No. 99771-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents–Cross-Movants,

vs.

THE CITY OF SEATTLE,

Petitioner.

RESPONDENTS' ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

ROBERT M. MCKENNA
(WSBA# 18327)
rmckenna@orrick.com
DANIEL J. DUNNE
(WSBA# 16999)
ddunne@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Telephone: +1 206 839 4300
Facsimile: +1 206 839 4301

DANIEL A. RUBENS
(*pro hac vice*)
drubens@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
Telephone: +1 212 506 5000

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

There are no grounds for direct review in this Court. The trial court's partial denial of the City's motion to dismiss did not resolve any novel legal issues, and the City never claims otherwise. The trial court merely assumed, as it must, that the facts pleaded in Plaintiffs' complaint are true, and from there it determined, based on the Ordinance's unique features, that those allegations state claims upon which relief could be granted. The City's disagreement with that ruling does not give rise to a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination," RAP 4.2(a)(4), the sole basis for direct review the City has invoked.

In contending otherwise, the City repeatedly ignores the limited nature of the trial court's holding and refuses to accept the settled CR 12(b)(6) standard. The denial of a motion to dismiss is a preliminary ruling that allows a case to proceed to discovery; it does not resolve anything on the merits. A trial court does not "impermissibly sit as a super-legislature," City's Statement of Grounds for Direct Review ("SGDR") 1, when it concludes that factual allegations, if credited, would state a claim for relief.

The City's warnings of dire policy consequences are completely unfounded. While the City portends that economic legislation will grind

to a halt throughout the State if discovery proceeds in this case, it offers no factual support for that hyperbolic assertion. A single trial court decision—which necessarily lacks precedential force—denying a motion to dismiss in the face of well-pleaded allegations concerning a uniquely intrusive ordinance enacted during the COVID emergency is not going to stymie other legislative efforts, just as the existing reality that governments must frequently defend lawsuits challenging legislation on the merits has not stopped legislatures from legislating.

Fundamentally, the City takes issue with the notion that courts have a meaningful, though limited, role in ensuring that legislation is a valid exercise of legislative power and respects constitutional rights, even during a public health emergency. It is a well-settled feature of our constitutional system that courts can and must exercise that review. And it is equally axiomatic that motions to dismiss must be granted "sparingly and with care," "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). The City's disagreement with the trial court's fact-specific application of these established principles does not warrant interlocutory review in the first place, let alone present a broad issue of public importance justifying direct review by this Court.

II. NATURE OF THE CASE AND DECISION

Plaintiffs adopt the description of the nature of the case and decision set forth in their Answer to the City's Motion for Discretionary Review.

III. COUNTERSTATEMENT OF ISSUE

Whether the trial court's decision denying in part the City's motion to dismiss, which applied settled legal standards to allow certain of Plaintiffs' claims to proceed to discovery and resolution on the merits, presents a fundamental and urgent issue of broad public import that requires prompt and ultimate determination by this Court.

IV. ARGUMENTS AGAINST DIRECT REVIEW

RAP 4.2(a) limits the circumstances under which a "party may seek review in the Supreme Court of a decision of a superior court." Such review is discretionary, and the City has given no compelling reason why this preliminary procedural decision holding that certain claims have been sufficiently pleaded should leapfrog both the remainder of the trial court proceedings and review by the Court of Appeals. This Court should deny review.

A. The Trial Court's Application Of The CR 12(b)(6) Standard To Allow Certain Claims To Proceed To Discovery Accords With Settled Principles Of Constitutional Law And Civil Procedure.

In arguing that the trial court's partial denial of a CR 12(b)(6) motion resolved "fundamental and urgent issue[s] of broad public import," SGDR at 7-10 (alteration in original), the City betrays a basic misunderstanding of the procedural posture of this case and the role of the courts in reviewing legislative enactments. Nothing about the trial court's ruling threatens to reinstate *Lochner*, reverse a century of caselaw, or disrupt existing economic legislation like minimum wage laws or the regulation of working conditions. The court did not break any new constitutional ground by denying the City's motion to dismiss in part, based on "allegations about 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, combined with the allegations of pretext." Appendix to Petitioner's Statement of Grounds for Direct Review ("SGDR App.") 278. Indeed, despite the trial court's emphasis that this Ordinance is "unique," the City has failed to identify a single law or regulation with similar restrictions. That failure further underscores how unlikely it is that the trial court's decision will affect any other case.

In portraying the trial court's unremarkable conclusion as unleashing a constitutional crisis, the City appears to believe that courts have no role in reviewing claims that economic legislation is irrational or pretextual, apart from summarily dismissing such claims on the pleadings alone. Unsurprisingly, there is no support in precedent for the City's astonishing position, as detailed in Plaintiffs' accompanying answer to the City's motion for discretionary review. In fact, this Court has held the opposite: "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); *see also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008) (rational basis review "allows some inquiry into the rationale for the [legislative] classification").

The City's attempts to claim precedential support for its position confuse the nature of judicial review and the current posture of this case. As the trial court recognized, courts can—and must, to fulfill their constitutional obligations—review whether legislation exceeds police powers or violates constitutional rights by assessing whether there is a "rational relationship" between a "statute" and its stated "purpose." *Simpson v. State*, 26 Wn. App. 687, 694 (1980); *see also Fowler Packing Co. v. Lanier*, 844 F.3d 809, 816 (9th Cir. 2016) (denying motion to

dismiss where plaintiffs' allegations, accepted as true, would mean there was no acceptable justification for the legislation). Contrary to the City's claims, SGDR 7-11, this inquiry is not tantamount to "second-guess[ing] the wisdom of the legislature" in crafting the legislation at issue. *See Rousso v. State*, 170 Wn.2d 70, 75 (2010) (distinguishing between such "second-guess[ing]" and appropriate evaluation of legislation's constitutionality). Nor does deference to legislative judgments require courts to credit the legislature's claimed justifications for its actions, while disregarding well-pleaded allegations of an "illegitimate purpose" at the motion-to-dismiss stage. *See Fowler*, 844 F.3d at 815.

Again, disregarding the procedural posture and the express limitations on the trial court's actual holding, the City refers to cases addressing challenges to state legislation brought under the Due Process Clause of the Fourteenth Amendment. *See Ferguson v. Skrupa*, 372 U.S. 726, 729, (1963); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392, (1937); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 228, (2006), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, (2019); *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 534, (1974). These decisions reflect the well-settled post-*Lochner* recognition that most economic regulations do not infringe a "liberty" to contract protected by the Due Process Clause of the

Fourteenth Amendment. *See Aetna*, 83 Wn.2d at 531-34 (describing the history of due process clause claims). These cases do not, however, support the City's view that *all* economic legislation necessarily represents a valid exercise of a government's police powers, or that such legislation cannot violate *other* constitutional protections, including the Takings, Contracts, Equal Protection, and Privileges and Immunities Clauses.

Further, the City's position ignores the established standard for reviewing CR 12(b)(6) motions, which are to be granted "sparingly and with care," "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.*, 184 Wn.2d at 100. The City's fearmongering about "business interests" does not change the fact that CR 12(b)(6) applies equally to all litigants—businesses, governments, and individuals alike. There is no principled basis to grant local governments special solicitude and allow their litigation positions to override well-pleaded factual allegations, without applying that same rule across the board.

Exercising its proper role to evaluate Plaintiffs' claims of legislative overreach, the trial court below neither applied a heightened standard of review nor denied dismissal on the pleadings because of any policy disagreement with the Ordinance. *Contra* SGDR at 10. It merely

concluded that, accepting Plaintiffs' allegations of pretext as true as required at the motion-to-dismiss stage, it could not hold as a matter of law that the Ordinance was a valid exercise of the City's police power that bore a rational relationship to the City's claimed purpose. *See* SGDR App. at 281. That is exactly the inquiry that precedent requires at this stage in the proceedings. The trial court's sound application of pleading standards and constitutional principles to allow certain of Plaintiffs' claims to proceed to discovery does not merit this Court's direct review.

B. The Trial Court's Denial Of The City's Motion To Dismiss Has No Application Beyond This Case And Does Not Present Fundamental Or Urgent Issues Of Broad Public Import.

The City spends little effort explaining how anything the trial court decided presents a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination" by this Court, as RAP 4.2(a)(4) requires.[1] No such issue is present. The trial court merely denied a motion to dismiss in part and allowed some of Plaintiffs' claims to proceed. The court did not enjoin the Ordinance, which will remain in place throughout this litigation—at least until it automatically terminates when the state of emergency ceases. The only issue at stake here is

[1] The City cites RAP 4.2(**b**)(4), *see* SGDR at 7 n.19, but that provision does not exist, and Plaintiffs assume that the City intended to cite RAP 4.2**(a**)(4)**.**

whether the City should be relieved of any further obligation to respond to discovery requests and defend the Ordinance on the merits.

The City counters with ominous warnings that the trial court's decision will somehow open the floodgates and "distort[] legislative decision making throughout Washington." SGDR at 11. The City proclaims that the trial court's decision "encourage[s] baseless litigation," that the "costs and burdens of litigation are massively increased" if governments have to participate in discovery, and that "[t]he threat of costly legislation is likely to preclude smaller governmental entities from even *considering* novel legislative approaches to emerging economic problems." *Id.* at 12. From now on, the City warns, "fiscally responsible lawmakers" will have "to weigh the public benefits of a new law against the substantial costs that will result from useless litigation." *Id.* And if the trial court's decision is not immediately reversed on discretionary review, "the trial court's ruling will prevent numerous jurisdictions throughout Washington from responding to the COVID-19 crisis, or any future such emergencies, in the manner that best protects Washington's residents." *Id.* at 13.[2]

[2] The City's argument on this front also relies entirely on its premise that the Plaintiffs' claims are meritless. For the reasons explained above and in the opposition to the City's motion for discretionary review, they are not.

These dire predictions are as overblown as they sound, which is why they arrive without a citation to any case, rule, or evidence that supports them. As an initial matter, the City has provided no evidence that this litigation threatens to impose "massive" burdens.[3] More generally, the trial court's straightforward denial of a motion to dismiss, on the grounds that this Ordinance is uniquely intrusive and possibly pretextual, is not binding on other courts considering other plaintiffs' challenges to other legislation. That one trial court allowed these claims to proceed to discovery is not going to preclude legislatures from enacting other economic regulations as they see fit. Forty years ago, an association of business owners sued the governor over her declaration of emergency preceding the Mt. St. Helen's eruption. *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 467 (1982). That case proceeded to summary judgment, yet the City offers no evidence that the discovery process in that case dissuaded the State—or any municipalities—from crafting legislative responses to future emergencies, including the recent pandemic. In fact, this Ordinance is proof that the City was not so dissuaded.

Cougar Business Owners is not an isolated example. Remarkably, nearly every case the City cites to support its arguments on Plaintiffs'

[3] The City has not yet produced a single document in response to reasonably limited discovery that has been pending for nearly a year.

constitutional claims after the action had proceeded past the pleadings stage, or on a factual record otherwise more developed than the one here. *See Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506 (2020) (summary judgment); *Rousso v. State*, 170 Wn.2d 70 (2010) (same); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 213 (2006) (post-administrative hearing), *abrogated by Yim v. City of Seattle*, 194 Wn.2d 682 (2019); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 387 (1937) (post-trial); *Aetna*, 83 Wn.2d at 525 (1974) (same); *Am. Network, Inc. v. Wash. Utilities & Transp. Comm'n*, 113 Wn.2d 59 (1989) (same); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (following evidentiary hearing and judgment). The same is true of the City's lone example where this Court granted direct review to resolve a case with "wide implications for governmental liability." SGDR at 7 & n.20. *See Hartley v. State*, 103 Wn.2d 768, 770 (1985) (summary judgment). States and municipalities have not yielded their legislative power out of fears they will be required to incur expense in civil litigation, just as they have not done so out of fear they will incur the expense of producing documents about controversial legislation in response to public disclosure requests. These checks and balances promote rather than deter enactment of legislation that is faithful to the Constitution.

Governments throughout the State—including the City of Seattle—are regularly sued over both their legislation and the conduct of their officials, and many of those cases proceed to discovery. That will remain true regardless of whether the trial court's decision here is upheld. The City's arguments, if taken at face value, belie a lack of trust in the ability of the judiciary to carry out its mission to efficiently adjudicate controversies that come before it. The Civil Rules impose limits on discovery and ensure that it does not impose undue burdens on the parties. *See* CR 26(b). If the City believes the costs of civil discovery outweigh countervailing considerations of access to courts that inform this Court's longstanding interpretation of CR 12(b)(6), that is an argument to be directed to the legislature, not this Court. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 103 (2010). The City's dissatisfaction that this case will proceed does not pose any urgency or present a question of broad import that merits bypassing the Court of Appeals.

V. CONCLUSION

Applying well-established standards under Rule 12(b)(6), the trial court denied in part a motion to dismiss a well-pleaded complaint. There are no grounds for direct review, and the City's motion for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 11th day of June, 2021.

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: *s/Robert M. McKenna*

ROBERT M. MCKENNA (WSBA #18327)
rmckenna@orrick.com
DANIEL J. DUNNE (WSBA #16999)
ddunne@orrick.com
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Telephone: +1 206 839 4300
Facsimile: +1 206 839 4301

DANIEL A. RUBENS
(*Pro Hac Vice*)
drubens@orrick.com
51 West 52nd Street
New York, NY 10019
Telephone: +1 212 506 5000

Attorneys for Respondents

CERTIFICATE OF SERVICE

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

Dated June 11th, 2021.

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

ORRICK, HERRINGTON & SUTCLIFFE LLP

June 11, 2021 - 4:23 PM

Transmittal Information

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

The following documents have been uploaded:

- 997713_Answer_SOG_for_Direct_Review_20210611162221SC671747_7121.pdf
  This File Contains:
  Answer to Statement of Grounds for Direct Review
  The Original File Name was Answer to Statement of Grounds.pdf

A copy of the uploaded files will be sent to:

- Derrick.DeVera@seattle.gov
- Jennifer.Litfin@seattle.gov
- cpitts@altber.com
- ddunne@orrick.com
- drubens@orrick.com
- jeremiah.miller@seattle.gov
- mherbert@altshulerberzon.com
- sleyton@altber.com

Comments:

Sender Name: Malissa Tracey - Email: mtracey@orrick.com
Filing on Behalf of: Robert M. Mckenna - Email: rmckenna@orrick.com (Alternate Email: sea_wa_appellatefilings@orrick.com)

Address:
701 Fifth Avenue, Suite 5600
Seattle, WA, 98104
Phone: (206) 839-4309

Note: The Filing Id is 20210611162221SC671747