 124; CP at 78-79 (Am. Compl. at ¶¶ 31-32); *compare Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (citing *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)) (no case resulting in less than 50% diminution in value of property found sufficient under *Penn Central*). Second, as a leader in a new industry around which governments are still formulating regulatory responses, Instacart could not have reasonably expected to be free from government regulation. Indeed, Instacart operates in Seattle, which has been at the forefront of regulating the gig economy. *Penn Central*, 438 U.S. at 124. And finally, the "interference" with Respondents' contracts "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good" a form of government action that does not support a taking. *Connolly*, 475 U.S. at 225; *see Taylor v. United States*, 959 F.3d 1081, 1087-90 (Fed. Cir. 2020) (upholding a Fed. R. Civ. P. 12(b)(6) dismissal of a regulatory takings claim where the plaintiff had alleged a taking of only an "interest in the benefits of contract," lawfully terminated by one private party as protected property, and the plaintiff was operating in a heavily regulated industry). Claims subject to *Penn Central* analysis may be properly disposed of on a motion to dismiss. *See Taylor*, 959 F.3d 1081; *see also Chang*, 859 F.2d 893.

Cienega Gardens v. United States.[94] In that case, the sole purpose of the regulation at issue was to extinguish certain private parties' contractual rights "to prepay their forty-year mortgage loans after twenty years."[95] The Federal Circuit held that unlike "legislation targeted at some public benefit, which incidentally affects contract rights," a law "*aimed at* the contract rights themselves in order to nullify them" could be the basis for a takings claim.[96] The ordinance plainly falls within the former category, given that its purpose is to provide delivery drivers with hazard pay for the length of the COVID-19 pandemic, not to "nullify" any of Instacart's contracts. Indeed, the Ordinance requires FDNCs to

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[94] 331 F.3d 1319 (Fed. Cir. 2003).

[95] *Id.* at 1323.

[96] *Id.* at 1335 (emphasis supplied); *cf. Huntleigh USA Corp.*, 525 F.3d at 1381–82 (distinguishing *Cienega Gardens* from a case involving the frustration of contracts for security services at airports due to the creation of the Transportation Security Administration because the plaintiff's "contracts with various commercial airlines were frustrated by a shift in the government's regulation of the airlines" as opposed to having contracts with the federal government unilaterally modified by Congress in material terms.).

honor their existing contracts, instead of modifying certain terms in response to the Ordinance's passage.

Second, and perhaps more troubling, Respondents seek to convert a simple allegation of contract impairment into a taking of their contracts for labor.[97] It is well settled that the Constitution does not prohibit workplace regulations that impact private contracts for labor.[98] Nor does a requirement to pay money to workers, coupled with limited restrictions on business activities, amount to a taking of Respondents' contracts for labor.

Respondents' strained reading of the "taking" of contract rights fails to account for the differences between the Contract

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[97] Resp. Br. at 45-46.

[98] *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-393, 57 S. Ct. 578, 81 L.Ed 703 (1937) (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") (cleaned up); *Peterson v. Hagan*, 56 Wn.2d 48, 55-56, 351 P.2d 127 (1960) (recognizing that *City of Seattle v. Smyth*, 22 Wn. 327, 60 P. 1120 (1900), which found an eight hour workday ordinance unconstitutional on the grounds that it interfered with a contract for labor, had been overruled).

Clause and Takings Clause. Mere impairment of contracts is properly analyzed under the Contract Clause.[99] The conversion of a simple claim of contract impairment into a takings claim would effectively obliterate the Contracts Clause as a means of analyzing state regulation of activities also subject to private agreements, by allowing litigants to bypass the requirements of the Contract Clause in favor of a less rigorous analysis under the Takings Clause. Such a regime would run headlong into the maxim that all elements of the constitution must be given effect.[100] Indeed, Respondents have not identified any court that

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[99] *See* Section II.D, *supra*.

[100] *See*, *e.g.*, *Application of Eng*, 113 Wn.2d 178, 184, 776 P.2d 1336 (1989) ("in construing a constitutional provision, one must view the instrument as a whole and give effect to all of its provisions harmoniously"); *see also* Thomas W. Merrill, "The Landscape of Constitutional Property," 86 Va. L. Rev. 885, 990–91 (2000) (permitting impairments of contracts to become a taking would render the Contract Clause "superfluous"); *Parella v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (noting that, "when faced with multiple, potentially relevant constitutional provisions, courts should invoke the provision that treats most directly the right asserted," and holding that where "the only property interest

has ever applied Respondents' preferred "regulatory takings" analysis to claims premised solely upon a law's alleged impairment of private contracts for labor.[101]

Furthermore, Respondents' attempt to treat any impairment of a contract as a taking would subject all economic legislation to a multi-factor test that Respondents themselves contend can never be applied on a motion to dismiss.[102] Accordingly, accepting Respondents' position would 'ratchet down' the pleading standard for such claims.[103] Respondents do

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alleged is an expectancy interest claimed to derive from a contract," any takings claim should be analyzed "under the Contract Clause").

[101] Resp. Br. at 47 & n.6. *Cf. Nw. Grocery Ass'n v. City of Seattle*, 526 F. Supp. 3d 884, 893–94 (W.D. Wash. 2021), *appeal dismissed*, 21-35205, 2021 WL 4206416 (9th Cir. Sept. 7, 2021) (refusing to apply heightened scrutiny to an equal protection challenge to the City's grocery employee hazard pay Ordinance based on an alleged impairment of contracts).

[102] Resp. Br. at 50. The City respectfully disagrees with the conclusion. *See supra*, n. 93.

[103] *Cf.* Resp. Br. at 31 (claiming that the City is seeking to "ratchet[] up" pleading standards for plaintiffs).

not dispute that every minimum wage law could be attacked as a taking under its theory.[104]

Third, Respondents' reliance on the recent *Cedar Point Nursery v. Hassid*[105] decision is misplaced. The Court in *Cedar Point* addressed a law forcing certain landowners (agricultural employers) to suffer an intermittent physical "invasion" by people they never invited onto their land (union organizers).[106] The only new issue addressed in *Cedar Point* was whether the law created a physical easement sufficient for *per se* "physical invasion" takings purposes even though the right to invade did not span every hour of every day of the year.[107] The *Cedar Point* Court ruled that the intermittent physical easement provided by the law effected a *per se* taking.[108] That real property holding

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[104] *Id.* at 49.

[105] -- U.S. --, 141 S. Ct. 2063, 210 L.Ed.2d 369 (2021).

[106] *Id.* at 2069.

[107] *Id.* at 2074.

[108] *Id.* at 2074-76.

has no application here; *Cedar Point* is silent as to evaluating the taking of contracts or other inchoate property rights in the context of regulatory takings.[109]

Respondents' claim that the Ordinance "forc[es] Instacart to spread desirable benefits to workers (guaranteed and enhanced pay), consumers (artificially low grocery delivery prices) and retailers (guaranteed low-cost delivery)" and is therefore akin to wartime orders commandeering whole industries is equally misplaced.[110]

For example, nothing in the Ordinance requires FDNCs to "guarantee" low-cost delivery to retailers. FDNCs are free to increase the rates they charge businesses without any restriction

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[109] *See generally Cedar Point* 141 S. Ct. 2063.

[110] Resp. Br. at 48. In fact, even wartime government actions that completely end a contract are not takings, *cf. Omnia*, 261 U.S. 502.

from the Ordinance. Further, guaranteed pay is commonplace in federal, state, and local minimum wage laws.[111]

F. The trial court properly dismissed Respondents' claim under Ch. 82.84 RCW.

Respondents concede that the Ordinance does not raise money for public purposes or bring money into the public treasury and therefore does not impose a tax on groceries.[112] But they urge this Court to overlook the fact that "tax, fee, or other assessment on groceries" is specifically defined in RCW 82.84.030 to include *only* measures that are "similar" to the types of taxes listed, and instead, they emphasize other statutory terms. Their arguments find no support in statutory text or purpose.

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[111] Respondents' complaint about "artificially low" grocery prices is at odds with their insistence on the importance of affordable food. *See* Resp. Br. at 16-17.

[112] *See King Cty. Fire Prot. Dists. No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cty.*, 123 Wn.2d 819, 833, 872 P.2d 516 (1994) (defining a tax).

Respondents focus on the use of "any" to modify "tax, fee, or other assessment on groceries" in RCW 82.84.040.[113] However, the phrase "tax, fee, or other assessment on groceries" is statutorily defined as including "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…."[114] Respondents do not even attempt to show that hazard pay to workers is "similar" to any of the enumerated taxes in Chapter 82.84 RCW's definition. Instead, they rely on *Amalgamated Transit Union Loc. 587 v. State*[115] for the proposition that "the term any…means something other than similar."[116] But there, the statute at issue did not limit the word "any" with a qualifier;[117] here "similar" expressly restricts the scope of prohibited taxes,

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[113] Resp. Br. at 22–23.

[114] RCW 82.84.030(5) (emphasis supplied).

[115] 142 Wn.2d 183, 219, 11 P.3d 762 (2000).

[116] Resp. Br. at 23.

[117] *Amalgamated Transit Union*, 142 Wn.2d at 193.

fees, or assessments. Respondents emphasize that every word in the statute should be given meaning, but their reading ignores the word "similar" entirely.

Respondents also contend that the statutory language of "includes, but is not limited to" demonstrates that RCW 82.84's definition must be read expansively.[118] Though the quoted language may imply that the listed examples are illustrative, not exhaustive, the examples can, nevertheless, "*limit* the scope of the statute."[119] Interpreting a statute that used "including, but not limited to" and did not include the word "similar," this Court still applied the principle that "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms."[120] That principle applies with greater

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[118] Resp. Br. at 23, 25 & n.2.

[119] *State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740, 743 (2015) (emphasis in original).

[120] *Id.*

force here, as the statute explicitly directs that covered charges should be comparable to the enumerated taxes.

Respondents also rely on case law and dictionaries supplying the common meaning of "fee."[121] But Chapter 82.84 RCW's definition applies to the entire term "tax, fee, or other assessment on groceries," so "fee" and "other assessment" have no independent statutory meaning. "A legislative definition prevails over a dictionary definition or common understanding of any given term."[122] Further, even if the common definition of fee were relevant here, "the common and ordinary understanding is that a tax supplements the public treasury, while a fee *circles back to the regulator* to cover the cost of regulation."[123] Both the

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[121] Resp. Br. at 22.

[122] *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 458, 832 P.2d 1303 (1992); *see also Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 147 L.Ed.2d 743 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.")

[123] *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 670, 278 P.3d 632 (2012) (emphasis supplied). Respondents cite several cases addressing

ordinary understandings of "tax" and "fee" thus incorporate an understanding that money ends up in government coffers, either for a general or specific purpose—not with a third-party worker.

Next, Respondents contend that the words "charge" or "exaction" inherently incorporate non-governmental payments.[124] But those terms as well are modified by the word "similar." And even if that were not the case, the California Court of Appeal recently recognized that broad language encompassing "any levy, charge, or exaction of any kind imposed by a local government" does not encompass a charge paid by consumers to another private party because the funds do not remit to the government.[125]

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whether a certain charge is a tax or a fee, all of which involve money remitted to the government. *See, e.g.*, *id.* at 671; *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 749–51, 966 P.2d 1232 (1998).

[124] Resp. Br. at 23-24.

[125] *Schmeer v. Cty. of Los Angeles*, 213 Cal.App.4th 1310, 1325–26, 153 Cal.Rptr.3d 352 (2013). The language in *Schmeer* was even broader than here because it was not constrained by use of the word "similar."

Respondents further argue that the trial court's reading of the statutory language would make "impose" and "collect" duplicative.[126] But in fact, similar language—differentiating imposition and collection—is commonly used in the context of taxation, which always accrues to the state. Under Article VII, section 1 of Washington's Constitution, all taxes "shall be *levied and collected* for public purposes only."[127] If both terms in the initiative could be distinguished only by reading "impose" to include charges not remitted to the government, the Constitution's use of "levy" and "collect" would be surplusage in the context of taxation. Further, the use of both terms makes sense, given that taxes may be imposed by one entity but collected by another,[128] and may refer to temporally distinct

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[126] Resp. Br. at 26-27.

[127] *See also* US Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes.").

[128] *See, e.g., Cal. Cannabis Coal. v. City of Upland*, 3 Cal.5th 924, 944–45, 401 P.3d 49 (2017), *as modified on denial of reh'g* (Nov. 1, 2017) (holding that a tax adopted by initiative was not imposed by the City, even if the city collected the funds).

events—so that, by prohibiting both, the statute makes each collection a new violation, extending any applicable statute of limitations.

Nor does statutory purpose support Respondents' reading of the statute. The initiative was designed to "prohibit[] new, local taxes on groceries, period."[129] Respondents focus on the statute's declaration that "keeping the price of groceries as low as possible improves the access to food for all Washingtonians," RCW 82.84.020(2), but ignore that the findings that immediately follow exclusively address taxes, declaring that "*taxing* groceries is regressive and hurts low- and fixed-income Washingtonians the most" and "working families in Washington pay a greater share of their family income in *state and local taxes* than their wealthier counterparts."[130] Moreover, Respondents concede that the Ordinance explicitly prohibits covered businesses from

[129] CP 215 (voter pamphlet).

[130] RCW 82.84.020(3)-(4) (emphasis supplied).

passing the costs of hazard pay on to customers, so that it does not even implicate Respondents' imagined purpose of prohibiting all measures that could cause grocery prices to increase for consumers.[131]

Respondents' reading of RCW 82.84 would render it applicable to any imposition of an additional cost regardless of whether the government, workers, consumers, or any other person is the beneficiary. That the Ordinance's premium pay requirement applies per "stop" rather than per hour does not transform it from a minimum wage regulation into a prohibited grocery tax or fee. Respondents' expansive reading of Chapter 82.84 RCW would preempt any efforts by local governments to regulate the wages of grocery store or food delivery employees. In fact, Respondents' argument may prohibit any regulation of grocery stores or food delivery companies. A requirement that

[131] CP 106 (Ordinance 100.027.A.4) (prohibiting hiring entities from "[a]dd[ing] customer charges to online orders for delivery of groceries" as a result of the Ordinance).

grocery cashiers be allowed to sit while working, for example, could be deemed a "charge" requiring stores to purchase additional chairs from a third party. Such a reading is contrary to the text of the statute, and nothing in the materials provided to the voters who approved Initiative 1634 ever suggested such a result.

III. CONCLUSION

This Court should reject Respondents' arguments, each of which runs counter to settled authority and seeks to privilege private business interests over public welfare. For more than a century, courts have rejected the notion that the 'free market' should supersede the actions of an elected government aimed at protecting public safety, health, and welfare. The City respectfully requests that the Court reverse the trial court's denial of the City's motion to dismiss with respect to Respondents' police power, equal protection, Contracts Clause, Takings Clause, and 42 U.S.C. § 1983 claims and affirm the trial court's dismissal of Respondent's claim under Chapter 82.84 RCW.

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