No. 99771-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

*Respondents–Cross-Movants,*

vs.

THE CITY OF SEATTLE,

*Petitioner.*

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# RESPONDENTS' ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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## I. INTRODUCTION

This Court should deny discretionary review because the trial court committed no error—let alone obvious error—in its narrow decision denying in part the City's CR 12(b)(6) motion. Applying a deferential standard that the City concedes was "appropriate," Petitioner's Motion for Discretionary Review ("MDR") 2, the trial court declined to dismiss Plaintiffs' claims that the emergency Ordinance exceeded the City's police powers and violated Instacart's constitutional rights. The court predicated its careful ruling on the "unique nature of this [O]rdinance, which not only regulates compensation to drivers but also precludes the plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses." Appendix to Petitioner's Motion for Discretionary Review ("App.") 49. The court so held after crediting well-pleaded facts in Plaintiffs' complaint, as it was required to do on a CR 12(b)(6) motion, particularly allegations that the City Council took advantage of a public health emergency as a pretext to achieve longstanding goals to regulate compensation in the gig economy. As with the denial of any motion to dismiss, the decision merely allows this litigation to proceed to discovery and an eventual decision on the merits. No injunction has been entered, the Ordinance is still in effect, and the status quo ante persists pending a merits decision.

The decision below is not the type of ruling that warrants the extraordinary step of discretionary review on the basis of "obvious error." RAP 2.3(b)(1). Rather than make a serious attempt to identify an error of that nature, the City resorts to hyperbole and misdirection. Denying a motion to dismiss under the well-established CR 12(b)(6) standard is not akin to "resuscitating a *Lochner*-era approach to the review of economic legislation." MDR 2-3. Nor does subjecting economic legislation to deferential, but meaningful, judicial review pose a "serious threat to democratic processes." MDR 3. The trial court's ruling was confined to the Ordinance at issue and the current procedural posture of this litigation; it does not "have ramifications beyond this case." MDR 18. And the City provides nothing to back up its breathless claims that the expense of defending against a lawsuit that survives a motion to dismiss will deter other legislation. At bottom, the City stands in the same position as any other litigant whose CR 12(b)(6) motion is denied in part. Its emphatic disagreement with the ruling does not warrant an unusual exercise of this Court's discretion to permit interlocutory appellate review.

The City is also wrong on the merits. On each of the Plaintiffs' constitutional claims, the City's core argument reduces to its mistaken belief that the pandemic gives it carte blanche to do anything it wants, unchecked by courts, even if the challenged legislation is pretextual or

irrational. That view is incompatible with precedent, including the cases the City cites. In almost every instance, the City relies on decisions that considered a developed factual record, where courts determined that the plaintiffs had not offered sufficient evidence to sustain their claims. For these and other reasons explained below, the trial court's denial of the motion to dismiss was correct in all respects.

If the Court does grant review, it should also address the trial court's ruling granting the motion to dismiss in part. The trial court dismissed Plaintiffs' claim that the Ordinance violates RCW 82.84, which prohibits "any tax, fee, or other assessment on groceries," *id.* 82.84.040(1), based on a mistaken reading of the statute. Judicial economy would be served by addressing that error to the extent this Court grants discretionary review of the trial court's order.

## II. IDENTITY OF RESPONDENTS

Respondents are the Washington Food Industry Association and Maplebear Inc. d/b/a Instacart, the Plaintiffs below.

## III. COUNTERSTATEMENT OF ISSUES

1. Should this Court grant discretionary review when the trial court applied settled legal standards to deny in part the City's CR 12(b)(6) motion after crediting Plaintiffs' factual allegations and considering

unique features of the emergency ordinance, when the City cannot identify any obvious error that would render further proceedings useless?

2. If the Court grants the City's motion for discretionary review, should its review encompass the trial court's dismissal of Plaintiffs' claim that the Ordinance violates RCW 82.84?

## IV. COUNTERSTATEMENT OF THE CASE AND DECISION BELOW

### 1. The City Uses The Pandemic As A Pretext To Regulate FDNCs For Reasons Unrelated To Health And Safety.

Food delivery network companies ("FDNCs") like Instacart operate online networks that facilitate ordering and delivering food and groceries from restaurants and retail grocers directly to customers by independent contractors. App. 102.[1] Because they enable customers to obtain food and groceries without going into a restaurant or grocery store, FDNCs have served an important role for higher-risk populations during the COVID-19 pandemic. *Id*. at 103. FDNCs partner with independent contractors, and as a result, they have long been a target of unions seeking to organize gig economy workers. *Id*. at 98.

On June 15, 2020, the Seattle City Council passed Council Bill 119799 (the "Ordinance"), mandating that FDNCs provide their "gig

[1] All facts are taken from the First Amended Complaint and must be presumed to be true at this stage in the litigation. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962 (2014).

workers" with "premium pay" of at least $2.50 per delivery for each "online order that results in … a work-related stop in Seattle." *Id.* at 99.[2] Beyond mandating premium pay, the Ordinance intrudes into FDNC management and operational decisions by forbidding FDNCs from modifying their service areas, reducing drivers' compensation or access to orders, or increasing customer charges for grocery deliveries to recover the new costs imposed by the Ordinance. *Id.* at 100.[3] As Plaintiffs' complaint details, the City has appropriated Instacart's and other FDNCs' private networks to provide public benefits to Seattle drivers, retailers, and consumers, while prohibiting FDNCs that facilitate grocery deliveries from recovering from consumers the increased costs the Ordinance imposes.

While the City has invoked the COVID-19 pandemic to justify these measures, the Ordinance's provisions on their face do nothing to promote public health. *Id.* at 99-100. The Ordinance includes no PPE mandate or other health or safety requirements, and, before its passage, Instacart already had implemented extensive measures to protect its

[2] Under the originally enacted Ordinance, these provisions were in effect for three years following the end of the public health emergency. Original Ordinance, App. 149. After this lawsuit was filed, the City adopted "technical corrections" that limited the Ordinance's provisions to the duration of the public health emergency. "Technical Amendments," App. 168; *see* Complaint, App. 101-02.

[3] The Ordinance also imposes steep penalties for violations, creating a private right of action as well as a mechanism for agency enforcement and imposition of monetary damages or business license suspension. *Id.* at 102.

drivers and customers who use its platform.[4] *Id*. at 104. Although the City has claimed that the Ordinance was intended to protect FDNC drivers and ensure continued delivery services during the pandemic, drivers had seen a dramatic spike in earnings due to pandemic demand, well before the Ordinance was enacted: Drivers using the Instacart platform enjoyed a 50% increase in earnings on average in May 2020 to earn approximately $30 per hour worked including tips—nearly double the Seattle minimum wage. *Id*. at 101. These market forces caused the number of Instacart drivers in the Seattle area to triple, from 1,000 to well over 3,000 in May 2020, before the Ordinance's passage. *Id*. at 103.

The complaint also alleges that the City passed the Ordinance to promote labor organizations' goals of establishing an effective minimum wage for independent contractors, and that the City Council exploited the COVID public health emergency as a pretext to do so. *Id*. at 101. The Council worked closely with labor organizations in drafting the Ordinance. *Id.* at 98-99. For instance, the Teamsters requested the exclusion of transportation network company ("TNC") drivers so the Teamsters could propose specific legislation the Teamsters were drafting

[4] These measures included providing free face masks and sanitizer to drivers, supporting touchless payment methods for shoppers' use at stores, defaulting to contactless doorstep deliveries, and providing all drivers diagnosed with COVID-19 with 14 days' pay (exclusive of tips) while suspending them from new deliveries for that period. *Id.* at 104.

for them. The City Council acceded, and the City Council removed TNC coverage even though those workers face a greater risk of contracting and spreading COVID-19 than do FDNC drivers because TNC drivers are exposed to passengers in the backseat, not groceries in a car trunk or wide-aisled, high-ceilinged stores. *Id*. at 98-99.

### 2. The Trial Court Grants In Part And Denies In Part The City's Motion To Dismiss.

In June 2020, Plaintiffs filed suit alleging that the Ordinance exceeded the City's police powers and violated Plaintiffs' rights under the Washington and United States Constitutions. Plaintiffs also asserted that the Ordinance violated Washington Initiative 1634, codified as Chapter 82.84 RCW, which prohibits local governments from imposing "any tax, fee, or other assessment on groceries." RCW 82.84.040(1); App. 106.

The City moved to dismiss the operative complaint in its entirety. The trial court granted that motion as to Plaintiffs' RCW 82.84 claim, but denied the remainder of the motion. App. at 274-76. In particular, it found resolution of Plaintiffs' remaining claims inappropriate on the pleadings, given: (1) "the setting in which the motion is brought," which required the Court to "give credit to the well-pled allegations," and draw all inferences in Plaintiffs' favor; (2) the "unique nature of this ordinance, which not only regulates compensation to drivers but also precludes the

plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses;" and (3) "the allegations of pretext." *Id.* at 278-81. The trial court emphasized that this was "not a decision on the merits of the litigation," but only "whether the plaintiffs have well-pled claims that survive this early challenge." *Id*. at 281. The trial court thereafter denied the City's motion for reconsideration and request to certify the order for interlocutory review under RAP 2.3(b)(4).

## V. ARGUMENT

Discretionary review of interlocutory orders is "seldom granted," *State v. Richardson*, 177 Wn.2d 351, 365 (2012), and available only in limited circumstances. RAP 2.3(b). Discretionary review of interlocutory orders "is not favored because it lends itself to piecemeal, multiple appeals" that undermine judicial efficiency. *Right–Price Recreation, L.L.C. v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380 (2002). Having failed to convince the trial court that the order qualified for certification for immediate review under RAP 2.3(b)(4), the City now relies solely on RAP 2.3(b)(1), which authorizes review of an "obvious error which would render further proceedings useless." MDR at 9. The City cannot make the required showing.

### A. The City Cannot Show An "Obvious Error Which Would Render Further Proceedings Useless."

Discretionary review under RAP 2.3(b)(1) is reserved for errors that are "obvious." If that limitation were not in place, defendants who lose a motion to dismiss could obtain interlocutory appellate review as a matter of course, even though any claimed error is fully reviewable on an appeal from final judgment.[5] For all its bluster, the City does not come close to articulating any error that is obvious, and this motion can be denied for that reason alone, without any need to consider the City's arguments directed at specific claims.

The City concedes that the trial court "recited the appropriate standard" for constitutional challenges to "economic litigation." MDR 2. Indeed, the court acknowledged that the City has broad "authority to enact legislation to promote and protect public health, safety, and welfare" and "that in addressing the exigencies of a public health emergency, the City's regulatory authority is given greater deference by the courts." App. 47. The City nonetheless maintains that the trial court failed to "faithfully apply" that standard, instead "effectively subject[ing] the law to heightened scrutiny." MDR 2. As the City's reliance on adverbs reveals,

[5] *See DGHI, Enterprs. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 949 (1999) (discretionary review is "not ordinarily granted" for interlocutory orders when "[t]he issue can be reviewed after trial in an appeal from final judgment").

its arguments require an appellate court to parse the trial court's application of settled legal rules to the particulars of this Ordinance and the complaint's factual allegations. The City's suggestion that the trial court acted in bad faith by denying the motion in part—despite articulating the correct legal standard—does not find support in anything the court actually said, and does not describe the type of glaring error that could justify review under RAP 2.3(b)(1).

Moreover, if the error here really were so obvious, one would expect the City to cite controlling Washington authority affirming the dismissal of similar claims on CR 12(b)(6) motions, and holding that factual development is irrelevant for claims that a law is irrational or pretextual. The City cites no such case. At the same time, it ignores numerous cases recognizing that allegations like those here present questions of fact and subjecting economic legislation to judicial review.[6]

Unable to show any "obvious error," the City resorts to further exaggeration, describing the trial court's decision as a "serious threat to democratic processes." MDR 3. But the trial court's decision did not break any new constitutional ground; it neither resolved the merits of the claims nor opined on legislation other than the Ordinance at issue. By its

[6] *See, e.g*, *Ketcham v. King Cnty. Med. Serv. Corp.*, 81 Wn.2d 565, 576 (1972); *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 816 (9th Cir. 2016); *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 959 (N.D. Cal. 2020).

terms, the court's holding was limited to the "unique nature of this ordinance." App. 49. And although the City repeatedly invokes the public health emergency to justify the Ordinance's unprecedented measures, it is well settled that government action is subject to judicial review even during such an emergency.[7]

For similar reasons, the City's assertions about "dangerous implications for future litigation," MDR 17, are baseless and misdirected. To begin, it is unclear why the City believes that the trial court's decision, which is not binding on any other court, has *any* "ramifications beyond this case." *Id*. at 18. And even if those "ramifications" existed, they cannot make up for the City's failure to establish "obvious error" under RAP 2.3(b)(1). In any event, the City fails to back up its claim that discovery in this case will be particularly "onerous and far-reaching," apart from citing a single pending discovery request (to which the City has already objected) on a highly relevant topic.[8] The City also speculates that "the mere threat of such costly litigation may prevent" smaller localities

[7] *See Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (emphasizing that "it is the duty of the courts" to judge where a public health statute has "no real or substantial relation" to a legitimate state interest); *cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

[8] *See* MDR 18 n.58 (noting that Plaintiffs have requested that the City produce communications about the potential regulation of gig workers). In any event, the litigation has been pending for a year, and due to various delay tactics—including this interlocutory appeal—the City has yet to produce a single document in discovery.

"from enacting legislation," MDR at 19, but offers zero support or citation for that as well.

Indeed, the City's protestations that disclosure would have a chilling effect cannot be reconciled with the fact that Plaintiffs' requests for legislators' communications are similar to valid requests citizens make routinely under the Public Records Act, RCW 42.56. As that Act makes clear, a government's concerns about the costs of producing records do not outweigh important policy interests served by public disclosure. *See* RCW 42.56.030. For similar reasons, cost considerations should not override the CR 12(b)(6) standard, which permits plaintiffs access to discovery if they can state a legally sufficient claim.[9] At bottom, the City's argument is not that some aspect of this case causes any particular trouble, but that any legislation the City passes should be exempt from judicial review. This Court should reject that misguided view.

[9] The City also maligns Instacart for being a "well-resourced stakeholder[]" and an example of a "powerful economic interest[]," MDR at 18-19, as if Instacart's success—and the tens of thousands of jobs it has created in Seattle alone—entitle it to less constitutional protection than other litigants. The argument is especially ironic given the City Council's close workings with certain well-financed and connected labor organizations in crafting the Ordinance.

## B. The Trial Court Correctly Declined To Dismiss Plaintiffs' Claims That The Ordinance Exceeded The City's Police Powers And Violated Constitutional Rights.

Despite conceding that the trial court articulated the controlling legal principles correctly, the City provides an incomplete account of the CR 12(b)(6) standard. While emphasizing the obvious point that the rule requires dismissal of legally insufficient claims, *see* MDR 9, the City fails to mention this Court's repeated admonitions that such motions must be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 100 (2015) (quotation omitted). The trial court did not err—or commit obvious error—in declining to afford this "unusual" remedy.

### 1. The trial court correctly declined to rule, as a matter of law, that the Ordinance was a valid exercise of the City's police power and satisfied rational basis review.

Rational basis may be deferential, but it is not a rubber stamp. It requires courts to assess whether there is a "rational relationship" between a law and its stated purpose. *Simpson v. State*, 26 Wn. App. 687, 694-95 (1980). "As relaxed and tolerant as the rational basis standard is … the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." *DeYoung v.*

*Providence Med. Ctr.*, 136 Wn. 2d 136, 144 (1998). As the trial court recognized, the complaint pleads facts showing that there is *no* relationship between the Ordinance's provisions and the City's stated public health aims, and that the Ordinance was enacted at the behest of organized labor to serve ends unrelated to public health. Allegations like these are sufficient to preclude CR 12(b)(6) dismissal. *See, e.g.*, *Levin*, 482 F. Supp. 3d at 959 ("Except in unusual circumstances, and even where the Court must show deference to legislative judgment, questions of reasonableness and necessity are fact dependent.").

The City's arguments that the trial court nevertheless committed "obvious error" all depend on the remarkable contention, first made in its motion for reconsideration, that "allegations of pretext or lack of necessity" for the Ordinance are *irrelevant* to whether the City exceeded its police powers or violated Plaintiffs' constitutional rights. MDR at 16. Unsurprisingly, it is well established that pretextual government action does not survive constitutional scrutiny. Any other rule would render rational basis review meaningless.[10]

[10] The City's contentions regarding pretext echo the precise argument the Ninth Circuit considered and rejected in *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580 (9th Cir. 2008). There, the "Defendants argue[d] that [Plaintiff's] allegations of pretext and animus are irrelevant under Equal Protection law, because they have articulated legitimate reasons" for the challenged government action. 546 F.3d at 587. The court rejected that argument because "Supreme Court and circuit law allows some inquiry into the rationale for the classification." *Id.* at 590.

The authorities on which the City relies do not hold otherwise. To the contrary, nearly every decision that the City cites as rejecting a rational-basis-type challenge does so based on some factual record beyond the pleadings.[11] These cases do not stand for the principle that courts must accept any and every pretextual justification for legislation—and certainly not at the pleadings stage.

Instead, these cases confirm that while rational basis review is deferential, a developed factual record is often required to apply the standard. For example, in *Minnesota Clover Leaf Creamery Co.*, 499 U.S. 456, 464 (1981), the Supreme Court affirmed that "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational," while finding that plaintiffs failed to meet their burden because their evidence established merely that the legislation was "debatable." Similarly, in *RUI One Corp.*, which the City cites as holding generally that motive is irrelevant, the Ninth Circuit affirmed *summary judgment* in defendant's favor where

[11] *See Vance v. Bradley*, 440 U.S. 93, 95 (1979) (summary judgment); *New Orleans v. Dukes*, 427 U.S. 297, 299 (1976) (same); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004) (same); *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775 (2014) (same); *CLEAN v. State*, 130 Wn.2d 782, 813 (1996), as amended (Jan. 13, 1997) (same); *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 467 (1982) (same); *Petstel, Inc. v. King Cnty.*, 77 Wn.2d 144, 147 (1969) (after trial); *Clover Leaf Creamery Co.*, 449 U.S. 456, 460 (after evidentiary hearings); *State v. Smith*, 93 Wn. 2d 329, 333, 337 (1980) (same); *Shepard v. City of Seattle*, 59 Wash. 363, 367 (1910) (after "findings of fact").

"the findings" proffered by the defendant established that the ordinance was "more than reasonable." 371 F.3d at 1156.[12] The City will have the same opportunity to present evidence to establish that the Ordinance bears a reasonable relationship to its claimed purpose as this case continues.

The only case the City cites where a trial court dismissed an equal protection claim on the pleadings actually affirms the proper interplay between rational basis review and the motion-to-dismiss standard. In *Fowler Packing*, the Ninth Circuit *reinstated* a rational basis challenge that the trial court had dismissed on the pleadings. After "[a]ccepting plaintiffs' allegations as true," as was required "at this stage of the litigation," the Court of Appeals concluded that "the only conceivable explanation" for the legislation—securing union support—was one that "would not survive even rational basis scrutiny." 844 F.3d at 815-16.

Here, as in *Fowler*, the trial court correctly held that, accepting Plaintiffs' allegations as true, there was no permissible basis for the Ordinance's passage. The City's justifications for the Ordinance—that it "could reasonably have determined that" a premium pay provision was

[12] For similar reasons, the City is wrong to rely on *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993), a case involving judicial review of agency action. *Beach* requires the government to "provide a rational basis for the classification," *id.* at 313, and as the Ninth Circuit has explained, *Beach* does not stand for the proposition that pretextual government action is immune from challenge. *See Lazy Y Ranch*, 546 F.3d at 590.

necessary to ensure adequate provision and driver safety, MDR 12 n.35—are contrary to Plaintiffs' allegations that the Ordinance did nothing to further driver availability or public health, which must be accepted as true at this stage. Similarly, the City's argument that the Court should have dismissed Plaintiffs' equal protection claim because it could have had "many reasonable bases" for excluding TNC drivers, *id*. at 15, contradicts Plaintiffs' allegations that the Ordinance enacted at the behest of organized labor for pretextual reasons. These competing factual accounts cannot be resolved on a CR 12(b)(6) motion.[13]

**2. The trial court did not err in declining to dismiss the Contracts Clause claim.**

Repeating its mistaken understanding of the rational basis standard, the City maintains that "allegations of pretext or lack of necessity are irrelevant" to a Contracts Clause claim. MDR 16. But this Court has subjected economic legislation to the "judicial test of reasonableness," and found violations of the Contracts Clause when special-interest legislation fails that test, despite claims that the laws are

[13] In contending that the same analysis provides "reasonable grounds" for the classification that defeats any claim under the Privileges and Immunities Clause, MDR 15 n.47, the City overlooks that the "reasonable grounds" test is more demanding than rational basis. *See Schroeder v. Weighall*, 179 Wn.2d 566, 574 (2014). And the City is wrong to contend that Plaintiffs failed to identify a fundamental right of state citizenship that can support a claim under this Clause, given that the Ordinance interferes with Instacart's right to "carry on business." App. 111 (¶ 84); *see Am. Legion Post #149 v. State Dep't of Health*, 164 Wn.2d 570, 608 (2008).

in furtherance of "public health, welfare and safety." *Ketcham*, 81 Wn.2d at 575-76. Numerous cases refute the City's suggestion that it can defeat a Contracts Clause claim merely by asserting that the Ordinance is a valid exercise of police powers. MDR 16 n.51. As the U.S. Supreme Court has observed, if "the Contract Clause is to retain any meaning at all, … it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[14] The trial court followed these settled principles in declining to dismiss the Contracts Clause claim.

**3. The trial court correctly declined to dismiss the Takings Clause claim.**

As the City tacitly concedes, MDR at 16 n.54, whether a regulatory action rises to the level of a "taking" requires an "ad hoc, factual" analysis of the character of the specific regulation, its economic impact on the individual claimant, and the degree to which it interfered with the claimant's business expectations.[15] Accordingly, this inquiry "can seldom

[14] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978); *see also Levin*, 482 F. Supp. 3d at 959 (although law's "stated purpose is to promote and protect the health, safety, and welfare … plaintiffs nevertheless may maintain a Contract Clause claim if the Ordinance operates so as to substantially impair plaintiffs' contracts"). In a footnote, the City raises a new argument: that Instacart did not sufficiently identify existing contractual rights that the Ordinance impaired. MDR 16 n.51. That argument is waived, as the City did not present it to the trial court, and in any event, Instacart specifically pleaded the relevant contractual provisions that the Ordinance impairs. *See* Complaint, App. 108-09.
[15] *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see also Yim v. City of Seattle*, 194 Wn.2d 651, 669 (2019) ("fact specific inquiry" required in regulatory takings context).

be done on the pleadings," and dismissal of a claim subject to *Penn Central* analysis prior to discovery "must be reviewed with particular skepticism." *McDougal v. Cnty. of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991); *see Berst v. Snohomish Cnty.*, 114 Wn. App. 245, 256-57 (2002) (same; reversing CR 12(b)(6) dismissal of takings claim). Recognizing that Instacart had stated a claim that the Ordinance's degree of interference with its contracts rose to the level of a taking, the trial court appropriately allowed the claim to proceed to discovery.

The City's argument to the contrary rests on a mistaken reading of a single decision, *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), that preceded the modern framework for regulatory takings by decades. MDR at 15-16. *Omnia* does not establish a rule that a takings claim based on contractual rights can proceed only when the government "acquire[s]" a party's contractual rights; the case merely held that government action does not constitute a taking if it has an only incidental effect on the value of a contractual expectancy. 261 U.S. at 510-12.

### C. If The Court Grants The City's Motion, It Should Also Review The Dismissal Of Plaintiffs' RCW 82.84 Preemption Claim.

Any interlocutory review of the trial court's order on the motion to dismiss should encompass the trial court's dismissal with prejudice of Plaintiffs' claim that the Ordinance is preempted by RCW 82.84. For

reasons set forth in Plaintiffs' opposition to the motion to dismiss, App. 308-13, Plaintiffs respectfully submit that the Ordinance violates RCW 82.84 and that Count One of the complaint should not have been dismissed. Including that issue within any discretionary review would further judicial economy by obviating the need for a separate, subsequent appeal confined to the RCW 82.84 claim if the Court were to agree with the City that the remaining claims must be dismissed.[16]

## VI. CONCLUSION

For the foregoing reasons, the Court should deny the City's premature motion for discretionary review. If the Court grants the City's motion, its review should encompass the trial court's dismissal of Plaintiffs' claim that the Ordinance is preempted by RCW 82.84.

[16] Principles of constitutional avoidance support addressing Plaintiffs' statutory claim first. If this Court were to hold that RCW 82.84 preempts the Ordinance, it would render resolution of Plaintiffs' constitutional claims unnecessary. *See State v. Blake*, 197 Wn. 2d 170, 192 (2021) ("[W]here an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." (quotation omitted)).

RESPECTFULLY SUBMITTED this 11th day of June, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Respondents' Answer to Petitioner's Motion for Discretionary Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated June 11, 2021.

*s/Robert M. McKenna*
Robert M. McKenna
*Attorney for Respondents*

## ORRICK, HERRINGTON & SUTCLIFFE LLP

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