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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' BRIEF

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. CROSS-ASSIGNMENT OF ERROR. 5

III. ISSUE ON CROSS-ASSIGNMENT OF ERROR. 6

IV. STATEMENT OF THE CASE...................................... 6

A. FDNCs Offer Seattle Residents Safe Food Delivery During The Pandemic. 6

B. The City Enacted An Ordinance That Exceeds The City Council's Powers And Violates FDNCs' Constitutional Rights. 10

C. The City's Stated Reasons For Enacting The Ordinance Were Pretextual................................ 13

D. The Ordinance Was Enacted Despite Washington Voters' Approval Of Initiative 1634, The Keep Groceries Affordable Act......... 16

E. After Plaintiffs Sued To Challenge The Ordinance, The Trial Court Denied The City's Motion To Dismiss In Part, But The Commissioner Granted Direct, Discretionary Review. 17

V. ARGUMENT 20

A. RCW 82.84 Prohibits The Ordinance's Premium-Pay Provision..................................... 20

B. The Ordinance Violates Both The State And Federal Constitutions. 29

1. The City's assertions that the trial court adopted a "*Lochner*-era approach" are inappropriate and unfounded. 30

2. The Ordinance exceeds the City's police power. 32

TABLE OF CONTENTS
(continued)

Page

3. The trial court correctly determined that Plaintiffs stated a claim under the Takings Clause. 43
   - a. Instacart has pleaded that the Ordinance appropriates a protected property interest. 45
   - b. Instacart has pleaded that the Ordinance cannot pass the *Penn Central* test. 49
   - c. Plaintiffs' takings claim does not seek to resuscitate *Lochner*. 51
4. The trial court correctly determined that Plaintiffs stated a claim under the Contracts Clause. 53
5. The trial court correctly declined to dismiss Plaintiffs' claims that the Ordinance violates the Equal Protection Clause and the Washington Privileges and Immunities clause. 61
   - a. Equal Protection Clause 61
   - b. Privileges and Immunities Clause 66

C. The Trial Court Correctly Applied CR 12(b)(6) And Washington's Notice Pleading Standard. 69

VI. CONCLUSION 73

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n,
83 Wn.2d 523, 520 P.2d 162 (1974) 51, 52

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) 58

Am. Legion Post #149 v. State Dep't of Health,
164 Wn.2d 570, 608 P.3d 306 (2008) 67

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996)... 41

Berst v. Snohomish Cnty.,
114 Wn. App. 245, 57 P.3d 273 (2002) 45, 50

Cedar Point Nursery v. Hassid,
141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) 44, 47, 49

Chong Yim v. City of Seattle,
194 Wn.2d 651, 451 P.3d 675 (2019) 43

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir. 2003).................................... 46, 48

City of Seattle v. McCready,
123 Wn.2d 260, 863 P.2d 1344 (1994) 24

City of Seattle v. Webster,
115 Wn.2d 635, 802 P.2d 1333 (1990) 35, 38

Cornwell v. Cal. Bd. of Barbering & Cosmetology,
962 F. Supp. 1260 (S.D. Cal. 1997) 70

Cougar Bus. Owners Ass'n v. State,
97 Wn.2d 466, 647 P.2d 481 (1982) 32, 36, 39, 71

Daniels v. State Farm Mut. Auto. Ins. Co.,
193 Wn.2d 563, 444 P.3d 582 (2019) 36

DeYoung v. Providence Med. Ctr.,
136 Wn.2d 136, 960 P.2d 919 (1998) 61

Duquesne Light Co. v. Barasch,
488 U.S. 299, 109 S. Ct. 609, 102 L. Ed. 2d 646
(1989) 48

E. N.Y. Sav. Bank v. Hahn,
326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34 (1945) 57

F.C.C. v. Beach Commc'ns, Inc.,
508 U.S. 307, 43 S. Ct. 437, 67 L. Ed. 773
(1993) 65

Jacobson v. Massachusetts,
197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643
(1905) 33

Ketcham v. King Cnty. Med. Serv. Corp.,
81 Wn.2d 565, 502 P.2d 1197 (1972) 51, 54, 60

Kimball Laundry Co. v. United States,
338 U.S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765
(1949) 48

Lazy Y Ranch Ltd. v. Behrens,
546 F.3d 580 (9th Cir. 2008) 41, 42, 64, 66

Levin Richmond Terminal Corp. v. City of Richmond,
482 F. Supp. 3d 944 (N.D. Cal. 2020) 70

Lochner v. New York,
198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937
(1905) 31

Lynch v. United States,
292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434
(1934) 46

Mackenzie v. City of Rockledge,
920 F.2d 1554 (11th Cir. 1991)... 41

Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.,
196 Wn.2d 506, 475 P.3d 164 (2020)................................. 68

McCurry v. Chevy Chase Bank, FSB,
169 Wn.2d 96, 233 P.3d 861 (2010).................................. 72

McDougal v. Cnty. of Imperial,
942 F.2d 668 (9th Cir. 1991).. 45, 50

Ockletree v. Franciscan Health Sys.,
179 Wn.2d 769, 317 P.3d 1009 (2014)............................... 67

Omnia Com. Co. v. United States,
261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773
(1923) 47

Pennell v. City of San Jose,
485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1
(1988) 64

Penn Central Transp. Co. v. City of New York,
438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631
(1978) 44, 50

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 60

Ralph v. City of Wenatchee,
34 Wn.2d 638, 209 P.2d 270 (1949) 32, 68

Roman Cath. Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) 33

Ruckelshaus v. Monsanto,
467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815
(1984) 46

RUI One Corp. v. City of Berkeley,
371 F.3d 1137 (9th Cir. 2004).. 70

Shepard v. City of Seattle,
59 Wn. 363, 109 P. 1067 (1910) 71

Sloma v. State Dep't of Ret. Sys.,
12 Wn. App. 2d 602, 459 P.3d 396 (2020) 54

Sound Infiniti, Inc. v. Snyder,
169 Wn.2d 199, 237 P.3d 241 (2010) 20

Squaw Valley Dev. Co. v. Goldberg,
375 F.3d 936 (9th Cir. 2004)... 41

State v. Osman,
157 Wn.2d 474, 139 P.3d 334 (2006) 64

State v. Smith,
93 Wn.2d 329, 610 P.2d 869 (1980) 70

State v. Spino,
61 Wn.2d 246, 377 P.2d 868 (1963) 32, 35

SuperValu, Inc. v. Dep't of Lab. & Indus.,
158 Wn.2d 422, 144 P.3d 1160 (2006) 21

Sveen v. Melin,
138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018) 55, 56, 59

Tenore v. AT&T Wireless Servs.,
136 Wn.2d 322, 962 P.2d 104 (1998) 69

Wroblewski v. City of Washburn,
965 F.2d 452 (7th Cir. 1992) 70

Constitutional Provisions

U.S. Const. am. V 44

U.S. Const. art. I, sec. 10, cl. 1 55

Wash. Const. art. I, § 12 66

Wash. Const. art. XI, § 11 32

Statutes

RCW 82.84 .... 3, 6, 17, 18, 19, 20, 24, 27, 29

RCW 82.84.020 .... 17, 28

RCW 82.84.030 .... 21, 22, 23, 28

RCW 82.84.040 .... 20, 22, 23, 26, 28

Other Authorities

Dr. Robert Kulick, *NERA Study Finds Direct Causal Relationship Between Instacart Adoption and Economic Growth in the US Grocery Industry*, https://tinyurl.com/2728v5zr (last visited Oct. 4, 2021) 8

Eli Lehrer, *The Future of Work*, National Affairs (Summer 2016) https://tinyurl.com/me9ehdz8 13

Governor's Proclamation 20-25 Appendix (Mar. 23, 2020) https://tinyurl.com/buejxmrn 15

I. INTRODUCTION

When COVID-19 began its rapid spread in the United States, people were afraid to go grocery shopping for fear of infection. Food delivery network companies ("FDNCs") like Plaintiff Instacart were among the first businesses to step up, facilitating contactless grocery delivery to consumers' front doors within hours. When thousands of residents lost their jobs overnight, FDNCs immediately bulked up their worker networks, offering compensation averaging $30/hour that was nearly double the Seattle minimum wage and 50% more than FDNC workers made pre-COVID. And to protect workers' health and safety, Instacart provided testing, personal protective equipment, contactless pay and delivery options, and two weeks' sick pay to infected workers. As society faced its biggest challenge in generations, FDNCs like Instacart rose to meet the moment, increasing work opportunities while promoting food security and public health.

The City of Seattle chose a different path. Rather than applauding FDNCs' role in supporting the community, the City chose to use the emergency as a pretext to achieve a longstanding objective unrelated to public health: regulating the gig economy as a political favor to special interests. Working closely with several private organizations—and tailoring the legislation to those organizations' requests, even though none represented gig workers—the City enacted an unprecedented Ordinance that intruded on the most fundamental aspects of FDNCs' businesses and froze their operations in the state they occupied at passage. In addition to imposing a so-called COVID "hazard pay" requirement—a new, $2.50-per-delivery premium-pay surcharge—the Ordinance forbids FDNCs from altering the areas they serve, forces FDNCs to continue providing access to their platforms for any delivery worker regardless of changes in demand, and, in an apparent effort to impose price controls, prohibits FDNCs from passing on mandated cost increases to consumers. Under the guise of a

public-health emergency, the City thus regulated FDNCs like public utilities, appropriating their networks of contractual relationships with independent contractors, consumers, and grocers to offer subsidized services to Seattle residents and businesses.

As a result of these unprecedented regulatory controls, the Ordinance violates both a state statute and multiple constitutional provisions. First, although the City accuses Plaintiffs of taking "grievances not to the polls but to the courts," City's Opening Brief ("OB") 1, the City ignores that the voters have already spoken. Three years ago, Washington voters approved an initiative that became the Keep Groceries Affordable Act of 2018, codified at RCW 82.84. That law prohibits any "tax, fee, or other assessment" on groceries, including on grocery delivery. By attaching a $2.50 fee per delivery in Seattle, the Ordinance flouts that prohibition. The trial court incorrectly dismissed that claim on the view that the statute prohibits only those charges that are paid to the

government, but the statute sweeps far more broadly. This Court should reverse the trial court's dismissal of that claim.

The trial court was correct, however, in declining to dismiss Plaintiffs' claims that the Ordinance violates several constitutional provisions. Most fundamentally, the Ordinance is plainly pretextual and irrational—purporting to solve problems that did not exist—and therefore exceeds the City's police power. But that's not all. By appropriating and nullifying many of Instacart's pre-existing contractual rights without affording just compensation, the Ordinance runs afoul of the Takings Clause and, for similar reasons, the Contracts Clause of the Washington and U.S. Constitutions. And by singling out FDNCs while excluding transportation network companies ("TNCs"), whose drivers face more risk and who also provide a vital service, the Ordinance violates the Equal Protection Clause of the U.S. Constitution and the Privileges and Immunities Clause of the Washington Constitution.

Each of these claims requires development of a factual record. The trial court recognized as much, and for that reason it denied the City's CR 12(b)(6) motion and allowed the claims to proceed to discovery. That ruling reflected a careful application of settled pleading standards, not a "dangerous retreat to the last Gilded Age." OB 2. The City's invocations of *Lochner*-era jurisprudence are entirely baseless and cannot excuse the City's refusal to credit the facts pleaded in the complaint. Were this Court to accept the City's position, it would mark a retreat from the notice pleading standard that until now applied to all plaintiffs, including those challenging government actions. Because Plaintiffs have pleaded facts that, if true, would support their claims, the trial court's decision denying the City's motion to dismiss as to Plaintiffs' constitutional claims should be affirmed.

II. CROSS-ASSIGNMENT OF ERROR.

The trial court erred in dismissing Plaintiffs' claim that RCW 82.84 preempts the Ordinance.

III. ISSUE ON CROSS-ASSIGNMENT OF ERROR.

Does RCW 82.84, which prohibits local governments from "impos[ing] or collect[ing] any tax, fee, or other assessment on groceries," preempt the Ordinance?

IV. STATEMENT OF THE CASE

A. FDNCs Offer Seattle Residents Safe Food Delivery During The Pandemic.

FDNCs, like Plaintiff Instacart, operate online networks that facilitate ordering and delivering food and groceries directly to customers, eliminating the need for those customers to make a physical trip to the store. FDNCs provide this service by operating an online multi-sided platform that connects all parties—stores, customers, and delivery workers—for everyone's benefit. Retailers, including grocery stores, use that platform to offer products to customers. Customers can search for and purchase those products. Finally, independent delivery workers can select a customer's order, pick up the groceries they have purchased, and deliver them to the consumer. CP 80 (¶ 39). These workers and businesses who contract with

FDNCs typically earn their pay through a mix of service fees and customer tips. CP 81-82 (¶ 44).

FDNCs have seen widespread growth and popularity because they benefit so many different parties. Customers, including those who are too busy or physically unable to go to a store, can order groceries or prepared food from their phone and have the order show up at their door. CP 81 (¶ 41). Stores gain access to new customers and can provide a valuable service to them without incurring the prohibitive cost of building the infrastructure for on-demand orders. Independent contractors earn income by choosing whether, how often, and when to drive. *Id.* And communities reap myriad benefits, including increased access to food for residents, increased wages for grocery employees, and increased revenue for grocers. For instance, net employment at grocery stores in the Seattle metropolitan area increased by 1,700 people from 2014 to 2018 because of increased grocery sales through Instacart. CP 80-81 (¶ 40).

FDNC usage swelled during the pandemic, reducing the risk of customers spreading the coronavirus inside food and grocery retailers. CP 81 (¶ 41). That option has been especially critical for consumers in higher-risk populations. *Id.* This popularity in turn has led FDNCs to offer even more opportunities for shoppers during a time when unemployment otherwise surged. *Id.* (¶ 43). Instacart alone contracted with thousands more delivery people in just the Seattle area after the pandemic began. *Id.* And a recent study from NERA Economic Consulting found that, nationwide, "Instacart was responsible for creating approximately 70,000 additional jobs in the US grocery industry and further annualized revenue growth of $3.5 billion." Dr. Robert Kulick, *NERA Study Finds Direct Causal Relationship Between Instacart Adoption and Economic Growth in the US Grocery Industry*, https://tinyurl.com/2728v5zr.

The increased demand for FDNC service has also been a financial boon for workers who contract with the companies.

Instacart's own experience is representative. Shoppers using the Instacart platform enjoyed a 50% spike in average earnings after the onset of the pandemic. CP 82 (¶ 45). As of May 2020, Seattle shoppers were earning approximately $30 per hour, including tips—nearly double the $16.39 Seattle minimum wage. CP 79 (¶ 32).

Instacart immediately recognized the need to provide safe and protective conditions for shoppers. The company made available free health-and-safety kits with face masks and sanitizer, and it facilitated contactless food delivery and contactless in-store payment options. CP 82 (¶¶ 46-47). Instacart also recognized the threat to public health if sick shoppers visited stores and homes. The company accordingly introduced daily in-app wellness checks for COVID-19 symptoms. *Id.* (¶ 48). And to ensure that shoppers would not be penalized for falling ill and missing work opportunities, shoppers diagnosed with COVID-19 automatically received a

payment equal to their earnings for the prior 14 days and were suspended from deliveries during their recovery period. *Id.*

In short, faced with an unprecedented public health emergency, FDNCs like Instacart teamed with independent workers to fill vital needs while protecting public health. Shoppers found work with excellent pay and robust health protection, and consumers obtained delivery of food and groceries, reducing exposure to COVID and reducing risks to public health. And all of this happened without government intervention: Instacart and other FDNCs instituted these measures on their own to meet the urgency of the times.

B. The City Enacted An Ordinance That Exceeds The City Council's Powers And Violates FDNCs' Constitutional Rights.

In June 2020—months after the pandemic hit, and after Instacart and other FDNCs had already met the increased demand for food delivery as described above—the Seattle City Council passed a "Gig Worker Premium Pay Ordinance,"

supposedly in response to the COVID-19 pandemic. CP 71, 78 (¶¶ 2, 28); *see generally* CP 94-98 (Ord. § 1).

The Ordinance imposes massive burdens on FDNCs. It mandates that FDNCs provide "gig workers" with "premium pay" of at least $2.50 per delivery for each "online order that results in … a work-related stop in Seattle." CP 105 (Ord. § 100.025(A)). While purportedly intended to ensure that workers earn at least $15 per hour, CP 76 (¶ 23) the Ordinance simply assumes the premium pay will defray the expense of buying protective equipment, CP 97-98 (Ord., §§ 1.P, 1.T, I.U), but does not actually require that workers do buy protective equipment or enact any steps to make that equipment cheaper or more available, CP 78 (¶ 29).

Not only does the Ordinance impose this premium-pay mandate, but it also precludes FDNCs from taking any steps to defray these added costs. The Ordinance prohibits FDNCs from: (1) "[r]educ[ing] or otherwise modify[ing]" the areas they currently serve; (2) [r]educing a gig worker's compensation; (3)

[l]imiting a gig worker's earning capacity, including … "restricting access to online orders"; and (4) "[a]dd[ing] customer charges to online orders for delivery of groceries." CP 105-06 (Ord. § 100.027(A)).

The Ordinance ensures compliance by imposing steep penalties of more than $5,000 per aggrieved party. CP 116 (Ord. § 100.200(E)). It also allows the Office of Labor Standards to impose other relief, including corrective action, liquidated damages, civil penalties, fines, and interest. CP 114-16. It further authorizes that office to request that the City's Department of Finance deny, suspend, refuse to renew, or revoke the business license of an FDNC for non-compliance. CP 120. Finally, the Ordinance creates a private right of action for damages and attorneys' fees. CP 123 (Ord. § 100.260(A)).

The Ordinance imposes these drastic restrictions and penalties on just a segment of delivery, grocery, and transportation workers. The Ordinance does not cover transportation network companies ("TNCs"), such as Uber or

Lyft, or other workers providing similar services during the COVID-19 emergency such as taxi drivers, private for-hire drivers, grocery-store workers, food-service workers, or restaurant workers. CP 78 (¶ 30). Nor does the Ordinance include any findings that FDNC workers face a greater risk for contracting COVID-19 than do drivers for TNCs. Although TNC workers are also independent contractors exposed to possible infection by transporting passengers in their cars, the Ordinance excludes them from premium pay or other benefits.

C. The City's Stated Reasons For Enacting The Ordinance Were Pretextual.

Although the Ordinance purports to be a public health measure, in actuality it represents a coordinated effort by the City Council and labor organizations to jointly achieve their longstanding goal of organizing independent contractors in the gig economy, independent of the present COVID-19 crisis. CP 76, 79 (¶¶ 20, 33); *see generally* Eli Lehrer, *The Future of Work*, National Affairs (Summer 2016) https://tinyurl.com/me9ehdz8.

Working Washington, a self-styled worker advocacy group, was instrumental in crafting the bill that became the Ordinance, and Council members also solicited input from the Service Employees International Union and the United Food Commercial Workers Union. CP 76 (¶¶ 20, 22-23). The Council worked closely with Working Washington to determine the industries to be regulated, which independent contractors to cover, the amount of premium pay, and other key details. CP 76 (¶ 21).

The bill that became the Ordinance originally applied to TNCs like Uber and Lyft that "offer[] prearranged transportation services for compensation using an online-enabled application or platform." CP 77 (¶ 27). Setting aside the substance of the Ordinance, it made sense for the Council to target both categories of companies. FDNC workers and TNC drivers are both part of the "essential workforce" designated by the Governor's March 23, 2020 Proclamation that limited travel and interaction of Washingtonians to combat the spread of

COVID-19. *See* Proclamation 20-25 Appendix (Mar. 23, 2020), https://tinyurl.com/buejxmrn. TNC drivers also face greater risks of contracting and spreading the virus to their passengers than FDNC workers, who deliver groceries but do not transport passengers. CP 77 (¶ 27). But because the Teamsters preferred to draft separate, permanent wage legislation for TNCs unrelated to any emergency, the City Council removed TNCs from the bill. CP 77 (¶ 27).

Months later, the City Council passed the TNC legislation that the Teamsters had outlined, which established permanent compensation and workplace standards for TNC drivers. *See* Seattle, Wash., Ordinance 126189 (Oct. 8, 2020), https://tinyurl.com/pv6pamvp ("TNC Ordinance"). The TNC Ordinance institutes the City's 2019 "policy" to establish "a minimum compensation standard for TNC drivers that is comprised [sic] of at least the equivalent of the 'hourly minimum wage' … plus 'reasonable expenses.'" *Id.* at 3 (§ 1.D). Its mandated permanent rate increases took effect on

January 1, 2021. *Id.* at 13, 60 (§§ 2, 9). Although the TNC Ordinance was not enacted as emergency legislation, it requires TNCs to provide personal protective equipment to drivers for the duration of the declared emergency, *id.* at 28—a requirement the FDNC Ordinance omits. And unlike the FDNC Ordinance, the TNC Ordinance does not restrict TNCs from reducing or modifying the areas they serve, reducing drivers' earning capacity or compensation, or adding customer charges to offset compliance costs. *See* CP 105-06 (Ord. § 100.027).

D. The Ordinance Was Enacted Despite Washington Voters' Approval Of Initiative 1634, The Keep Groceries Affordable Act.

In adopting the Ordinance, the City Council disregarded preexisting state law that restricted local governments' ability to impose additional charges on grocery deliveries. In 2018, Washington voters approved I-1634, the Prohibit Local Taxes on Groceries Measure (codified as the Keep Groceries Affordable Act of 2018, RCW Chapter 82.84). The Act

includes the finding that "keeping the price of groceries as low as possible improves the access to food for all Washingtonians," and declares that "no local governmental entity may impose any new tax, fee, or other assessment that targets grocery items," including "transportation" of groceries. RCW 82.84.020(2), (5); CP 70, 75 (¶¶ 1, 18).

E. After Plaintiffs Sued To Challenge The Ordinance, The Trial Court Denied The City's Motion To Dismiss In Part, But The Commissioner Granted Direct, Discretionary Review.

Plaintiffs sued the City in June 2020, arguing that the Ordinance was preempted by RCW 82.84, beyond the Council's police power, and unconstitutional. Plaintiffs' initial Complaint noted, among much else, that the Ordinance's key restrictions on FDNCs were plainly unrelated to the public-health emergency because they were to remain in effect for three years following the emergency's termination. Faced with those allegations, the City introduced so-called "technical amendments" that substantively modified the Ordinance to

specify that the restrictive provisions are in effect for the duration of the emergency (which is still ongoing). CP 79-80 (¶ 35). Plaintiffs then amended their complaint in September 2020 to address the Ordinance as amended. The City moved to dismiss this complaint in its entirety, and the trial court granted the motion in part and denied it in part.

The court granted the motion as to Plaintiffs' RCW 82.84 claim, concluding that the provision's "plain language… prohibits taxes and similar fees and assessments, fees and assessments that would go to the governmental entity." CP 490. Because the Ordinance imposed its fee directly on the FDNCs and the court construed the statute as not reaching that variety of "fee," the court determined that the Ordinance did not fall within the ban in RCW 82.84 on any "fee" or "other assessment" on groceries.

Conversely, the trial court denied the City's motion to dismiss Plaintiffs' constitutional claims. 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 … but also precludes the plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses;" and (3) "the allegations of pretext." CP 493. The trial court "reiterate[d]" 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." CP 496.

The City sought direct discretionary review of that decision in this Court. The Commissioner granted that motion, as well as Plaintiffs' request for cross-review of the trial court's dismissal of the RCW 82.84 claim.

V. ARGUMENT

A. RCW 82.84 Prohibits The Ordinance's Premium-Pay Provision.

The Ordinance violates RCW 82.84's preemption of local government legislation imposing fees on grocery deliveries. Two years before the Ordinance was enacted, Washington voters approved the ballot initiative codified at RCW 82.84 (the Keep Groceries Affordable Act of 2018, or "the Act"). Under the plain text of that law, local governments may not impose "fees" or "other assessments" on the sale or delivery of groceries. Yet the Ordinance does just that.[1]

RCW 82.84.040 provides that "a local governmental entity may not impose or collect any tax, fee, or other assessment on groceries." The Act then specifies that a "[t]ax, fee, or other assessment on groceries includes, but is not limited to, a sales tax, gross receipts tax, business and occupation tax,

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[1] This Court reviews questions of statutory interpretation de novo. *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 206, 237 P.3d 241 (2010).

business license tax, excise tax, privilege tax, or any other similar levy, charge, or exaction of any kind on groceries or the manufacture, distribution, sale, possession, ownership, transfer, transportation, container, use, or consumption thereof." RCW 82.84.030(5). All agree that the statute's references to "sale" or "transportation" of "groceries" encompass grocery deliveries like those that FDNCs provide. The dispute boils down to whether the Ordinance's premium-pay provision, which adds $2.50 to the cost of each delivery, is a "tax, fee, or other assessment" within the meaning of the Act.

The foremost rule of interpreting voter initiatives is that where, as here, the language is "plain and unambiguous," the voters' "intent is gleaned from the language of the measure," and the court's "conclusion must be based … upon the plain language of the initiative." *SuperValu, Inc. v. Dep't of Lab. & Indus.*, 158 Wn.2d 422, 430, 432, 144 P.3d 1160 (2006) (quotations omitted). That rule should resolve this case, as RCW 82.84 unambiguously prohibits the City from imposing

“fee[s]” and “other assessment[s]” on groceries, including grocery delivery, and defines those terms to include “charge[s]” and “exaction[s] of any kind.” RCW 82.84.040(1); *id.* 82.84.030(5).

By assessing a $2.50 per-delivery-charge on groceries, the Ordinance violates the prohibition against grocery-related “fee[s],” as a matter of both ordinary meaning and judicial construction. The “common understanding of the term ‘fee’ is ‘a charge fixed by law … for certain privileges or services.” *Wash. Ass’n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 664, 278 P.3d 632 (2012) (quoting Webster’s 3d New Int’l Dictionary); *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 749-51, 966 P.2d 1232 (1998) (distinguishing between taxes and fees): *see also* Fee, Black’s Law Dictionary (11th ed. 2019) (“A charge or payment for labor or services ….”).

What’s more, the text of the statute reveals that the People intended for “fee” (as well as “other assessment”) to be

construed broadly. The law prohibits "*any* tax, fee, or other assessment on groceries." RCW 82.84.040 (emphasis added). This Court has recognized that "the term any" preceding an item "means something other than similar, lending further weight to the argument that [the modified term] is defined expansively." *Amalgamated Transit Union Loc. 587 v. State*, 142 Wn.2d 183, 193, 11 P.3d 762, 774 (2000).

The statutory definitions likewise confirm the Act's breadth. The definitional provision makes clear that "'tax, fee, or other assessment on groceries' *includes, but is not limited to*," an extensive list of enumerated taxes, as well as "any other similar levy, charge, or exaction *of any kind* on groceries." RCW 82.84.030(5) (emphasis added). The emphasized phrases make clear that the enumerated terms are "non-exhaustive." *Archer v. Marysville Sch. Dist.*, 195 Wn. App. 1014 (2016) (unpublished). And the terms "charge" or "exaction" are themselves easily broad enough to include the Ordinance's premium-pay mandate. *See Activate, Inc. v. Washington State*

Dep't of Revenue, 150 Wn. App. 807, 824, 209 P.3d 524 (2009) ("The dictionary … defines 'charge' as 'an expenditure or incurred expense,' a 'pecuniary liability,' or 'the price demanded for a thing or service.'"); Exaction, Black's Law Dictionary 679 (10th ed. 2014) ("fee, reward, or compensation, whether properly, arbitrarily, or wrongfully demanded").

The trial court nonetheless concluded that the Ordinance fell outside the terms of RCW 82.84, on the view that the Act's "plain language … confirms that the statute prohibits taxes and similar fees and assessments, fees and assessments that would go to the governmental entity," and does not "prohibit a local government from regulating worker compensation or working conditions." CP 490-91. That cramped understanding of the Act defies bedrock rules of statutory interpretation. To read RCW 82.84 in a manner that denies independent meaning to "fee," "charge," and "exaction" "runs directly contrary to the settled practice of construing statutes to avoid superfluous language." *City of Seattle v. McCready*, 123 Wn.2d 260, 280,

863 P.2d 1344 (1994). And that reading ignores the expansive phrases "any," "of any kind," and "includes, but is not limited to," which appear in both the operative and definitional sections.

The City similarly argues that "the law prevents the imposition of taxes," and nothing more. OB 65. Relying on the statutory definition, the City emphasizes that "the more general categories (levy, charge, or exaction)" listed in the definition "are limited to those that are 'similar' to the list of taxes prohibited." OB 66. But the fact that the definition leads off by enumerating various types of taxes does not nullify the other indicators of statutory breadth—among them, that the definition is meant to be inclusive and not limiting.[2] If the Act's drafters

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[2] The City's argument appears to gesture toward the *ejusdem generis* canon of construction, which "requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms." *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972). As this Court has made clear, however, "the ejusdem generis rule is to be employed to support the

wanted to limit the Act's scope to taxes or tax-like exactions, they would have said so, instead of putting "fees" on equal stature with taxes.

What's more, both the trial court and the City ignore another important textual marker of breadth: The operative provision of the Act says that local governments may "not *impose **or** collect* any tax, fee, or other assessment on groceries." RCW 82.84.040(1) (emphasis added). Under the trial court's narrow reading and the City's tax-only construction, the prohibition on a local government's "impos[ing]" any fee or other assessment would be entirely unnecessary because only the government can collect such

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legislative intent in the context of the whole statute and its general purpose." *Silverstreak, Inc. v. State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 883, 145 P.3d 891 (2007) (quotations omitted). Here, the purpose of RCW 82.84 is to countermand local government actions that raise the price of groceries. Moreover, the phrase "include[es], but is not limited to," shows that RCW 82.84's terms are meant to be read expansively. *See, e.g.*, *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir 1995).

exactions, and the statute already prohibits that "collect[ion]." *Id*. That the voters banned *both* the imposition and the collection—and recognized the difference between the two—renders the trial court's distinction untenable. *See, e.g.*, *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (explaining that courts "must accord meaning, if possible, to every word in a statute").

For all these reasons, RCW 82.84 unambiguously prohibits more than just taxes. The City nonetheless points to the voter's pamphlet that accompanied I-1634 as evidence that the initiative was solely focused on taxes. OB 64-65. This step is both unnecessary and unavailable because, in the City's own words, "[t]he 'legislative intent' behind the initiative is *only* relevant if there is some ambiguity in the meaning of the law …." OB 64-65 (emphasis added). There is no ambiguity here. The Act's purposefully broad language, and the meaning of the words it deploys, show that it prohibits laws exactly like the Ordinance.

Regardless, the City's arguments about intent misunderstand I-1634's true purpose.[3] The pamphlet emphasized the need to "keep[] the price of groceries as low as possible," and declared that local governments should not "impose any new tax, fee, or other assessment that targets grocery items." CP 284. As the Act's title indicates, the goal was to keep groceries affordable, and the statute should be construed to promote that goal. *See also, e.g.*, RCW 82.84.020 ("keeping the price of groceries as low as possible improves the access to food for all Washingtonians"). What difference would it make if a $2.50-per-delivery surcharge goes to the

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[3] The City also asserts that the Ordinance merely establishes "wage requirements," and urges that "the law does not prohibit regulating working conditions." OB 66. Had the City actually opted to increase FDNC workers' earnings or to regulate their working conditions, this argument might have relevance. But instead, the City imposed a charge to each "stop" made by a worker delivering an "online order" of groceries. That choice brought the Ordinance squarely within the ambit of the Act, which prohibits any "levy, charge or exaction of any kind" on the "transportation" of "groceries." RCW 82.84.030; *id.* 82.84.040.

public fisc or to some private actor? Either way, consumers are paying more for their groceries, and the purpose of the Initiative was to prevent exactly that.[4]

B. The Ordinance Violates Both The State And Federal Constitutions.

The Ordinance exceeds the City's police powers and violates a panoply of constitutional provisions. At a minimum, Plaintiffs have supported those claims with factual allegations sufficient to survive a CR 12(b)(6) motion. Many of these claims turn on the common theme that the Ordinance is arbitrary and irrational because its purported aim is to solve a problem that does not exist, and the City used its emergency power as a pretext to dole out a political favor. The supposed purpose to boost workers' earnings so they would buy personal

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[4] The City's attempt to ensure that the per-grocery-delivery fee in this Ordinance does not get passed on to the consumer makes no difference for the purposes of interpreting RCW 82.84. The statute has no exception that permits fees or assessments that are not passed on to consumers. If the delivery surcharge would violate the Act without those attendant measures, then it violates the Act with them too.

protective equipment cannot withstand scrutiny in the face of well-pleaded facts that workers had already seen their earnings surge and that FDNCs were already providing personal protective equipment to workers at no charge. Nor can the City explain why it regulated FDNCs but not TNCs, or why it did not simply require FDNCs to provide personal protective equipment—as the City required of TNCs in non-emergency legislation. And setting all those problems aside, the City's purported aims are completely unrelated to the Ordinance's provisions that freeze FDNCs' service areas, prevent FDNCs from adjusting their business to account for the Ordinance's increased costs, and otherwise single out the FDNC business model for disfavored treatment. These problems are fatal, and they undergird each of Plaintiffs' constitutional claims.

1. The City's assertions that the trial court adopted a "*Lochner*-era approach" are inappropriate and unfounded.

The City's overarching tactic in response to each of Plaintiffs' constitutional claims is not to engage with them on

the merits, but to distort the district court's case-specific procedural ruling into the second coming of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). The City begins its brief with that theme, OB 1, devotes an entire section of its argument to it, OB 13-16, and returns to it when defending against Plaintiffs' constitutional claims, OB 41-47. That charge of Lochnerism is grossly unfair to the trial judge's reasoning in the opinion below, not to mention a distortion of Plaintiffs' arguments.

The reason for this overblown rhetoric is obvious. The City is trying to inject an ideological element into this case and thereby distract from what this unusual interlocutory appeal actually seeks: a ruling ratcheting up pleading standards for all plaintiffs—whether "business interests" or individuals—who challenge government action. Notwithstanding the City's rhetoric, the trial court applied settled pleading requirements and modern-day constitutional doctrines that permit Plaintiff's well-pleaded claims to survive a motion to dismiss.

2. The Ordinance exceeds the City's police power.

Washington's municipalities have the power to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. That power is far-reaching but not unlimited. Legislation is a valid exercise of police power only if it is "reasonably necessary in the interest of the public health [and] safety," "substantially related to the evil sought to be cured," and "reasonably related to the legitimate object of the legislation." *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 477-78, 647 P.2d 481 (1982). By contrast, laws that are "arbitrary, unjust, [or] oppressive" are invalid exercises of the police power. *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 642, 209 P.2d 270 (1949). Municipalities thus "may not, under the guise of the police power, impose" on lawful conduct "restrictions that are unnecessary and unreasonabl[e]." *State v. Spino*, 61 Wn.2d 246, 250, 377 P.2d 868 (1963).

This rule holds true even—indeed, especially—during emergencies. Even where legislation claims to address an exigent circumstance, "it is the duty of the courts" to determine whether government action has "real or substantial relation" to legitimate state interest. *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905). While the Court in *Jacobson* correctly upheld the challenged vaccine mandate at issue, it did so only after agreeing that "the means prescribed by the state" had a "real or substantial relation to the protection of the public health and the public safety." *Id.* That "modest decision" should not be "mistaken … for a towering authority that overshadows the Constitution during a pandemic." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring).

Applying these principles, the trial court correctly held that Plaintiffs have stated a claim that the Ordinance exceeds the City's police power. That was so for three reasons. "First" was "the setting in which the motion is brought." CP 493. As

the court recognized, under CR 12(b)(6), courts must "give credit to the well-pled allegations," allow for "reasonable inferences" in the non-movant's favor, and consider even "hypothetical facts" and draw all inferences in Plaintiffs' favor. CP 493. As explained above, the complaint here pleads facts showing that the Ordinance was a political favor to special interests and that the problems it purports to address do not exist.

Second, the trial court highlighted the "unique nature of this ordinance, which not only regulates compensation … but also precludes the plaintiffs from adjusting their business model to offset the imposition of those regulatory expenses." CP 493. These features are entirely unrelated to the City's purported interest in ensuring access to protective personal equipment, or in any other interest the City may have other than raising costs for FDNCs.

Third, the trial court recognized the well-pleaded "allegations of pretext, which are supported by allegations" that

"there was no real need here since delivery services were thriving [and] compensation … was at record highs, all of [which] must be accepted as true." CP 493. Though the City has wide latitude to decide which interests best serve its citizens, the police power does not provide the unchecked authority to pass laws that are "unnecessary and unreasonabl[e]." *Spino*, 61 Wn.2d at 250.

The City now resists this conclusion, but it misapprehends how courts must evaluate claims like these at the pleadings stage. Though the City recognizes that "the police power is not without its limits," OB 22, it seems to misunderstand what those limits are. Relying primarily on *City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990), the City argues that "[t]he trial court misapplied" the rational-basis standard "because conceivable bases for the Ordinance abound." OB 25. That argument rests on two fundamental mistakes. First, it is not enough for the City merely to identify "conceivable bases" for the Ordinance. The law must also be

"substantially related to the evil sought to be cured" and "reasonably related to the legitimate object of the legislation." *Cougar Bus. Owners*, 97 Wn.2d at 477-78. Second, on a motion to dismiss, the City cannot rely on presumptions or inferences that contradict facts that Plaintiffs have pleaded. *See, e.g.*, *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wn.2d 563, 571, 444 P.3d 582 (2019) ("dismissal under CR 12(b)(6) [is] proper only if there is no set of facts that could conceivably be drawn from the complaint to support any one of the … legal theories involved").

The City's proffered rationales fail to account for either of these principles. The City says the Ordinance is legitimate because "[h]azard pay furthers public health, safety, and welfare by compensating [workers] for the risk they incur in frequenting crowded public establishments, assisting efforts to slow the spread of a highly infectious disease." OB 25. The City further contends that the Ordinance "promotes public health by ensuring an adequate supply of FDNC drivers …

[a]nd it helps ensure that these drivers have the means to protect themselves and their communities from the hazards of their jobs." OB 25.

When compared with the pleaded facts of this case, these supposedly "conceivable bases" for the Ordinance are plainly irrational. It is wholly arbitrary to provide "hazard pay" to "compensate[e]" for "risk" when workers' pay has already spiked because of that risk, CP 79 (¶ 32). Nor can the City explain how the Ordinance "ensur[es] an adequate supply of FDNC drivers" when the number of delivery workers in Seattle had already tripled to reach record highs and there was no decrease in service to consumers—just the opposite—without the Ordinance, CP 81 (¶¶ 41-43). And it is impossible to credit the City's claim that the Ordinance ensures that workers "have the means to protect themselves and their communities from the hazards of their jobs" when the pleaded facts show that FDNC workers already received free personal protective equipment, their earnings had already skyrocketed (giving them far more

ability to purchase their own equipment than any $2.50-per-delivery surcharge could), and the Ordinance does not actually do anything to provide (or even require) that equipment—unlike the TNC law, *see supra* 16.

The City responds that these allegations "were not a license for the trial court to second-guess the wisdom or propriety of the Ordinance." OB 27. That is a straw man that refuses to take the complaint or the trial court's decision on their own terms. The trial court expressly recognized that "[i]t is not a function of the Court to second guess the policy decisions of the political branches," and emphasized that it was "not ruling on the merits." CP 492-93. Instead, quoting *Webster*—the very case the City relies on—the court explained that when pleaded facts contradict the government's asserted rationale, the case cannot be resolved on the pleadings. CP 493-95.

But for as much as the City focuses on the premium-pay provision in the Ordinance, it ignores other provisions that are

even more problematic. None of the City's justifications has anything to do with the other onerous restrictions the Ordinance places on FDNCs' businesses, which also drew the trial court's attention. *See* CP 493 (describing the "unique nature of this ordinance"). Freezing FDNCs' service areas, preventing them from raising costs, and otherwise restricting FDNCs' business operations, *see* CP 79 (¶ 34), does nothing to ensure higher pay, access to personal protective equipment, or an adequate supply of workers. Those provisions are irrelevant to the "evil sought to be cured" and are not "reasonably related to the legitimate object of the legislation." *Cougar Bus. Owners*, 97 Wn.2d at 478.

The only response the City offers in this regard is to say that these provisions "seek to ensure that drivers actually receive an increase in pay and that the services remain available and affordable for consumers." OB 26. But freezing service maps, preventing FDNCs from offsetting increased costs, and otherwise interfering with business operations does not ensure

that workers receive increased pay. When faced with pleaded facts that FDNCs like Instacart had tripled worker supply and were facing record demand even while doubling worker earnings, the City's response that it wanted to ensure availability and affordability is irrational.

Finally, the City claims the trial court "further erred in entertaining [Plaintiffs'] allegations that the Ordinance was unnecessary and pretextual." OB 26. The City maintains that the actual legislative "motive" is *never* relevant as long as "the ordinance is valid on its face." OB 27-28 (quotations and citation omitted). In other words, the City argues that legislation prompted by even the most pernicious motives should be insulated from judicial review as long as the defendant can, after the fact, offer any innocuous rationale that *could have*—but did not—lead to the challenged government action.

The City's position contravenes settled constitutional law and would turn rational basis review into a farce. As numerous

courts have recognized, "a government deprivation that results from an improper motive and by arbitrary or pretextual means necessarily lacks a rational basis." *Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1559 n.5 (11th Cir. 1991); *see also, e.g.*, *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 587 (9th Cir. 2008) (rejecting the notion that "allegations of pretext and animus are irrelevant" on rational basis review); *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) ("the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary"). In contending otherwise, the City relies exclusively on cases lacking any allegations of pretext to support its supposed rule that courts do not examine legislative motive. *See* OB 27-28 & nn. 53-57. But that "rule" gives way when there are well-pleaded allegations of pretext. *Cf. Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004) (at summary judgment, "plaintiff may show pretext by creating a triable issue of fact that either: (1) the proffered rational basis was objectively false;

or (2) the defendant actually acted based on an improper motive").

The City's only response to this line of cases is to concede that rational basis review "would not preclude a meaningful challenge to purely arbitrary legislation lacking an articulable rational basis." OB 30 n.61. That question-begging assertion is insufficient to overturn settled principles of rational basis review. The problem in *Lazy Y Ranch*, for example, was not that the defendant Land Board had failed to even articulate a rational basis for denying the Plaintiffs' bid—the Board had cited concerns about "administrative costs." 546 F.3d at 586. Instead, the "[d]efendants argue[d] that their *articulated* purposes end the inquiry and mean that [plaintiff]'s claims of *actual* improper motives" were irrelevant. *Id.* at 587. That is precisely the argument the City makes here, yet the Ninth Circuit properly rejected it. This Court should do the same.

3. The trial court correctly determined that Plaintiffs stated a claim under the Takings Clause.

The trial court was correct to deny the City's motion to dismiss Instacart's claim under the Takings Clause.[5] By passing an ordinance that not only imposes a premium-pay mandate but also seizes control of FDNCs' contracts to prevent them from offsetting that cost, the City has set up a scheme that commandeers FDNCs' contract-based platform without providing just compensation. That is a classic taking. The City's attempts to justify this scheme run headlong into settled precedent that the U.S. Supreme Court recently clarified and reaffirmed. Similarly, a long line of caselaw confirms that regulatory takings claims like those asserted here are fact-intensive and not typically susceptible to dismissal under CR 12(b)(6).

[5] Plaintiffs brought parallel takings claims under both the federal and state constitutions. CP 85-86. This Court has held that the same standard governs those claims. *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 659, 451 P.3d 675 (2019).

The Takings Clause provides that "private property" may not "be taken for public use, without just compensation." U.S. Const. am. V. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021). But a taking can occur even absent direct appropriation: "When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies." *Id.*

To determine whether a taking within this second category—often dubbed a "regulatory taking"—has occurred, courts "appl[y] the flexible test developed in *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)]." *Cedar Point Nursery*, 141 S. Ct. at 2072. That framework looks to (1) the economic impact of the regulation, (2) the extent to which it interferes with the

business's reasonable investment-backed expectations, and (3) the nature of the government action. *Penn Cent.*, 438 U.S. at 124-25. This inquiry "can seldom be done on the pleadings," and dismissal of a claim subject to *Penn Central* analysis before 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, 57 P.3d 273 (2002) (same; reversing CR 12(b)(6) dismissal of takings claim).

a. Instacart has pleaded that the Ordinance appropriates a protected property interest.

The City begins by misconstruing Plaintiffs' position, professing that the complaint "appear[s] to allege that the Ordinance 'takes' property because it causes a reduction in business revenues, profits, or profitability." OB 47. But the very paragraph of the complaint that the City cites, OB 47 n.108, explains that the Ordinance effectuates a "regulatory taking" because "the City is rendering commercially impracticable Instacart's previously agreed-to contracts for

services" with delivery workers by simultaneously instituting a premium-pay requirement and prohibiting Instacart from taking steps to adjust its operations to account for those costs. CP 85-86 (¶ 68). The takings claim thus does not depend on the harms to Instacart's profit margin, but arises because the Ordinance appropriates Instacart's "contract rights themselves in order to nullify them," a form of government action that courts have long recognized as a taking. *Cienega Gardens v. United States*, 331 F.3d 1319, 1335 (Fed. Cir. 2003); *see Lynch v. United States*, 292 U.S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434 (1934) (explaining that "[v]alid contracts are property" for purposes of the Takings Clause); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (listing contractual rights among the various "intangible interests" that have been held to be "property for purposes of

the Fifth Amendment's Taking Clause").[6] It is the seizure of Plaintiffs' contractual rights, not the damage to their profitability, that constitutes a taking.

The City next claims there is a categorical rule that a "mere *impairment* of a party's contractual rights" can never be a taking and instead "[t]he government must instead *acquire* those rights and dedicate them to a public purpose." OB 50-51. That supposed rule cannot be squared with the Supreme Court's recent statement that the Takings Clause can apply whenever "the government … imposes regulations that restrict an owner's ability to use his own property." *Cedar Point Nursery*, 141 S. Ct. at 2071-72 (collecting cases).[7] But even if acquisition were

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[6] For this reason, there is no merit to the City's concern that it cannot locate any case "holding that impairment of a contract constitutes a taking." OB 53.

[7] The City's exclusive authority for this argument is a single decision, *Omnia Com. Co. v. United States*, 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923), that preceded the modern framework for regulatory takings by decades. While *Omnia* may exclude from the Takings Clause consequential losses resulting from government actions that incidentally affect contractual relationships, it does not shield government conduct

a requirement, the allegations here plainly satisfy it. Through the Ordinance, the City is appropriating Instacart's contractual relationships and forcing Instacart to spread desirable benefits to workers (guaranteed and enhanced pay), consumers (artificially low grocery delivery prices) and retailers (guaranteed low-cost delivery). In those respects, the Ordinance is analogous to the government commandeering a private enterprise to support a wartime effort, or subjecting a public utility to a rate so low as to be confiscatory—both scenarios that require just compensation. *See, e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989).

The City tries to minimize the Ordinance's impact by comparing it to a minimum wage, which "imposes limits on the terms under which an employer can contract with its

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that "directly and intentionally abrogate[s]" contractual rights. *Cienega Gardens*, 331 F.3d at 1335.

employees." OB 52. But minimum wage laws do not come with provisions that prohibit the regulated business from taking any steps to defray those costs. In any event, the City's argument does not provide a basis to skip over the *Penn Central* analysis, which permits government impairments of property rights only *after* evaluating "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Cedar Point Nursery*, 141 S. Ct. at 2072.

b. Instacart has pleaded that the Ordinance cannot pass the *Penn Central* test.

Because the Ordinance "imposes regulations that restrict [FDNCs'] ability to use [their] own property," it must be analyzed under the *Penn Central* test. *Cedar Point Nursery*, 141 S. Ct. at 2071. At a minimum, the unique features of the Ordinance create a fact issue as to whether it constitutes a regulatory taking, as the trial court recognized in distinguishing the Ordinance from ordinary wage legislation. CP 493. Indeed, the City has never pointed to another similar Ordinance—in

Seattle, in Washington, or anywhere else—that similarly seizes control of businesses' operations and directs them to provide services to the public at subsidized rates.

Whether the Ordinance passes muster under the *Penn Central* test cannot possibly be determined at the CR 12(b)(6) stage. A court cannot evaluate, as a matter of law, "the economic impact" of the Ordinance or "the extent to which the [Ordinance] has interfered with distinct investment-backed expectations," *Penn Central*, 438 U.S. at 124, without discovery. *See McDougal*, 942 F.2d at 676; *Berst*, 114 Wn. App. at 256-57. And in fact, the City has never claimed that the *Penn Central* test can be resolved at this stage in the proceedings.

Instead, the City ignores *Penn Central* altogether. It asserts that the takings claim would "short-circuit" claims under the Contracts Clause. OB 52-53. But as explained, the Takings Clause violation here goes beyond a mere claim of contractual "impairment." OB53. In any event, there is nothing unusual

about government action violating multiple constitutional provisions. *See, e.g.*, *Ketcham v. King Cnty. Med. Serv. Corp.*, 81 Wn.2d 565, 578, 502 P.2d 1197, 1204 (1972).

c. Plaintiffs' takings claim does not seek to resuscitate *Lochner*.

Rather than engage with the *Penn Central* test that governs this dispute, the City prefers to take aim at a straw man. The City accuses Plaintiffs of trying to rehabilitate *Lochner* and pretends that Plaintiffs are arguing that "freedom to contract supersedes governmental police powers." OB 41. As explained above, that contention is not a fair characterization of this lawsuit. *See supra* 30-31. The City also ignores that Plaintiffs have not asserted the type of constitutional claim most associated with the *Lochner* era: a substantive due process claim based on economic liberty.[8]

[8] For instance, the City quotes this Court's recognition of the "'unfortunate history' of attempts by businesses to invoke purported constitutional rights to displace economic regulation," OB 42-43 (quoting *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 534, 520

Nor is there any merit to the City's attempts to draw on decisions upholding legislation regulating wages and working conditions. OB 43-44. None of those decisions is remotely like the Ordinance, which goes far beyond merely increasing wages or regulating working conditions by seizing control of FDNCs' operations to prevent them from accounting for the costs of those measures. The City is of course allowed to legislate in the areas of public health and safety, but it cannot do so in a way that takes property without providing just compensation (or, as explained below, without impairing contracts). That should be uncontroversial.

More critically, while the City accuses Plaintiffs of trying "to displace exercises of the police power" by "invok[ing]

P.2d 162 (1974). But the very next words of that decision reveal that it was referring to the "unfortunate history *of the due process clause*" being used to undermine economic legislation. *Aetna*, 83 Wn.2d at 534 (emphasis added). The City acknowledges that even under "[c]urrent … jurisprudence," OB 54, the Contracts Clause and the Takings Clause provide meaningful limits on the government's ability to interfere with protected economic rights.

purported constitutional rights," OB 43-44, it is the City that is trying to upend settled precedent. As explained repeatedly throughout, Plaintiffs are arguing that the City has exceeded its police power, not that it lacks authority to act at all. And specifically in the Takings Clause context, it is the City that refuses even to defend the Ordinance under the governing *Penn Central* test, which asks whether the government has reasonably exercised its power. The City's concern is not so much that Plaintiffs are trying to gut the City's authority—it is that Plaintiffs dare to question whether the City has *unlimited* power in this arena. Contemporary constitutional doctrine favors Plaintiffs' approach, not the City's.

4. The trial court correctly determined that Plaintiffs stated a claim under the Contracts Clause.

Instacart has also stated a claim that the Ordinance violates the Contracts Clause, and the trial court was right to

deny the City's motion to dismiss in that respect as well.[9] Here too, Instacart's allegations about "the unique nature of this ordinance, which imposes burdens and restricts the ability to adjust a business model to accommodate the increased burdens" are sufficient for this claim to proceed to discovery. CP 495. As explained, the Ordinance does far more than a typical wage or working condition regulation, and so the City's efforts to tar the Contracts Clause claim as Lochnerism (OB 44-45) again fall flat. Far from giving governments a free pass to impair contracts, this Court has expressly held that economic legislation must satisfy the "judicial test of reasonableness" and that special-interest legislation may violate the Contracts Clause even when the law purports to further "public health, welfare and safety." *Ketcham*, 81 Wn.2d at 575-76.

[9] Plaintiffs asserted claims under the Contracts Clause of both the federal and state constitutions. CP 86-87. The same standard governs both. *Sloma v. State Dep't of Ret. Sys.*, 12 Wn. App. 2d 602, 619, 459 P.3d 396 (2020).

The Contracts Clause of the U.S. Constitution prohibits states and municipalities from "impairing the Obligation of Contracts." U.S. Const. art. I, sec. 10, cl. 1. To determine whether legislation violates this provision, courts consider whether the challenged law results in a "substantial impairment of a contractual relationship," and if so, whether the "means and ends of the legislation" was "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22, 201 L. Ed. 2d 180 (2018) (quotations omitted).

Instacart sufficiently pleaded that the Ordinance substantially impaired its contracts and is not sufficiently tailored to advance a legitimate public purpose. First, there can be little doubt that the Ordinance impairs Instacart's contracts. As the complaint explains, the Ordinance directly conflicts with, and therefore "impairs," several contractual provisions, including Instacart's contractual rights to modify the terms of

its agreements with shoppers and control access to its platform. CP 86-87 (¶ 73), 105-06.

Second, Instacart has pleaded that the Ordinance "broadly adjusts the rights and responsibilities under existing contracts beyond the degree necessary to advance any rational and legitimate purpose of addressing the health and safety conditions caused by COVID-19." CP 87 (¶ 75). And the complaint supports that assertion with detailed factual allegations. As explained above, Instacart had already seen a threefold rise in workers who contracted with the company, the workers had seen their pay surge, and Instacart was voluntarily providing protective equipment and sick pay to workers to guard against the spread of COVID-19. *See supra* 9-10. Crediting those allegations, there is at least a factual dispute as to whether the "means and ends of the" Ordinance were "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1821-22 (quotations omitted).

The City responds first with the specious claim that there has been no contractual impairment. OB 55. The City contends that "lawful exercises of the police power are an implicit part of all private contracts rather than a source of impairment." OB 55. That argument is rife with holes. For one, it aims at the wrong target. Whether the City is lawfully exercising its police power speaks to whether the Ordinance is sufficiently tailored to comply with the Clause. It says nothing about whether there is a substantial impairment. The City cites no case that supports a contrary understanding.[10] For another, whether the City was lawfully exercising its police power is not something the City can simply assume; it is one of the main issues in dispute on the City's motion to dismiss. *See supra* 32-42. And finally, the City's assertion of police power does not

[10] The one case the City does cite suggests the opposite is true. *See* OB 55 n.125 (citing *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232, 234, 66 S. Ct. 69, 90 L. Ed. 34 (1945)). The Court's holding indicates that, in certain circumstances, some impairment may be justified, but does nothing to support the City's claim that there was *no* impairment here.

immunize it from a Contracts Clause violation. As the U.S. Supreme Court has put it, "[i]f 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." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

Next, the City states that the Ordinance "cannot be said to impair Respondents' contracts" because it "is a temporary measure to address a public health emergency." OB 56. This argument suffers from all the same problems. It has nothing to do with whether Instacart's contracts are impaired and is instead relevant only to whether those impairments are proper. It also fights the facts Plaintiffs have pleaded, including that the measure does *not* address a public health emergency because the problems it purports to address were non-existent.

The flaws in the City's argument do not stop there. Most obviously, the Ordinance can hardly be considered temporary at

this point. The Ordinance has now been in place for over a year, with no indication of when it will end. Surely the City cannot skirt scrutiny by relying on its emergency powers and then treat those powers as permanent and unending, particularly at this early stage in the litigation process. Nor is this case like any example the City cites where governments have *prohibited* business activity to protect public health. This Ordinance instead *appropriates* private business by forcing FDNCs to subsidize workers, consumers, and retailers. The City points to no case permitting a similar statutory design.

When the City finally confronts the second prong of the Contracts Clause analysis, it offers only a meager defense. It says that whether the "means and ends of the legislation" were "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose," *Sveen*, 138 S. Ct. 1815 (quotations omitted), "amount[s] to rational basis review," OB 57. This Court has never framed the test in these terms, and the U.S. Supreme Court has described rational basis review as

"less searching" than this prong of the Contracts Clause analysis, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). But even if rational basis were the standard, this Court has held that at Ordinance can survive only if *the City* can "show[]" that "the restrictions sought to be imposed by means of the police powers are rationally connected to improving or benefiting the public peace, health, safety and welfare." *Ketcham*, 81 Wn.2d at 576. And in *Ketcham*, this Court made clear that this is an intensely factual inquiry. This Court struck down the challenged law there after exhaustively examining "testimony," "evidence," and the "design" of the statute because on "the detailed facts of [that] particular case," the government had not "show[n] a rational connection between the public health, welfare and safety" and the challenged statute. *Id.* at 575. So too here.

5. The trial court correctly declined to dismiss Plaintiffs' claims that the Ordinance violates the Equal Protection Clause and the Washington Privileges and Immunities clause.

a. Equal Protection Clause

In denying the City's motion to dismiss Plaintiffs' equal protection claim, the trial court focused on allegations of pretext and arbitrariness, holding that "plaintiffs may be able to overcome the deference given to the City under the equal protection clause" if those allegations can be proven. CP 496. That ruling was a sound application of the rational basis standard, which builds in deference to politically accountable branches but is not tantamount to a rubber stamp. "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, 960 P.2d 919 (1998).

Plaintiffs pleaded facts showing that solicitude to special interests led the City Council to target FDNCs while excluding TNCs, and that the FDNC Ordinance's stated public-health aims were a pretext to reward political allies and avoid political accountability. *See supra* 13-16. Drawing distinctions as a favor to special interest groups, under the guise of a public-health emergency, is precisely the sort of arbitrary and irrational government action that fails rational basis.

The City offers only one theory for why the Ordinance targets FDNCs but not TNCs. It says that "the Council rationally could have concluded that FDNC drivers are more vulnerable than workers in other sectors, such as the grocery industry, who are classified as employees rather than independent contractors." OB 31-32. That response borders on incoherent. TNC drivers, like FDNC workers, are independent contractors. The City could *not* have rationally concluded that FDNC workers are more vulnerable than TNC drivers, and there are no legislative findings suggesting the City did hold

that illogical belief. Every bit of common knowledge about the spread of COVID-19 suggests that TNC drivers face more risk from passengers in the backseat of a car than FDNC workers experience from groceries in a trunk or wide-aisled, high-ceilinged grocery stores.

The City also notes that "legislative efforts to provide separate statutory protections to TNC drivers were already underway at the time of the Ordinance's passage" and that the City "recently finalized a minimum compensation ordinance that sets minimum pay rates for TNC drivers." OB 32. The City is again fighting the pleaded facts, including that TNC drivers were removed from the Ordinance's scope as a political favor for special interests. CP 77 (¶ 27).[11]

[11] The City also asserts that "[t]he trial court … overstepped its authority in entertaining Respondents' allegations that the Ordinance was not strictly necessary." OB 35. The City cites no part of the trial court's decision where it adopted this view, and there is none. The trial court emphasized that it was not issuing "a decision on the merits" but instead was "deciding only whether the plaintiffs have well-pled claims that survive this early challenge." CP 496.

The City also argues that it is entitled to deference on its choice of where to draw the line between covered entities. OB 33-34. But the City seems to believe that "deference" is synonymous with "unreviewable authority." To the contrary, a state actor's "*classification*" must be "rationally related to a legitimate state interest." *Pennell v. City of San Jose*, 485 U.S. 1, 14, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) (quotations omitted; emphasis added); *see also State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006) (the Equal Protection Clause requires "*some basis in reality for the distinction* between the two classes and [that] the distinction serves the purpose intended by the legislature" (emphasis added)). Just as in *Lazy Y Ranch*, the "flaw" in the City's "argument" here "is that [it has] only put forth a rationale for" targeting FDNCs, and has "not offered a rational basis for classifying" FDNCs differently than similarly situated TNCs that provide similar services and whose workers face all the same needs that the City claims underlie the Ordinance. 546 F.3d at 589. Here, too, "the nature

of the classification … is at the center of the dispute," and the City has no rational explanation for the line it drew. *Id.* at 590.[12]

The City also asserts that Plaintiffs "gain nothing by alleging that the stated bases for the Ordinance were pretextual" because "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction *actually* motivated the legislature." OB 34 (quoting *Beach Commc'ns*, 508 U.S. at 315). For the same reasons a pretextual rationale fails to justify the City's claimed exercise of police powers, it cannot immunize the City from scrutiny under the Equal Protection Clause. If accepted, the City's argument would mean that governments are free to adopt laws motivated

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[12] For that same reason, the City is wrong to rely on *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 43 S. Ct. 437, 67 L. Ed. 773 (1993), *see* OB 33-34, a case that arose on a petition for review of agency action. As the City recognizes, *see id.*, *Beach* requires the government to "provide a rational basis for the classification." 508 U.S. at 313. Here, the City has not done so.

by invidious discriminatory purposes so long as they could conjure up a facially neutral explanation—and that governments could then gloat about doing so. For obvious reasons, that is impermissible. When government action is alleged to be pretextual, the "Supreme Court … allows some inquiry into the rationale for the classification." *Lazy Y Ranch*, 546 F.3d at 590 (capitalization omitted).

The trial court was correct to recognize that the City's pleaded facts, including the allegations of pretext, precluded dismissal of Plaintiffs' equal protection claim. That claim too should proceed to discovery.

b. Privileges and Immunities Clause

The Washington Constitution provides that "[n]o law shall be passed granting to any … corporation … privileges or immunities which upon the same terms shall not equally belong to all … corporations." Wash. Const. art. I, § 12. A law violates this clause if (1) it "involves a privilege or immunity," and (2) the legislature lacks a "reasonable ground" for

infringing that privilege or immunity. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014).

Plaintiffs have adequately pleaded a claim that the Ordinance violates the Privileges and Immunities clause. The complaint explains that the Ordinance interferes with FDNCs' right to "carry on business," CP 89 (¶ 84), which has long been recognized as a "fundamental right of citizenship" protected under the clause, *Am. Legion Post #149 v. State Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008). And as explained above, the complaint pleads facts that, taken as true, would mean the City Council lacked any reasonable ground to strip FDNCs of this privilege while leaving it in place for similarly situated entities. *Supra* 61-66.

The City argues that the same analysis should apply to this claim as applied to the equal protection claim. OB 36-37. Even accepting that premise, it would follow that Plaintiffs' claim should survive for reasons just explained. But the premise is flawed. As the City acknowledges, the two claims

are not coterminous if "a law implicates a 'privilege or immunity' as defined in [Washington's] early cases distinguishing the fundamental rights of state citizenship." OB 37 (quoting *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 520, 475 P.3d 164 (2020)). The City says FDNCs do not "come within this exception" because "a law implicates the fundamental right to carry on a business … only when it prevents an entity from engaging in business altogether." OB37; *see also* OB 40.

That argument conflicts with this Court's own application of the Clause. For example, in *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 641, 209 P.2d 270 (1949), the Court struck down a license fee on itinerant photographers because the law "discriminate[d] unreasonably" against the challengers' business. The required fee did not force the photographers to shut down their businesses. Yet this Court found a violation of the Privileges and Immunities Clause. *Id.*

Plaintiffs have stated a claim here similar to the one sustained in *Ralph*. The complaint alleges that the Ordinance unreasonably discriminates against FDNCs by increasing their costs and interfering with their business without imposing similar obligations on similarly situated businesses such as TNCs. CP 74-75, 89 (¶¶ 16, 84.) Plaintiffs are entitled to discovery to prove this claim.

C. The Trial Court Correctly Applied CR 12(b)(6) And Washington's Notice Pleading Standard.

The trial court emphasized that it was "not ruling on the merits" but "accept[ing]" the pleaded facts "as true," and therefore refused to dismiss the claim under CR 12(b)(6). CP 493. That disposition reflected the settled pleading standard that this Court has articulated: "CR 12(b)(6) motions should 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.'" *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d

104 (1998). That standard is rarely met as to constitutional claims like those Plaintiffs have asserted here: "Except in unusual circumstances, and even where the Court must show deference to legislative judgment, questions of reasonableness and necessity are fact dependent" and thus should typically proceed to discovery. *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 959 (N.D. Cal. 2020); *see also, e.g.*, *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1276 (S.D. Cal. 1997). As many courts have recognized, the deference built into the rational-basis standard does not nullify the directive that courts must "take as true all of the complaint's allegations and reasonable inferences that follow." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).

The City's contrary arguments rely primarily on cases decided in other procedural postures. *See, e.g.*, *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980) (criminal appeal); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004)

(summary judgment); *Shepard v. City of Seattle*, 59 Wn. 363, 109 P. 1067 (1910) (bench trial); *Cougar Business Owners*, 97 Wn.2d at 467 (summary judgment). The City devotes a single footnote to a handful of cases—none from this State—in which a court dismissed a claim after concluding there was a rational basis to support the challenged conduct. OB 60 n.136. That the City has unearthed so few cases despite its cross-country search should be telling. Of course it is possible that claims could be so lacking in factual allegations that they fail even at the pleading stage, but that is not the case for the complaint here, and none of those cases call into question that rational basis is often fact intensive. Regardless, none of the City's citations involved claims under the Takings, Contracts, or Privileges and Immunities Clauses, nor did any include allegations of pretext.

The City is equally wrong to rely on a policy argument that CR 12(b)(6) should be applied in a manner that protects local governments from "the cost and burdens of litigation." OB 62. The City cites nothing to support its prediction that

ordinary litigation costs will deter novel legislation or “distort legislative decision making.” *Id.* 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 has not stopped them from legislating in response to emergencies.

The City’s arguments, if taken at face value, belie a lack of trust in the ability of the judiciary to efficiently adjudicate controversies. The Civil Rules impose limits on discovery and ensure that it does not impose undue burdens on the parties. *See* CR 26(b). The Rules do not afford state or local governments any special solicitude on a motion to dismiss. 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, 233 P.3d 861 (2010).

VI. CONCLUSION

This Court should reverse the trial court's decision dismissing Plaintiffs' claim that RCW 82.84 preempts the Ordinance and should affirm the trial court's decision denying the City's motion to dismiss Plaintiffs' constitutional claims.

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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.

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