

FILED
SUPREME COURT
STATE OF WASHINGTON
1/3/2022 4:16 PM
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No. 99771-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON FOOD INDUSTRY ASSOCIATION and
MAPLEBEAR, INC. d/b/a INSTACART,

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

**BRIEF OF *AMICUS CURIAE* NORTHWEST GROCERY
ASSOCIATION**

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I. INTRODUCTION

The Northwest Grocery Association (“NWGA”) respectfully submits this *amicus curiae* brief contingent on the granting of the accompanying motion for leave. This brief urges the Court to reverse and remand the trial court’s dismissal of Plaintiff-Respondent’s Count I that RCW 82.84 preempts Seattle City Council Ordinance 126094 (the “Ordinance”).¹

Initiative 1634, codified at RCW 82.84 (the “Keep Groceries Affordable Act”), provides that “a *local governmental entity may not impose or collect* any tax, fee, or other assessment on groceries.” (emphasis added). The Act then states that a “[t]ax, fee, or other assessment on groceries includes, but is not limited to, a sales tax, gross receipts tax, business and occupation tax, business license tax, excise tax,

¹ Although the NWGA only addresses Plaintiff-Respondent’s Count I herein, the NWGA supports each contention Respondents raise in opposition to the Ordinance.

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.” RCW 82.84.030(5) (emphasis added). Yet, the Ordinance does exactly that by imposing a \$2.50 surcharge on groceries and other food deliveries in Seattle.

The Ordinance raises a host of legal pitfalls — as discussed in the parties’ briefing. This amicus brief focuses on several other significant public health, safety, and economic implications this Court should consider, as further explained below.

II. IDENTITY, INTEREST AND FAMILIARITY OF AMICUS CURIAE

The NWGA serves as a representative and trade association for the grocery industry in Washington, Oregon, and Idaho by promoting the common interests of its approximately 1,200 member retailers (“Grocers”). As part of its mission, the NWGA has long advocated on behalf of its

Grocers on important policy issues, including, but not limited to, issues related to labor, transportation, taxation, and other matters which impact its Grocers' business operations. Consistent with its mission, the NWGA continues to support preemption efforts to promote a statewide standard for fees, taxes, and other policies that impact Grocers—largely to ensure efficient distribution of products.

The NWGA has worked closely with its Grocers through every aspect of the pandemic response — including, but not limited to, addressing supply chain issues, vaccination logistics, and tracking legislative developments to ensure compliance. Most importantly, the NWGA has supported its Grocers' efforts to quickly adapt to the new environment to ensure that they operate in a safe and hygienic manner in order to help slow the spread of COVID-19, and protect their employees and the public. Grocers often depend on third-party delivery services to

remain competitive with large grocery chains and online retailers that provide in-house delivery services.

The NWGA strongly supported passage of Initiative 1634, codified at RCW 82.84, which Respondents correctly contend preempts the Ordinance. The NWGA's goal in supporting the Initiative, then and now, was to alleviate the financial burdens being imposed on retail groceries by state and local governments, in order to "keep the price of groceries as low as possible[.]" See RCW 82.84.020. The surcharge imposed by Ordinance 126094 plainly constitutes a "tax, fee, or other assessment on groceries" which Initiative 1634 was intended to prohibit, and as a result the Ordinance is harming the NWGA's member grocers throughout Seattle. This *amicus* brief supports but will not repeat the Respondents' analysis of the "plain language" of RCW 82.84; the goal of this brief is to demonstrate how the Ordinance undermines the purpose and intent of the NWGA and other supporters of Initiative 1634,

and to address the adverse impact of the Ordinance on Seattle grocers.

III. ARGUMENT

A. The Ordinance Conflicts With the Stated Purpose and Intent of RCW 82.84 and Hurts NWGA Grocers and the Communities They Serve.

As noted above, as a supporter of Initiative 1634, the NWGA agrees wholeheartedly with the Respondents' argument that the plain language of RCW 82.84 preempts the Ordinance. Contrary to the trial court's opinion and the Defendant-Appellant's brief, the purpose and intent of Initiative 1634 was not solely to prohibit local "taxes" on groceries. Rather, as stated in plain language, the RCW prohibits any local "tax, fee, or other assessment on groceries." Indeed, the stated purpose of the RCW is to "keep the price of groceries as low as possible[.]" *See* RCW 82.84.020. That was certainly the NWGA's understanding when the association supported passage of Initiative 1634. The Ordinance defies the intent of

the voters and is harming NWGA's Grocers throughout the City.

Grocery is a high-volume, low-margin business that has been stagnant, and underperforming compared with the rest of the U.S. economy. *See, e.g.,* Dr. Robert Kulick, *The Economic Impact of Instacart on the Retail Grocery Industry: Evidence from Four States*, 9–12 (February 2020).

NWGA Grocers benefit from the operations of food delivery network companies ("FDNCs") which provide greater access to customers. FDNCs provide new revenue streams, without Grocers necessarily incurring the costs involved in creating and maintaining an in-house delivery network and platform. For instance, Respondent Instacart (a delivery and enterprise-solutions platform) increased grocery store revenues by \$55.8 million and created more than 1,900 Washington jobs in the retail grocery industry in 2019 due to increased demand of online grocery deliveries. *Id.* at 24, 26. Independent grocers,

which create 20,350 jobs in Washington, and pay \$805.61 million in wages annually, are struggling to break even during the pandemic. *See, e.g.*, Washington Food Industry Association, <https://www.wa-food-ind.org/hazard-pay> (last visited December 13, 2021). Without access to platforms like Instacart, Grocers would have struggled even more to stay afloat.

The Ordinance is only adding to Grocers' burden, as the delivery surcharge imposed on FDNCs impairs their ability to conduct business. Less availability of delivery services will lead to less customers utilizing the service – which results in more people shopping in grocery stores, and essentially undercutting the Seattle City Council's supposed public health goals in enacting the Ordinance in the first place.

Furthermore, although larger grocery operations may be able to subsidize some store losses with other stores' earnings, that is simply not an option for most NWGA's Grocers. Such a surcharge may ultimately force employers to cut staff, reduce

hours, or have a reduced impact on their community. Some Grocers have already had to take such measures. Indeed, in a similar context, since the passing of the Hazard Pay Ordinance, several Grocers closed their operations at certain Seattle locations in part because of that ordinance. *See, e.g.,* Paul Roberts, *QFC to close two Seattle stores, blames city's new \$4 hazard pay law*, Seattle Times, February 16, 2021 at 11:46 a.m., available at <https://www.seattletimes.com/business/local-business/qfc-to-close-two-seattle-stores-blames-citys-new-4-hazard-pay-law/>.

Without viable third-party delivery services, small and independent Grocers would face great difficulty competing against larger Grocers who can more readily afford in-house delivery services. The Ordinance's delivery surcharge unlawfully burdens all Grocers by increasing the costs of grocery-delivery services in Seattle—a threat to the economic viability of independent Seattle Grocers.

B. The Delivery Surcharge Mandate Imposed by the Ordinance Has Harmed Grocers' Efforts to Keep Operating During the Pandemic While Maintaining Low Prices Consistent With Initiative 1634.

There are several public health and safety reasons to not allow the Ordinance's surcharge on home delivery of groceries. The Ordinance states 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." Seattle City Council Ordinance No. 126094 (June 26, 2020), available at http://clerk.seattle.gov/~archives/Ordinances/Ord_126094.pdf. 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." *Id.*

Yet surprisingly, the Ordinance does not cite to any legislative findings in support of these expansive, conclusory statements to demonstrate that a delivery surcharge mitigates risk of COVID-19 transmission. The Ordinance does not cite to legislative findings to demonstrate that grocery delivery persons are at a greater risk of contracting COVID-19 than other workers who provide similar services, such as rideshare workers, restaurant workers, etc. – who are not impacted by the Ordinance. Nor does the Ordinance cite to any legislative findings to support the position that a delivery surcharge bears any relation to the cost of personal protective supplies or that such a surcharge would even be used to purchase such materials to protect ones' health and safety.

The NWGA does not deny that the pandemic has posed real risk to public health and safety — which is exactly why NWGA has worked directly with its Grocers to employ science-driven methods to protect employees and customers. Since the

start of pandemic, the NWGA, and other similar trade associations in Washington, were at the national forefront to develop safe workplaces for the grocery industry. NWGA Grocers and similar trade associations and their respective members have invested millions of dollars in providing personal protective equipment, installing safety equipment, and enforcing required social distancing protocols to protect employees and the public. Furthermore, the NWGA has worked with Grocers to encourage online shopping, home delivery, and curbside pick up to reduce public exposure, and has further worked to establish other options for more vulnerable populations (i.e., designated store hours).

In addition, NWGA Grocers have adapted their paid leave and overtime coverage policies, increased in-store cleaning, installed new service counters, and scaled for e-commerce — all to better serve their employees and the public. In short, NWGA Grocers and others in the grocery industry in

Seattle have taken extraordinary measures in response to the pandemic and have established rigorous safety measures, often at great expense, to ensure that they operate in a safe and hygienic manner.

Indeed, even the Seattle City Council has recognized the progress and efficacy of the grocery industry’s health and safety measures. After more than 200 days of requiring hazard pay, on December 13, 2021, the Seattle City Council approved ending Hazard Pay Ordinance² in **“recognition of the considerable progress made toward supporting the health and safety of frontline workers and the community through high rates of vaccination and reduced numbers of COVID-19 cases and**

² On February 3, 2021, the City of Seattle enacted Ordinance 126274 (“Hazard Pay Ordinance”) requiring grocery businesses to compensate employees with an additional \$4.00 per hour as “hazard pay” for work performed in Seattle during the COVID-19 emergency. The Hazard Pay Ordinance was intended to compensate grocery employees for the risks of working on the frontlines, improve their financial ability to access resources to stay safe and healthy, encourage them to continue their vital work, and support the welfare of the greater community that depends on grocery employees for safe and reliable access to food.

hospitalizations.” Seattle City Council Bill No. 120119 (December 13, 2021), available at <https://seattle.legistar.com/LegislationDetail.aspx?ID=5017883&GUID=2985E1C9-F050-4AC8-A601-7F10AA578B53>

(emphasis added). Seattle Mayor Jenny Durkan vetoed the ordinance in late December 2021, but the City Council’s recognition of the progress made to protect the health and safety of grocery workers is striking.

Ordinance 126094 impairs and frustrates the Grocers’ efforts described above to operate during the pandemic, while keeping prices low and affordable for Seattle residents, consistent with Initiative 1634. Adding an unnecessary \$2.50 surcharge onto off-site deliveries of essential products is contrary to the grocery industry’s focused efforts to protect public safety and the Seattle City’s Council’s own findings that supported an end to the Hazard Pay Ordinance. These delivery surcharges are entirely unrelated to controlling the spread of

COVID-19, and are based on the flawed premise that a delivery surcharge somehow mitigates COVID-19 exposure.

IV. CONCLUSION

Ordinance 126094 is ill-conceived and distracting from lawful, productive reform efforts. Aside from being contrary to the express language of Initiative 1634 as briefed by Plaintiff-Respondent, the Ordinance also fails to adequately address and acknowledge public health, safety, and economic concerns. The Ordinance has caused hardship on NWGA Grocers and other Seattle grocers and has impacted their level of service to the Seattle community and its various neighborhoods. For the foregoing reasons, *amicus* respectfully requests that the Court reverse and remand the trial court's dismissal of Plaintiff-Respondent's Count I that RCW 82.84 preempts Ordinance 126094.

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RESPECTFULLY SUBMITTED this 3rd day of January
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BRIEF OF *AMICUS CURIAE* NORTHWEST GROCERY ASSOCIATION

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Executed on January 3, 2022, at Seattle, Washington.

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4856-4441-4214.9 / 084915-1022

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January 03, 2022 - 4:16 PM

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Appellate Court Case Number: 99771-3
Appellate Court Case Title: Washington Food Industry Assoc. et al. v. City of Seattle

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