No. 99771-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

vs.

THE CITY OF SEATTLE,

Appellant.

RESPONDENTS' REPLY BRIEF

ROBERT M. MCKENNA
(WSBA No. 18327)
rmckenna@orrick.com
DANIEL J. DUNNE
(WSBA No. 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

BENJAMIN F. AIKEN
(*pro hac vice*)
baiken@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
Telephone: +1 202 339 8400

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

I. INTRODUCTION

The Ordinance falls squarely within the Keep Groceries Affordable Act's prohibition of local government "tax[es], fee[s], or other assessment[s] on groceries." RCW 82.84.040(1). The City's arguments to the contrary subvert the statutory text and contradict the Act's fundamental purpose. If Washington voters wanted to keep groceries affordable, why would they allow a local government to make groceries more expensive just because that government directs the surcharge revenue to a private party instead of keeping the proceeds for itself? They would not, and they did not.

The plain text of RCW 82.84 bars the $2.50 premium-pay surcharge on stops to deliver groceries. That is because the Ordinance imposes a "fee" or "other assessment" prohibited by the Act's operative provision. Still other aspects of the Act confirm that its terms must be interpreted broadly, including its expansive modifiers ("*any* tax, fee, or other assessment"; "levy, charge, or exaction *of any kind*") and express directive that the

Act's terms be "construed liberally." RCW 82.84.030, .050.[1] At every turn, the statute does everything possible to make clear that it must be read broadly in service of its ultimate aim: to prevent measures that would make groceries less affordable.

The City nonetheless asks this Court to construe the statute in a way that would thwart that goal, relying almost entirely on a single word—"similar"—in the statute's definitional provision to contend that the Act preempts only taxes (or perhaps also tax-like charges; as explained below, the City never stakes out a clear position in that regard). But the statute's illustrative definition of "tax, fee, or other assessment" in no way supports this cramped construction. If the City were correct that the Act is limited to taxes, that would render large swaths of the statutory language superfluous, including its references to "fee," "other assessment," "charge," "exaction," "of any kind," and "collect." Such a reading would disrespect

[1] Unless otherwise indicated, all emphasis in this brief is added.

both the will of Washington voters and this Court's instruction that every word in a statute must be given effect.

The City nonetheless tries to defend its narrow reading as consistent with voter intent, but those arguments similarly fall flat. The City suggests that Washington voters were concerned about only taxes, as opposed to other local government charges that make groceries less affordable. That argument defies the Act's stated aim, the additional explanations in the voters' pamphlet, and common sense. The people banned measures that would make groceries more expensive, no matter who might pocket the proceeds. The Ordinance's premium-pay provision violates the Keep Groceries Affordable Act, and this Court should strike it down.

II. ARGUMENT

A. RCW 82.84 preempts not just "taxes," but also "any fee[] or other assessment" on groceries.

The Act's plain terms are easily broad enough to encompass the Ordinance's premium-pay requirement. As Plaintiffs previously explained, the $2.50-per-delivery charge

on groceries constitutes both a "fee" and "other assessment" under the Act. *See* Resp. Opening Br. 22-23. Despite this, the City has steadfastly maintained that RCW 82.84 is limited to taxes, although its arguments to that effect have shifted over the course of these proceedings. In its opening brief, the City understood the Act as strictly a prohibition on "taxing groceries." City Opening Br. 66. But it obviously would defy the most basic rules of statutory interpretation to look at a statute that prohibits "any tax, fee, or other assessment" and say that it reaches only taxes. So the City now tries to hedge in its reply brief, offering that perhaps RCW 82.84 also reaches "money [that] ends up in government coffers, either for a general or specific purpose." City Reply Br. 47. Even so, the City has never identified any example of a non-tax that the Act would prohibit, and later in its brief it again retreats to its tax-only reading of the law. *See id.* at 49-51. Ultimately, then, the City rests on the indefensible notion that "any tax, fee, or other

assessment" applies to only taxes, and "levy, charge, or exaction of any kind" refers to only levies.

To justify reading "fee" and "other assessment" out of the Act, the City turns to the statute's definitions, plucking out the word "similar" from the capacious phrase: "any other similar levy, charge, or exaction of any kind." RCW 82.84.030(5). The City maintains that by using this word after offering a list of illustrative examples of prohibited taxes, the definition deprives the terms "fee" and "other assessment" of "[any] independent statutory meaning." City Reply Br. 46.

That restrictive reading is flawed several times over. Most importantly, it overlooks that the statutory definition is expressly illustrative, rather than exclusive; it specifies that the prohibited "'[t]ax, fee, or other assessment on groceries' *includes, but is not limited to*" the enumerated examples. RCW 82.84.030(5). The City does not dispute that point, but argues that the Act should nonetheless "be deemed only to incorporate those things similar in nature or 'comparable to' the specific

terms." City Reply Br. 45 (quoting *State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015)). In so contending, the City overlooks critical distinctions between the interpretive question in *Larson* and the issue here.

Larson concerned the scope of a criminal statute prohibiting retail theft, and in particular, whether ordinary wire cutters are "an item, article, implement, or device … designed to overcome security systems including, but not limited to, lined bags or tag removers." RCW 9A.56.360(1)(b); *see Larson*, 184 Wn.2d at 849. Applying the rule of *ejusdem generis*, the Court concluded that the "two illustrative examples of lined bags and tag removers" were "intended to limit the scope of RCW 9A.56.360(1)(b) to similar items." *Larson*, 184 Wn.2d at 850. Here, the statutory definition offers far more than "two illustrative examples"—it lists six types of taxes, and then goes on to specify its inclusion of "any other similar levy, charge, or exaction of *any kind* on groceries." RCW 82.84.030(5). If the City were correct that *ejusdem generis*

already limits the operative term "[t]ax, fee, or other assessment on groceries" to taxes similar to the six examples listed in the definition, the phrase "any other similar levy, charge, or exaction of *any kind* on groceries" would be entirely unnecessary.

Indeed, to understand the Act as confined to taxes that are "comparable to the enumerated taxes," City Reply Br. 46, makes inexplicable the voters' choice to restrict not just "taxes," but also "fees" and "other assessments." Such a reading would violate the bedrock rule that "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Nor, as Plaintiffs' opening brief explained (at 25 n.2), may *ejusdem generis* override clear indications of statutory purpose: here, to preempt the entire range of local-government charges that make

groceries less affordable. *See Silverstreak, Inc. v. State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 883, 154 P.3d 891 (2007).[2]

Similarly unpersuasive is the City's attempt to minimize the Act's reference to "*any* … fee, or other assessment." RCW 82.84.040(1). The City does not dispute that ordinarily, the word "any" signals that a term is to be interpreted "expansively," as this Court held in *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 220, 11 P.3d 762 (2000). The City contends that this case is different because RCW 82.84's definitional provision refers to "any other *similar* levy, charge, or exaction." RCW 82.84.030(5). But that argument fails to respond to the Act's *operative* provision, which itself refers to "any tax, fee, or other assessment" without any qualifier. RCW 82.84.040(1).

[2] *Larson* is further distinguishable because the criminal statute there lacks a directive that the Court "construe[]" its provisions "liberally," as the Act here contains. RCW 82.84.050(2); *cf. State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015) ("In criminal cases, we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor.").

That choice by Washington voters demands a broad construction of the types of "tax[es], fee[s], or other assessments[s]" subject to preemption. The City gets it backwards by fixating on the word "similar" in the statutory definition and using that to argue that every word in the operative phrase besides "tax" is surplusage. As explained, the word "similar" is sandwiched between sweeping terms—"any other," "of any kind"—and forms part of an overarching definition that is illustrative, not exclusive. The statutory definition reinforces the operative provision's breadth—it certainly does not justify the City's reading of the Act as exclusively tax-focused.

B. The City cannot meaningfully dispute that the Ordinance imposes a prohibited "fee" or "other assessment," including a "charge" or "exaction," on groceries.

The City's selective reading of the statutory definition serves only to distract from the question before this Court: whether the Ordinance's premium-pay charge counts as a prohibited "fee" or "other assessment." It plainly does. Other

critical words and phrases in the Act—"charge," "exaction of any kind," and "impose or collect"—further confirm this, and the City is wrong to contend otherwise.

"Fee." As Plaintiffs' opening brief explained and this Court has already recognized, the ordinary understanding of a "fee" is "'a charge fixed by law or by an institution … for certain privileges or services.'" *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 670, 278 P.3d 632 (2012) ("*Washington Association*") (quoting Webster's Third New Int'l Dictionary 833 (2002)). The Ordinance imposes such a charge on FDNCs for the delivery of groceries, even though the money does not "end[] up in government coffers." City Reply Br. 47.

The City grossly misreads *Washington Association* in arguing that ordinary uses of the word "fee" require funds to "circle[] back to the regulator to cover the cost of regulation." City Reply Br. 46 (emphasis omitted; citing 174 Wn.2d at 670). That case discussed the meaning of "fee" in the context of a

"*license* fee," not as an unmodified term. It is no doubt correct that a "license fee" (as distinguished from a tax) is paid to the agency that grants the license. But RCW 82.84 does not refer to a "license fee"; it prohibits "*any* … fee." RCW 82.84.040(1).

"**Other assessment."** The City never disputes that the Ordinance, at the very least, imposes an "assessment" on groceries within the ordinary meaning of that term. Indeed, the City never addresses that phrase beyond its counterintuitive—and incorrect—assertion that "'fee' and 'other assessment' have no independent statutory meaning." City Reply Br. 46.

"***Charge" or "exaction of any kind."*** The City likewise does not dispute that the premium-pay provision fits within the plain meaning of "charge[] or exaction of *any kind*." Resp. Opening Br. 23-24 (emphasis in original). The City's only response is—yet again—to rely on the fact that those terms "are modified by the word 'similar'" in the statutory definition. City Reply Br. 44-45, 47. But the City ignores what unites the

varied examples of taxes in the definition. The list runs the gamut of charges that would *increase the price consumers pay for groceries*, whether those charges are directly imposed on consumers ("sales tax") or placed on businesses that may in turn raise grocery prices ("business and occupation tax"; "business license tax"). In other words, the key similarity among the enumerated taxes is that they are charges tied to groceries, not that they generate revenue for the government (as opposed to third parties like grocery stores or workers). Viewed in that light—as the Act expressly demands, *see* RCW 82.84.020—the Ordinance *does* impose a charge or exaction similar to the enumerated list of taxes, in that it requires a monetary payment that raises the price of groceries.

Not only that, but the City's argument would also render superfluous the definition's reference to "similar … charge[s] or exaction[s] of any kind." The City's tax-only reading could have been accomplished by having that part of the definition read "any other similar levy of any kind," with no reference to

charges or exactions. A proper construction of the statute must respect the voters' choice to prohibit similar "charge[s]" and "exaction[s]" in addition to levies, consistent with their choice to prohibit not just taxes, but also fees and other assessments. Under the City's interpretation, however, the meaning of the statute would not change one iota if "charge or exaction" were stricken out entirely.

The City fares no better by invoking a California intermediate appellate court's decision in *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310, 1325-26, 153 Cal. Rptr. 3d 352 (2013), as supposedly affirming that RCW 82.84 concerns only taxes. City Reply Br. 47 n.125. The City's reliance on *Schmeer* is misplaced because the California constitutional provision at issue restricted local governments' ability to impose "taxes"; it did not purport to cover "fees" or "other assessments." *See* 213 Cal. App. 4th at 1326-27; Cal. Const. art. XIII C, § 2. That point was critical to the court's analysis of the phase "any levy, charge, or exaction of any

kind" in the context of defining "tax." *Schmeer* recognized that "[t]he term 'tax' in ordinary usage refers to a compulsory payment made to the government or remitted to the government," and further noted that its construction was "consistent with the ordinary meaning of the term 'tax.'" 213 Cal. App. 4th at 1326. Had the constitutional provision in *Schmeer* referred to "any tax, fee, or other assessment," the court may have come to a different conclusion about whether the definitional language was limiting.[3]

"Impose" or "collect." There is a final textual indication that the Act should not be read to reach only surcharges that are remitted to the government. The statute says that a "local government entity may not *impose or collect* any tax, fee, or

[3] That is especially true because *Schmeer* concluded that it was "ambiguous as to whether a levy, charge or exaction must be payable to a local government in order to constitute a tax." 213 Cal. App. 4th at 1327. To resolve that ambiguity, the California Court of Appeal looked at the "seven exceptions" in the constitutional provision's definition of "tax," all of which "relate[d] to charges ordinarily payable to the government." *Id.* There are no such exceptions here.

other assessment," RCW 82.84.040(1), yet the word "impose" would be superfluous under the City's reading. *See* Resp. Opening Br. 26. If the Act were intended to prevent only those fees or assessments that a local government collects, then the statute would prohibit a "local government entity" only from "collect[ing]" those fees or assessments, not from "impos[ing]" them. That the Act bars both confirms that the voters meant to cover more than just taxes.

The City's main response is to observe that the state Constitution provides that "all taxes 'shall be levied and collected for public purposes only,'" suggest that it is thus "common[]" to distinguish between the imposition and collection of taxes, and from there argue that Plaintiffs' reading would introduce "surplusage" into that constitutional phrase. City Reply Br. 48 (quoting Wash. Const. art. VII, § 1). But the fact that a 1930 constitutional amendment imposed a public-purpose requirement on all taxes that are "levied and collected" sheds no light on the proper construction of the Ordinance,

which Washington voters enacted nearly 90 years later for a wholly different goal. Any surplusage in the Constitution's phrasing says nothing about why the voters who approved the Act would have prohibited local governments from either imposing *or* collecting taxes, fees, or other assessments on groceries, if the aim were solely—as the City imagines—to disable local governments from collecting taxes on groceries.

The City is likewise wrong to hypothesize that "impose" and "collect" are "temporally distinct … so that, by prohibiting both, the statute makes each collection a new violation, extending any applicable statute of limitations." City Reply Br. 48-49. That argument is no answer because it addresses only collection, not imposition. The same end could have been achieved by banning only the former and not the latter. The City tries to respond to this problem by asserting "that taxes may be imposed by one entity but collected by another," citing a single California case as an example. City Reply Br. 48. That still fails to support the City's reading of the Act. Again,

if the City were correct that the statute reaches only charges that are paid to the government, that could be accomplished by banning only "collect[ion]" of a tax, even if a separate entity imposed it. By prohibiting both collection and imposition, the Act reaffirms that local-government-imposed charges on groceries must be preempted no matter where they are remitted.

C. The Ordinance conflicts with the purpose of RCW 82.84.

The City concludes with an argument that the purpose of the Act supports its reading. *See* City Reply Br. 49-51. But its account of purpose rests on its flawed premise that the Act is concerned with only taxes,[4] as opposed to other local-government-imposed charges that make groceries more expensive. While there is no need for this Court to consider indicia of purpose beyond the clear statutory text, *see Bostain v.*

[4] It is not even clear if the City buys its own story—as explained above, *supra* 4, the City elsewhere suggests that the Act may prohibit more than just taxes so long as the government collects the charges.

Food Exp., Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007), the initiative's history only confirms its breadth.

The voters' pamphlet accompanying the initiative eliminates any doubt that RCW 82.84 was intended to prohibit more than just "taxes." The purpose of RCW 82.84, as the pamphlet makes clear, is to preclude local governments from imposing additional charges on groceries, regardless of the form that those charges take. The pamphlet emphasized the need to "keep[] the price of groceries as low as possible." CP 284. The Act's title—"Keep Groceries Affordable Act of 2018"—confirms that goal, as does its plain text. *See* RCW 82.84.020(2) (finding that "keeping the price of groceries as low as possible improves the access to food for all Washingtonians"). The City quotes phrases from the pamphlet that focus specifically on taxes, but the fact that taxes were among voters' chief concerns does not mean that taxes were their *only* concern, or otherwise suggest that they wanted a law

directed to "any tax, fee, or other assessment" to cover taxes alone.

The City also argues that the Ordinance's offset provisions, which limit FDNCs' ability to recoup the delivery fee through an added customer charge, somehow exempt it from the Act's concerns. City Reply Br. 49-50. As an initial matter, the City contradicts this argument elsewhere in its brief. In responding to Plaintiffs' arguments under the Contracts Clause, the City contends that the offset provisions do not actually prevent FDNCs from passing on increased prices to consumers because "the Ordinance contains no blanket prohibition on FDNCs adjusting their business practices to account for the increased payments to workers." City Reply Br. 23. As an example, the City says that "nothing in the Ordinance would prevent FDNCs from increasing the costs of their services to food providers." *Id.* at 23-24. If FDNCs respond to the Ordinance by charging food providers more for their services, then grocery stores will in turn pass those

increased costs onto consumers, thereby raising the price of groceries.

In any event, the City is wrong that the offset provisions can save the Ordinance's premium-pay provision. The City never responds to Plaintiffs' argument that each provision of the Ordinance must be considered on its own to determine whether RCW 82.84 preempts it. *See* Resp. Opening Br. 28-29. That is especially true because the Ordinance contains a severability clause. *See* CP 124-25 (Ord. § 100.290) ("[t]he provisions of this ordinance are declared to be separate and severable"). Where, as here, a statutory provision is "grammatically, functionally, and volitionally severable," it "stands alone as a separate section of the Act." *El Centro De La Raza v. State*, 192 Wn.2d 103, 133, 428 P.3d 1143 (2018) (quotations omitted); *see also, e.g., Chadha v. INS*, 634 F.2d 408, 415 n.3 (9th Cir. 1980) (Kennedy, J.) ("If Congress included a severability clause, it is presumed to have intended

each section of the Act to stand or fall on its own."), *aff'd*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

Finally, the City accuses Plaintiffs' reading of lacking a limiting principle, contending that it "would render [the Act] applicable to any imposition of an additional cost regardless of whether the government, workers, consumers, or any other person is the beneficiary." City Reply Br. 50. The City is wrong. A "tax, fee, or other assessment" that is "*generally applicable* to a broad range of businesses and business activity" is exempted from the statute, as long as the charge does not rely on a classification relating to groceries. RCW 82.84.040(3)(a). Thus, nothing in the statute prohibits a municipality from regulating grocery stores or food delivery companies as part of a larger effort to address worker compensation or working conditions. Instead, to take the City's example, a requirement that store clerks—of any kind, not just grocery cashiers—be given chairs to sit in during shifts does not run afoul of RCW 82.84 because such a mandate would affect workers generally,

rather than target groceries specifically.[5] For these reasons, a proper interpretation of RCW 82.84 would not have the dire consequences the City imagines, but it would preempt the City's attempt to charge a fee on grocery deliveries.

III. CONCLUSION

The Ordinance's premium-pay provision is a "fee" or "other assessment" within the plain meaning of the Keep Groceries Affordable Act, and nothing in the Act's definitional provision narrows those terms to exclude a surcharge on groceries simply because the proceeds go to private parties. Plaintiffs' reading also comports with the voters' intent—expressed in both the text of the statute and in the voters' pamphlet. For these reasons and those stated in Plaintiffs'

[5] Nor does the City explain why a wage or working condition regulation affecting grocery or food delivery *workers* would be treated as a "tax, fee, or other assessment *on groceries*." RCW 82.84.040(1). The Ordinance's premium-pay requirement, by contrast, is plainly a fee "on groceries" because the charge is linked directly to a particular grocery delivery order.

opening brief, this Court should hold that the Act preempts the Ordinance.

* * *

This document contains 3,740 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th Day of December, 2021.

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: *s/Robert M. McKenna*

ROBERT M. MCKENNA
(WSBA No. 18327)
rmckenna@orrick.com
DANIEL J. DUNNE
(WSBA No. 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

BENJAMIN F. AIKEN
(*pro hac vice*)
bfaiken@orrick.com
1152 15th Street NW
Washington, DC 20005
Telephone: +1 202 339 8400

Attorneys for Respondents

CERTIFICATE OF SERVICE

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

Dated December 30, 2021.

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

ORRICK, HERRINGTON & SUTCLIFFE LLP

December 30, 2021 - 1:25 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_Briefs_20211230132412SC596322_1691.pdf
  This File Contains:
  Briefs - Respondents Reply
  The Original File Name was Reply Brief of Respondents.pdf

A copy of the uploaded files will be sent to:

- Derrick.DeVera@seattle.gov
- Jennifer.Litfin@seattle.gov
- Marisa.Johnson@seattle.gov
- ahossain@altshulerberzon.com
- baiken@orrick.com
- cpitts@altber.com
- dalmat@workerlaw.com
- ddunne@orrick.com
- drubens@orrick.com
- erica.franklin@seattle.gov
- jeremiah.miller@seattle.gov
- sheala.anderson@seattle.gov
- sleyton@altber.com
- woodward@workerlaw.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 20211230132412SC596322