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 CURIE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

JEFFREY T. EVEN, WSBA 20367
Deputy Solicitor General
ALEXIA DIORIO, WSBA 57280
Assistant Attorney General
Office ID 91087
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-753-6200
jeffrey.even@atg.wa.gov
alexia.diorio@atg.wa.gov

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I. INTRODUCTION AND INTEREST OF AMICUS

The COVID-19 pandemic is not only a public health crisis, but also an economic one. Over 834,000 people have been infected with the virus in Washington, and the COVID-19 global recession is the deepest since the end of World War II.[1] In response, state and local governments have issued emergency provisions to slow COVID-19's spread and mitigate economic hardships. One such measure is Seattle's Ordinance No. 126094 (Ordinance), which temporarily requires hazard pay for food delivery network drivers.

Respondents claim, in part, that the Ordinance is preempted by state law, is an unconstitutional takings of their property, and violates the Contracts Clause. The State offers this

[1] Wash. State Dep't of Health, Cases, Hospitalizations and Deaths by County, https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard#dashboard (last visited Dec. 28, 2021); Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, Brookings Institute (June 8, 2021), https://www.brookings.edu/research/social-and-economic-impact-of-covid-19/ (last visited Dec. 22, 2021).

brief to demonstrate that these claims are insufficient as a matter of law.

Amicus Curiae State of Washington has at least two interests in this case. First, the State has an interest in the health, safety, and well-being of its residents, which the State's own response to the pandemic has promoted. *See Rousso v. State*, 170 Wn.2d 70, 83, 239 P.3d 1084 (2010) (recognizing "substantial state interest" in protecting "the health, welfare, safety, and morals of its citizens").

Second, the State has implemented emergency measures during the COVID-19 pandemic that have been challenged in the courts by similar claims. Respondents raise arguments that if accepted, threaten separation of powers principles, misconstrue the state and local balance of police powers, and undermine well-established constitutional law. The State accordingly has an interest in the proper application of constitutional principles to this case.

II. ISSUES ADDRESSED BY AMICUS

1. Does Chapter 82.84 RCW preempt the Ordinance?

2. Does the Ordinance constitute a taking of Respondents' property without just compensation?

3. Does the Ordinance violate the Contracts Clause?

III. STATEMENT OF THE CASE

The State of Washington is satisfied with the statements of the case offered by the parties.

IV. ARGUMENT

A. Separation of Powers Requires Courts to Defer to Constitutional Laws Enacted by Other Branches of Government

"It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions." *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007). So long as a statute is constitutional, the judicial branch does not "substitute [its] judgment for that of the legislature or the people with respect to which laws are given effect." *Id.*

at 291; *see also Wash. State Legislature v. Inslee*, 498 P.3d 496, 508 (2021) (discussing separation of powers). This "foundational constitutional principle of separation of powers . . . 'ensure[s] that the fundamental functions of each coordinate branch of government remain inviolate.'" *Wash. State Legislature*, 498 P.3d at 508 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

B. Local Police Powers, like State Police Powers, Encompass Measures Taken to Combat a Pandemic Emergency

1. Our Constitution establishes broad local police power

Our state constitution establishes broad local police power. "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. This "home rule" provision provides that a city "has as broad legislative powers as the state, at least when it comes to local affairs." *King County v. King Cnty. Water Dists. Nos. 20, 45, 49, 90, 111, 119, 125*, 194 Wn.2d 830, 840, 453 P.3d 681

(2019) (internal quotation marks omitted) (quoting *King Cnty. Council v. Pub. Disclosure Comm'n*, 93 Wn.2d 559, 562-63, 611 P.2d 1227 (1980)); *see also* Hugh D. Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809, 824-28 (2015). This broad local police power "'encompass[es] all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.'" *Emerald Enters., LLC v. Clark County*, 2 Wn. App. 2d 794, 803, 413 P.3d 92 (2018) (quoting *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980)). The question is not whether state law grants local authority to regulate, but whether state law takes it away. Const. art. XI, § 11.

2. Washington courts have upheld the exercise of emergency powers

Given the broad powers of state and local governments, particularly when responding to emergencies like the COVID-19 pandemic, courts have rejected claims like those brought by Respondents. *See, e.g.*, *Slidewaters LLC v. Wash. Dep't of Lab. & Indus.*, 4 F.4th 747, 756 (9th Cir. 2021) (upholding the

governor's authority to issue emergency proclamations, and finding no violation of "the principle of separation of powers with regard to the legislative branch" or the "judicial branch"); *NW Grocery Ass'n v. City of Seattle*, 526 F. Supp. 3d 884, 889 (W.D. Wash. 2021) (granting Seattle's motion to dismiss claims challenging the pandemic-related Hazard Pay for Grocery Employees Ordinance); *Colvin v. Inslee*, 195 Wn.2d 879, 898, 467 P.3d 953 (2020) (the court has "no authority to oversee the governor's many discretionary actions to address the COVID-19 outbreak[]" when he is acting pursuant to his emergency powers); *Jevons v. Inslee*, ___ F. Supp. 3d ___, No. 1:20-CV-3182-SAB, 2021 WL 4443084, at *1 (E.D. Wash. Sept. 21, 2021) (upholding Governor's proclamations placing a temporary moratorium on some evictions due to COVID-19); *El Papel LLC v. Inslee*, No. 2:20-cv-01323-RAJ-JRC, 2020 WL 8024348, at *15 (W.D. Wash. Dec. 2, 2020) (magistrate judge's report and recommendation rejecting injunctive relief against state and local eviction moratorium); *Wise v. Inslee*, No. 2:21-CV-0288-TOR,

2021 WL 4951571, at *7 (E.D. Wash. Oct. 25, 2021) (denying injunctive relief regarding vaccines for educators, healthcare workers, state employees, and contractors).

This is because emergencies unlock additional powers, although a city's plenary police powers do not themselves depend upon an emergency. Washington and cities like Seattle have plenary power to establish policies that protect vulnerable workers on the frontlines of the COVID-19 pandemic. That authority exists outside of a pandemic, but "[s]tates are given 'great leeway in adopting summary procedures to protect public health and safety.'" *Slidewaters*, 4 F.4th at 758 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979)). "In an emergency, the leeway is even greater." *Id.* The COVID-19 pandemic is "both a public disorder and a disaster affecting life [and] health in Washington." *Id.* at 755 (internal quotation marks omitted). Given this context, emergency action is warranted. The trial court erred in failing to provide the appropriate deference to the Ordinance, which temporarily

provides hazard pay to at-risk workers delivering essential groceries during the pandemic.

C. Chapter 82.84 RCW Does Not Preempt Seattle's Hazard Pay Ordinance

Respondents have not demonstrated that the Ordinance is preempted by state law. Respondents claim that the Ordinance imposes a "fee" or "other assessment" on the sale or delivery of groceries, in conflict with the Keep Groceries Affordable Act of 2018, codified at Chapter 82.84 RCW. Resp'ts' Br. at 20. But Respondents fail to consider Washington cases addressing preemption, instead focusing exclusively on the text of the Ordinance and the state statute. When these provisions are examined in light of Washington precedent, Respondents' argument fails.

As discussed above, local police powers are broad. Const. art. XI, § 11. Washington courts recognize a strong presumption against state preemption of local authority, and "a heavy burden" rests upon Respondents to show that the Ordinance is unconstitutional. *Cannabis Action Coal. v. City of Kent*, 183

Wn.2d 219, 226, 351 P.3d 151 (2015); *Watson v. City of Seattle*, 189 Wn.2d 149, 158, 171, 401 P.3d 1 (2017). To evaluate whether clear legislative intent overrides local police powers, *State ex rel. Schillberg v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979), Washington courts employ a two-step analysis. "A state statute preempts an ordinance if the statute occupies the field or if the statute and the ordinance irreconcilably conflict." *Watson*, 189 Wn.2d at 171 (citing *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010)). Relevant here, a conflict arises when "'an ordinance permits what state law forbids or forbids what state law permits.'" *Id.* (quoting *Lawson*, 168 Wn.2d at 682)).[2] If an ordinance "'directly and irreconcilably conflicts'" with a statute,

[2] Respondents do not argue that field preemption applies, nor could they. Unlike here, field preemption "occurs when there is express legislative intent to occupy the entire field, or when such intent is necessarily implied." *Watson*, 189 Wn.2d at 171 (citing *Brown*, 116 Wn.2d at 560)).

it is constitutionally invalid. *Id.* (quoting *Brown*, 116 Wn.2d at 561). But if the statute and ordinance can be harmonized, no preemption exists. *Id.* (citing *Lawson*, 168 Wn.2d at 682).

There is no "direct and irreconcilable conflict" between the Ordinance and Chapter 82.84 RCW. This statute is about taxes. The ballot title for Initiative 1634 (I-1634) demonstrates that the voters understood the initiative to limit taxes and similar governmental charges, not regulation more generally. *See Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 555, 901 P.2d 1028 (1995) (courts use an initiative's ballot title to discern the intent of the voters, because that is the title the voters see on the ballot). The ballot title for Initiative 1634 read:[3]

> Initiative Measure No. 1634 concerns taxation of certain items intended for human consumption.
>
> This measure would prohibit new or increased local taxes, fees, or assessments on raw or

[3] *Available at* https://eledataweb.votewa.gov/OVG/OnlineVotersGuide/Measures?language=en&electionId=71&countyCode=xx&ismyVote=False&electionTitle=2018%20General%20Election%20#ososTop.

> processed foods or beverages (with exceptions), or ingredients thereof . . . .

Additionally, the drafters directed that the initiative be codified in Chapter 82, entitled "Excise Taxes," by specifying this in the title of the Initiative. Initiative 1634, Laws of 2019, ch. 2 ("AN ACT relating to the taxation of groceries; *and adding a new chapter to Title 82 RCW*") (emphasis added). The drafters also labeled Chapter 82.84 RCW itself "Local Grocery Tax Restrictions." The drafters envisioned the initiative as restricting taxes and governmental charges, rather than addressing other regulatory matters. The statutory legislative findings and declarations explicitly state 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." RCW 82.84.020.

Respondents argue it is "unnecessary" to examine legislative history because there is no ambiguity in the statute.

Resp'ts' Br. at 27. But as a tool of statutory interpretation, an examination of legislative history may "supplement textual analysis." *Watson*, 189 Wn.2d at 163; *Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 461-62, 430 P.3d 655 (2018) (legislative history can support a plain language conclusion). As Seattle points out, the voter pamphlet described I-1634 as "concern[ing] taxation of certain items intended for human consumption" and proponents described it as prohibiting "new, local taxes on groceries, period." Pet'r's Br. at 67 (citing CP at 213, 215). News articles about the motivation behind the initiative are telling. I-1634 was described as a "misleading" initiative actually funded to prevent cities from enacting soda taxes. Editorial, *The Times recommends: Vote no on misleading I-1634, the effort to ban local soda taxes*, Seattle Times, Oct. 9, 2018, https://www.seattletimes.com/opinion/editorials/the-times-recommends-vote-no-on-misleading-i-1634-the-effort-to-ban-local-soda-taxes/ (last visited Dec. 22, 2021). Almost all of the

funding for I-1634 came from large soda manufacturers. *Id.* Given this context, the statute prevents *taxes* on groceries.

Respondents concede that the Ordinance is not a tax. *See* Resp'ts' Br. at 20, 22. Under Washington law, a tax is a "charge intended to raise revenue for the public benefit." *Watson*, 189 Wn.2d at 156. The Ordinance raises no revenue for City operations. Food network delivery companies (FNDCs) must pay premiums to their workers, but not a single cent goes to the City.

Nor is the Ordinance a "similar levy, charge, or exaction" to a tax. Respondents argue that Chapter 82.84 RCW encompasses more than just taxes—it prevents fees, which Respondents, relying in part on dictionary definitions, argue are commonly understood as charges "fixed by law . . . for certain privileges or services." Resp'ts' Br. at 22-23 (also arguing that "other assessment" should be construed broadly) (quoting *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 664, 278 P.3d 632 (2012)). But in the context of the

statute, a "fee" is still money collected by the government. *See State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008) ("[a]ll words must be read in the context of the statute in which they appear"). If not taxes, the fees prohibited by the statute are "regulatory fees." *Watson*, 189 Wn.2d at 159 ("[N]ontax charges . . . [are] 'regulatory fees.' ") (quoting *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805, 23 P.3d 477 (2001)). Regulatory fees include "a wide assortment of utility customer fees, utility connection fees, garbage collection fees, local storm water facility fees, user fees, permit fees, parking fees, registration fees, filing fees, and license fees." *Samis Land Co.*, 143 Wn.2d at 805. These fees are still "deposited into a segregated fund" controlled by the local government. *Id.* at 804; *see also Watson*, 189 Wn.2d at 160 ("Collecting funds into a segregated, dedicated account indicates a regulatory fee"). The premiums here are not.

Respondents would broadly define "fee" as *any* charge that is imposed on businesses. Resp'ts' Br. at 22. But the cases

Respondents reference are taken out of context—both involved regulatory fees that the State collected. *Wash. Ass'n for Substance Abuse & Violence Prevention*, 174 Wn.2d at 662 ("I-1183 imposes 'license issuance fees' . . . deposited into the Liquor Revolving Fund" (citation and internal quotation marks omitted)); *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 741, 966 P.2d 1232 (1998) (Washington "regulates the trucking industry" by collecting regulatory fees). In contrast, the premiums here go directly to vulnerable workers, rather than being collected by a public entity in exchange for privileges or services. *See Wash. Ass'n for Substance Abuse & Violence Prevention*, 174 Wn.2d at 664 ("The license issuance fees . . . are charges for the privilege of selling liquor in Washington State."); *Franks & Sons, Inc.*, 136 Wn.2d at 749 ("Revenues from a fee are used exclusively for the purpose of financing regulation").

Respondents also argue that a "charge" or "exaction" are broad enough to encompass the Ordinance's hazard pay. Resp'ts' Br. at 23. But in *Activate, Inc. v. Washington State Department*

of Revenue, 150 Wn. App. 807, 824, 209 P.3d 524 (2009), a "charge" was analyzed in the context of a statutory exemption to taxes by retailers of cell phones; the question was whether cell phone purchasers had paid a "separate charge" for their free or discounted devices. This context is entirely different from temporary hazard pay required during the pandemic. Respondents also fail to note that Washington cases historically used "exaction" in the context of taxes. *See, e.g.*, *State ex. rel. City of Seattle v. Dep't of Pub. Utilities of Wash.*, 33 Wn.2d 896, 902, 207 P.2d 712 (1949) (a tax "is not a debt or contract in the ordinary sense, but it is an exaction in the strictest sense of the word."); *In re McGrath's Estate*, 191 Wash. 496, 503, 71 P.2d 395 (1937) ("the right of the sovereign to control the transfer [of property] is the sanction upon which all such exactions rest, whether they be called estate taxes, succession taxes, inheritance taxes, or privilege taxes.").

Respondents call attention to the fact that RCW 82.84.030(5) states "includes, but is not limited to" when

providing a definition of "tax, fee, or other assessment on groceries[,]" arguing that the statute should be broadly interpreted. Resp'ts' Br. at 23. The list includes a number of different taxes, and then states "or any other similar levy, charge, or exaction of any kind[.]" RCW 82.84.030(5). An illustrative list does not broaden the definition beyond the scope of the statute. The levy, charge, or exaction must be similar to the taxes enumerated in the statute. *State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (interpreting "including, but not limited to" narrowly to allow only things similar to the specific items listed); *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 427, 423 P.3d 223 (2018) *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) ("'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'" (quoting *Larson*, 184 Wn.2d at 849)).

Any supposed conflict between Chapter 82.84 RCW and the Ordinance must be *both* "direct and irreconcilable." Neither requirement exists here. Respondents fail to identify a direct conflict, and the two provisions may be harmonized to avoid preemption. *Lawson*, 168 Wn.2d at 684; *Emerald Enters., LLC*, 2 Wn. App. 2d at 804. If possible, this must be done; this Court has a duty to harmonize state and local laws. *See Ayers v. City of Tacoma*, 6 Wn.2d 545, 556, 108 P.2d 348 (1940). Chapter 82.84 RCW does not include labor standards and other business regulations, particularly if the locality is not collecting funds from those regulations.

This Ordinance is not within the statute's scope because it does not impose a tax on groceries. *See Watson*, 189 Wn.2d at 171 (where tax on firearm and ammunition sales was not within the scope of statute preempting local regulation of guns). In *Emerald Enterprises*, the court held that a county's local ban on retail marijuana stores could be harmonized with state law legalizing marijuana, because "while [state law] permits the

retail sale of marijuana, it does not grant retailers an affirmative right to sell marijuana." 2 Wn. App. 2d at 805. That case presented a closer question. Here, there is no plausible argument that Seattle's Ordinance, which requires businesses to pay *their workers* hazard pay, is a tax or regulatory fee.

The effect of Respondents' argument would be to treat regulation that requires any type of payment like a tax. It would also dramatically broaden the effect of Chapter 82.84 RCW to other expenses that private parties incur, including those that are not collected by the locality. The trial court rejected this interpretation, and so should this Court.

D. Respondents Fail to State Claims under the Takings and Contracts Clauses

Finally, Respondents' Takings and Contracts Clause claims fail as a matter of law. To allege a taking, Respondents must show that the Ordinance takes *private property* for *public use*. U.S. Const. amend. V; Const. art. I, § 16. It does not. Respondents have not stated a Contracts Clause claim because their contracts are not substantially impaired. Respondents

attempt to blend the Takings and Contracts Clauses by alleging that the Ordinance "seizes control of FDNCs' contracts to prevent them from offsetting [the premium-pay] cost" which is "a classic taking" because it "commandeers FDNCs' contract-based platform without providing just compensation." Resp'ts' Br. at 43. This hybrid claim must be rejected. These two clauses are legally distinct. The Ordinance is a valid exercise of Seattle's police power, especially during a public health emergency.[4]

1. Respondents cannot show that their private property has been taken or restricted

Both the United States and Washington's Constitutions provide that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; Const. art. I, § 16. This may occur when the government physically takes private property for public use, or when regulations restrict an

[4] Claims that another COVID-19 mitigation measure, a temporary eviction moratorium proclamation, impairs contracts and takes property are pending before the Court of Appeals. *Gonzales v. Inslee*, No. 55915-3-II (oral argument scheduled for Jan. 25, 2022).

owner's ability to use their property. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021). "When a regulation goes too far, it becomes a 'de facto exercise of eminent domain,' even though the private individual still actually owns and possesses the property." *Yim*, 194 Wn.2d at 660 (citation omitted). A "per se" taking describes two narrow categories of regulations—those that "require an owner to suffer a permanent physical invasion of her property" or "regulations that completely deprive an owner of all economically beneficial use." *Id.* at 661 (citation and internal quotation marks omitted). All other "partial" regulatory takings, which restrict use, are decided under the *Penn Central* factors. *Id.* (discussing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

Takings are government-authorized invasions of *property*. *Cedar Point Nursery*, 141 S. Ct. at 2074. Respondents' takings argument is premised on the Ordinance interfering with their contracts, which is based on a reduction in revenue. Profit is not

property. *See Connolly v. Pension Benefit Guar. Corp*, 475 U.S. 211, 223, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) ("Congress routinely creates burdens for some that directly benefit others . . . [such as] minimum wages, control prices, or [ ] causes of action . . . it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another"); *Bowles v. Willingham*, 321 U.S. 503, 518, 64 S. Ct. 641, 88 L. Ed. 892 (1944) (the fact that "property may lose utility and depreciate in value as a consequence of regulation. . . . has never been a barrier to the exercise of the police power").

Impairing contracts is also not a taking of property. *Bd. of Trs. of the W. Conf. of Teamsters Pension Tr. Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984) (the takings clause "does not prohibit Congress from readjusting the contractual relationships of private parties"). In limited circumstances, contracts have been involved in takings claims, but only when connected to physical property or completely

acquired for public purpose—neither of which is the case here. *See, e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1325 (Fed. Cir. 2003) (involving federally subsidized mortgages for low-income apartments); *Omnia Com. Co., Inc. v. United States*, 261 U.S. 502, 510, 43 S. Ct. 437, 67 L. Ed. 773 (1923) (government acquired entire production from steel company); *see also Jevons*, 2021 WL 4443084, at *14 (temporary evictions moratorium to combat COVID-19 did not "take" a property interest in a lease).

The Ordinance is not a per se taking because Respondents have not had their property physically invaded, nor has the Ordinance completely deprived Respondents of economically beneficial use of property. *See Yee v. City of Escondido*, 503 U.S. 519, 530, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (a wealth transfer "in itself does not convert regulation into physical invasion"); *see also El Papel, LLC v. Durkan*, No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323, at *17 (W.D. Wash. Sept. 15, 2021) (distinguishing *Cedar Point Nursery* and

rejecting a claim that regulation effected a "taking" of a contractual right). Nor can Respondents show a partial taking. Even under *Penn Central*, the regulation must impose a *substantial* economic impact on *property*. *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450-51 (9th Cir. 2018) (under the first *Penn Central* factor, the court considers the "value that has been taken from the property with the value that remains" and "the mere loss of some income because of regulation does not itself establish a taking") (cleaned up). The Ordinance does not fall within these requirements.

To allege a takings claim, Respondents must show that "no set of circumstances exist in which [the Ordinance], as currently written, can be constitutionally applied." *Yim*, 194 Wn.2d at 659 (cleaned up). That burden has not been met.

2. The Ordinance does not substantially impair Respondents' contracts

The Ordinance does not violate the Contracts Clause because it does not substantially impair contracts and is reasonably necessary. Both the United States and Washington's

Constitutions prohibit states from passing laws that impair the obligation of contracts. U.S. Const. art. I, § 10; Const. art. I, § 23. As similar clauses, both are given the same effect. *In re Estate of Hambleton*, 181 Wn.2d 802, 830, 335 P.3d 398 (2014). The Contracts Clause is construed "narrowly" so that "local governments retain the flexibility to exercise their police powers effectively." *Matsuda v. City & County of Honolulu*, 512 F.3d 1148, 1152 (9th Cir. 2008); *Hambleton*, 181 Wn.2d at 830 (the Contract Clause's "prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people") (internal quotation marks omitted) (quoting *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)). Similarly, courts "should decline to engage in second-guessing" the emergency responses of other branches because the judiciary "lacks the 'background, competence, and expertise to assess public health.'" *Jevons*, 2021 WL 4443084, at *10 (quoting *S.*

Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613-14, 207 L. Ed. 2d 154 (2020) (Roberts, J. concurring)).

Courts apply a two-step inquiry under the Contracts Clause. First, courts determine "whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22, 201 L. Ed. 2d 180 (2018) (citation omitted). Second, if a substantial impairment exists, courts evaluate "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at 1822 (quoting *Energy Rsrvs. Grp., Inc.*, 459 U.S. at 411-12); *Hambleton*, 181 Wn.2d at 831 ("The Contracts Clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effects" (internal quotation marks and citation omitted)).

Respondents' claims fail at step one. *See Sveen*, 138 S. Ct. at 1822 ("we may stop after step one because [the statute] does not substantially impair pre-existing contractual arrangements").

To determine whether a law imposes a "substantial impairment" on a contractual relationship, courts consider "the extent to which" the law (1) "undermines the contractual bargain," (2) "interferes with a party's reasonable expectations," and (3) "prevents the party from safeguarding or reinstating [their] rights." *Sveen*, 138 S. Ct. at 1822.

First, adding temporary hazard pay to workers' overall compensation does not undermine Respondents' contracts. If that were true, any laws imposing labor standards would do the same.

Second, the reasonableness of a party's contractual expectations largely depends on "whether the industry the complaining party has entered has been regulated in the past." *Energy Rsrvs. Grp.*, 459 U.S. at 411; *Hambleton*, 181 Wn.2d at 831 ("a party who enters into a contract regarding an activity already regulated in the particular way to which he now objects is deemed to have contracted subject to further legislation upon the same topic") (cleaned up); *see also Jevons*, 2021

WL 4443084, at *9 (rejecting argument that an eviction moratorium to combat COVID substantially impaired a contract, given the highly regulated nature of the industry). This is certainly true; employers must follow a number of labor standards in Seattle and Washington. *See NW Grocery Ass'n*, 526 F. Supp. 3d at 897 (rejecting a Contracts Clause claim for an ordinance requiring hazard pay for grocery store employees in part because those employees "were already subject to state and local minimum wage laws"). As this Court held in *Hambleton*, the "threshold inquiry [was] not met" where "[t]here was no substantial impairment of the trust because it was reasonable for the Estates to expect that the estate tax law would change." 181 Wn.2d at 831 (citation omitted). Given existing labor regulations, it is unreasonable for Respondents to assume labor standards will not change during the course of their contracts.

Third, the Supreme Court has held that a law altering contractual remedies without nullifying them does not "prevent[ ] the party from safeguarding or reinstating [their] rights." *Sveen*,

138 S. Ct. at 1822. Respondents cannot demonstrate that their contracts are nullified by temporary hazard pay given to vulnerable workers. Their Contract Clause claim is legally insufficient.

Even if a substantial impairment existed, which it clearly does not, the Ordinance is an appropriate and reasonable measure to advance a significant and legitimate public purpose—protecting vulnerable workers during the COVID-19 pandemic. *See NW Grocery Ass'n*, 526 F. Supp. 3d at 897 ("the City has a legitimate interest in the health and safety of frontline workers . . . and in particular, protecting them from coronavirus infection.").

3. This Court should reject attempts to bootstrap the Contracts and Takings Clauses when those claims, analyzed separately, both fail

Respondents' attempt to combine Contracts Clause and Takings Clause claims is concerning. Respondents base their Takings Clause claim on the Ordinance "seiz[ing]" Respondents' contractual rights. Resp'ts' Br. at 47. This Court must reject that

argument. These two claims under the Contracts and Takings Clauses are legally distinct, and each must be given full effect. As Seattle notes, "[t]he conversion of a simple claim of contract impairment into a takings claim would effectively obliterate the Contracts Clause[.]" Pet'r's Reply Br. at 39. Respondents' argument would broaden the Takings Clause is an unprecedented way. The Ordinance imposes hazard pay for front-line workers—it does not take over Respondents' contractual rights or seize property. The Ordinance is a rational exercise of Seattle's police power. State and local governments must be able to regulate working conditions of at-risk workers during this public health emergency. Respondents' claims fail as a matter of law. *See Jevons*, 2021 WL 4443084, at *14 (temporary evictions moratorium to combat COVID did not "take" a property interest in a lease).

V. CONCLUSION

For these reasons, this Court should reverse the trial court ruling, except with respect to Respondents' preemption claims,

and reaffirm the government's authority to implement emergency provisions during public health emergencies.

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RESPECTFULLY SUBMITTED this 3rd day of January, 2022.

ROBERT W. FERGUSON
Attorney General

s/ Jeffrey T. Even
JEFFREY T. EVEN, WSBA 20367
Deputy Solicitor General
ALEXIA DIORIO, WSBA 57280
Assistant Attorney General
Office ID 91087
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
jeffrey.even@atg.wa.gov
alexia.diorio@atg.wa.gov
360-753-6200

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Jeremiah Miller, WSBA 40949
Derrick De Vera, WSBA 49954
Erica Franklin, WSBA 43477
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
jeremiah.miller@seattle.com
derrick.devera@seattle.gov
erica.franklin@seattle.gov
Attorneys for Appellant

Stacey Leyton, WSBA 53757
P. Casey Pitts (*Pro Hac Vice*)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
sleyton@altber.com
cpitts@altber.com
Attorneys for Appellant

Robert M. McKenna, WSBA 18327
Daniel J. Dunne, WSBA 16999
Daniel A. Rubens, NYBA 468834
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle. WA 98104
mckenna@orrick.com
ddunne@orrick.com
druben@orrick.com
Attorneys for Respondents

DATED, this 3rd day of January, 2022, at Olympia, Washington.

s/Leena Vanderwood
LEENA VANDERWOOD
Legal Assistant

SOLICITOR GENERAL OFFICE

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- sea_wa_appellatefilings@orrick.com
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