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,

REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

There is no dispute that the City's Gig Worker Premium Pay ordinance is an economic regulation, subject only to rational basis review. Nonetheless, the trial court's ruling on the motion to dismiss below commits the trial court to evaluating (1) Council's motives in enacting the law (the sole focus of Respondents' Answer to the Motion for Discretionary Review); and (2) whether, as a factual matter, the law is necessary. This is not rational basis review, satisfied when *any reasonably conceivable basis* supports the law, whether or not it was the actual basis. Respondents do not contest at least one obvious basis for the Ordinance: ensuring that delivery drivers are adequately compensated for the risks they take.

The trial court's ruling is a return to nineteenth century notions of the role of courts in evaluating economic legislation, requiring the trial court to substitute its judgment and policy preferences for those of elected legislators. The trial court's willingness to ignore settled precedent requiring dismissal of Respondents' Contract Clause and Takings claims further reinforces this retrograde view. If left to stand, the trial court's obvious legal errors will cause further useless proceedings, permitting discovery, motions practice, and eventually a trial, all of which is unnecessary and inappropriate.

II. ARGUMENT

A. The City could have rationally believed the Ordinance would achieve its legitimate policy goals.

Economic regulations, based on police powers, *must be upheld* over challenges to their validity if they have any reasonably conceivable basis. This is true for police power, Equal Protection, and Contract Clause claims. In Washington, "if a state of facts justifying … [a police power] ordinance can reasonably be conceived to exist" those facts are presumed, and the ordinance must be held to support the ordinance.[1] Thus, "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."[2] The tests are substantially the same for Equal Protection claims[3] and elements of the Contracts Clause claims.[4] Accordingly, the central inquiry[5]

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[1] *City of Seattle v. Webster*, 115 Wn.2d 635, 654 (1990).
[2] *Petstel, Inc. v. King Cty.*, 77 Wn.2d 144, 155 (1969).
[3] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 315 (1993) (if there is "any reasonably conceivable… rational basis… it is entirely irrelevant… whether the conceived reason for the distinction actually motivated the legislature"); *see Heller v. Doe*, 509 U.S. 312, 320 (1993) (the government has no obligation to provide evidence to sustain the rationality of a classification).
[4] *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 969 (2009) (in evaluating whether private contracts are substantially impaired by a law 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") (cleaned up).
[5] Respondents' focus on the procedural posture of cases cited by the City is of no moment. Ans. at 15. The trial court was required to apply the facts, as pled, to the substantive law. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215 (2005). The substantive law is explained in cases in a variety of procedural postures.

for these claims is whether the City "*could rationally have decided that*" the Ordinance would achieve legitimate governmental goals.[6]

Here, rational bases for the ordinance abound. Notably, whether or not the Ordinance was a rational mechanism to promote public health and safety or driver retention, Respondents fail to even acknowledge a separate—and unequivocally rational—basis for the Ordinance. The hazard pay requirement compensates drivers for work-related risks they face.[7] The consumer protections in the law ensure that drivers receive the hazard pay they are due, while also protecting safe public access to food. Under these circumstances, Respondents' complaint must fail: "[e]ven at the motion to dismiss stage, a plaintiff alleging an equal protection violation must plead facts that establish that there is not any reasonable conceivable state of facts that could provide a rational basis for the classification."[8]

Respondents' allegations, that the law is unnecessary or pretextual are not relevant; there is a "reasonably conceivable state of facts" that provide a rational basis for the Ordinance, and it is therefore "not necessary to wait for further factual development in order to conduct a rational basis

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[6] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis in the original).
[7] Motion for Discretionary Review (Mot.), Appendix C at 59-60.
[8] *Hettinga v. United States*, 677 F.3d 471, 479 (D.C. Cir. 2012) (cleaned up); *see Daunt v. Benson*, 2021 WL 2154769, at *23, --F.3d-- (6th Cir. 2021) (to survive a motion to dismiss challenges to a law subject to rational basis review, plaintiffs must plead sufficient facts to negate every conceivable rational basis); *Wasatch Pedicab Co. L.L.C. v. Salt Lake City Corp.*, 343 Fed. Appx. 351, 354 (10th Cir. 2009) (unreported) (same).

review on a motion to dismiss."[9] Cases cited by Respondents amply demonstrate this principle.

In *Fowler Packing Company* the Ninth Circuit considered challenges to two carve-outs in a California prevailing wage law.[10] The defendant explained that the first exception was intended to exempt specific individuals already involved in litigation, and offered *no explanation* for the second exception.[11] The Ninth Circuit held that the first exception, "can *only* be explained as a concession" to a political stakeholder; and that, absent any explanation at all for the second exception, the court "*cannot conceive of any legitimate justification* for this perplexing provision…."[12] Rational bases offered for the Ordinance fully explain the legislative choices made by the City. As the Ninth Circuit recognized, if a court can "imagine a plausible basis" for a law, its inquiry is at an end.[13] No imagination is necessary here; the Ordinance has undisputed rational bases.

B. Respondents' Contract Clause and Takings claims, reviving discredited "economic liberty" theories, fail.

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[9] *Gilmore v. Cty. of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005) (cleaned up); *see Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 228-229 (2006), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682 (2019) (quoting *Nebbia v. People of New York*, 291 U.S. 502, 537 (1934)) ("legislatures are 'free to adopt whatever economic policy may reasonably be deemed to promote public welfare;' [and with] the 'wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal'").
[10] *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809 (9th Cir. 2016).
[11] *Id.* at 815-816.
[12] *Id.* (emphasis supplied).
[13] *Id.* at 815 & n.3.

Though Respondents disclaim a *Lochner*-style economic liberty theory for their case,[14] their allegations belie their position. Respondents' claims preference Respondents' freedom to set terms by contract for labor and for payment from businesses over governmental power to regulate businesses for public health, safety, and welfare.[15] It is this interference with the "right to contract" that was at the heart of the long discredited *Lochner* decision.[16] Perhaps recognizing that a substantive due process claim based on an alleged "freedom to contract" was doomed by decades of binding precedent, Respondents repackaged their economic liberty arguments as Contract Clause and Takings claims. These claims are unsuccessful as a matter of law, both under modern jurisprudence and as attempts to prioritize business interests over the public good.

First, all private contracts are subject to the state's police power; thus they cannot be unconstitutionally impaired by valid exercise of those powers.[17] Similarly, temporary, emergency legislation, addressed to a great

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[14] Respondent's Answer to Petitioner's Motion for Discretionary Review (Ans.) at 2; Respondents' Answer to Statement of Grounds for Direct Review at 6-7.
[15] *See* Mot., Appendix J at 316 (describing Instacart's business as "multiple sets of contractual relationships" and complaining that the Ordinance "imposes new restrictions and duties on Instacart's contractual rights" that amount to impairment of the contracts and a taking of those contracts).
[16] *See Lochner v. New York*, 198 U.S. 45, 53 (1905) *abrogated by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (a law setting 60-hour workweek for bakers in New York "necessarily interferes with the right of contract between the employer and employees" over terms and conditions of employment and is therefore unconstitutional).
[17] *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).

calamity, cannot impair contracts as a matter of law.[18] In *Amunrud v. Bd. of Appeals*, this Court specifically rejected the proposition that regulation of the relationship between businesses and workers is "outside of the police power of the state legislature to protect workers and interfere[s] with" contracts for labor.[19] Here, the Ordinance is a core exercise of the City's police powers, addressing an emergency. It cannot impair Respondents' contracts.

Second, Respondents' claim, that their esoteric "property" in their contract rights is taken, is insufficient as a matter of law. Contrary to Respondents' position, *Penn Central*'s regulatory takings analysis can only come into play (if at all) if Respondents' first establish that they have been deprived of a property interest. Otherwise, every law that requires businesses to better compensate workers, or results in reduced profits, would be subject to a *Penn Central* analysis. That is not, and cannot be, the law.

Respondents' contract rights are only taken if the contract is repurposed to provide the benefit of the contract to the state, not merely

[18] *Building Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934).
[19] *Amunrud*, 158 Wn.2d at 228 (2006) (citing *Lochner*, 198 U.S. 45); *see U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 60-61 (1977) (Brennan, J., dissenting) (remarking that "during the heyday of economic due process associated with *Lochner*" the Supreme Court treated "'the liberty of contract' under the Due Process Clause as virtually indistinguishable from the Contract Clause").

impaired in some way.[20] This standard remains current.[21] The private property that Respondents allege is taken is, again, their right to set the terms and conditions of their contracts.[22] This argument, which closely parallels Respondents' Contract Clause claims,[23] is indistinguishable from the substantive due process argument courts have rejected since the end of the *Lochner* era.

C. Respondents have failed to state a Washington Privileges and Immunities claim.

The trial court erred in allowing Respondents' claim under the Washington Constitution's Privileges and Immunities Clause[24] to proceed. Such claims are only proper where the law implicates a "fundamental right of state citizenship;" otherwise, such claims are indistinguishable from the federal Equal Protection analysis.[25] Respondents' claims that the Ordinance implicates their "right to carry on business" [26] are incorrect as a matter of

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[20] *Omnia Commercial Co. Inc. v. United States*, 261 U.S. 502, 513 (1923).
[21] *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).
[22] *See* Mot., Appendix D at 107-108 (First Amended Complaint); *see also id.*, Appendix J at 321 ("It is the rights defined by pre-existing contracts, not revenues or profits, that the City has taken and impaired through regulation").
[23] Allowing Respondents' claims to proceed as Takings claims also collapses existing Contract Clause jurisprudence. *See Classic Cab, Inc. v. D.C.*, 288 F. Supp. 3d 218, 225, 227 (D.D.C. 2018) (where a law "has not deprived the plaintiffs of any legal rights or remedies arising from the contract… [but] [a]t most… has had the *effect* of reducing or eliminating the contract's value" any "cognizable constitutional claim" is "under the Contract Clause, not" the Takings Clause or Due Process Clause) (emphasis in the original).
[24] Wash. Const. Art. I, § 12.
[25] *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518-519 (2020).
[26] Ans. at 17 & n.13.

law. In Washington, "mere harm to a business's profits caused by a change in the laws does not implicate the right to carry on a business." [27] Respondents did not plead, nor could they, that they were "effectively prohibited" from engaging in business at all. [28]

D. The trial court's errors raise issues of broad public importance requiring immediate remedy.

Respondents' Amended Complaint is a re-hashing of discredited theories of the role of the judiciary in evaluating economic legislation. As Respondents see it, "the City has appropriated Instacart's and other FDNCs' private networks to provide public benefits to Seattle drivers…."[29] This view of laws establishing worker protections harkens back to the nineteenth century, and such "[a] return to the *Lochner* era would… strip individuals of the many rights and protections that have been achieved through the political process."[30] Though Respondents seek to downplay the importance of the trial courts' ruling, it is critical this Court guide Washington courts evaluating economic legislation. Attempts by governments to protect and support people subject to their jurisdiction are routinely the focus of

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[27] *Blocktree Properties, LLC v. Public Utility Dist. No. 2 of Grant Cty, Washington*, 380 F. Supp.3d 1102, 1124 (E.D. Wash. 2019) (citing *Am. Legion Post #149 v. Dep't of Health*, 164 Wn. 2d 570 (2008), *Ass'n of Washington Spirits and Wine Distribs. v. Washington State Liquor Control Bd.*, 182 Wn.2d 342 (2015)).
[28] *Am. Legion Post#149*, 164 Wn.2d at 608 (emphasis added) (citing *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644 (1949)).
[29] Ans. at 5.
[30] *Amunrud*, 158 Wn.2d at 230.

litigation by powerful interests who could not prevail politically. Subverting the political process threatens the welfare of the people of this state.[31]

Further, the trial court's refusal to eliminate meritless claims on a CR 12(b)(6) motion significantly burdens governments seeking to protect the public health, safety, and general welfare. Discovery into legislative motives is disruptive and generally impossible; and here is wholly useless. As described at length above, the individual motives of legislators cannot provide a basis for overturning the Ordinance. [32]

E. There is no need to revisit the trial court's ruling on Respondents' spurious taxation preemption claim.

[31] Respondents' suggest that review of errors in a denial of a motion to dismiss is unnecessary. This is incorrect; permitting the litigation to proceed beyond a motion to dismiss when there is no legal basis for a plaintiffs' claims is reviewable error. *See Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380 (2002) (Court of Appeals, after accepting discretionary review on discovery order, should have also heard appeal of denial of motion to dismiss); *Montgomery v. Air Serv Corp., Inc.*, 9 Wn. App. 2d 532, 537 (2019) (where "the trial court's decision [denying a motion to dismiss] appeared inconsistent with recent case law from the United States Supreme Court" regarding personal jurisdiction, discretionary review is appropriate); *Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 938 (2014), *aff'd*, 184 Wn.2d 252 (2015) (taking discretionary review of denial of a motion to dismiss a claim of employment termination in violation of public policy).

[32] The fact that certain information may be available under the Public Records Act ("PRA") is irrelevant here. While some communications between legislators and constituents may be available, albeit on a different timeline and subject to different procedural requirements, Respondents will undoubtedly assert that they must depose legislators as to their motives, an exercise unavailable under the PRA. Such depositions are both unhelpful and improper. *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),.

This Court need not revisit Respondents' contention[33] that a ban on local taxes on groceries preempts the Ordinance. Respondents do not try to argue that the trial court's ruling meets the requirements of RAP 2.3 or 4.2; and the trial court made no error here. Local government may not "impose or collect any tax, fee, or other assessment on groceries" where the phrase "tax, fee, or other assessment on groceries" is defined solely by reference to other taxes, including sales tax and business and occupation tax, "or any other *similar* levy, charge, or exaction…."[34] Setting pay requirements, or instituting consumer protections, are simply not taxes.[35] The trial court correctly dismissed this claim; the Court should not hear Respondents' cross appeal.

III. CONCLUSION

The trial court did not apply the proper legal standard in considering the City's Motion to Dismiss in this matter. As a result, the trial court is now poised to substitute its own judgment for that of elected legislators. This heightened scrutiny of economic regulations stands in stark contrast to the established law in Washington. The Court should grant discretionary review to remedy this serious error immediately.

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[33] Ans. at 19-20.
[34] RCW 82.84.040, 82.84.030(5) (emphasis supplied).
[35] To the extent that the plain language of the law need be interpreted, the voters' pamphlet unequivocally demonstrates that RCW 82.84 is intended to prohibit *only* local taxes on groceries. *See* Mot., Appendix F at 194-196.

RESPECTFULLY SUBMITTED this 18th day of June, 2021.

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