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.

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, both state and federal. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

One of the Chamber's key priorities is protecting innovation and entrepreneurialism against policies that threaten economic growth. Gig-economy companies such as Instacart are a significant driver of economic innovation and are threatened by stifling state regulations. Beyond policy advocacy, the Chamber also frequently litigates and submits amicus briefs on issues concerning state and local regulation of the gig economy. *See,*

[1] No party or counsel for a party in the pending case authored this proposed *amicus curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

e.g., *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018); *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America, *Chan Healthcare Grp. PS v. Liberty Mut. Fire Ins. Co. & Liberty Mut. Ins. Co.*, 192 Wn.2d 516, 431 P.3d 484 (2018).

SUMMARY OF ARGUMENT

The City of Seattle attempts to defend the Ordinance as if it were routine wage-and-hour legislation, and decries any meaningful judicial review of the constitutionality of the Ordinance as a return to a bygone era. But the denial of the City's motion to dismiss Instacart's constitutional challenge reflects the sound application of ordinary pleading standards. In reviewing that decision, this Court should consider the significant ways in which the Ordinance departs from standard exercises of the police power to regulate economic activity. The Court also should take into account the context of the gig economy, which offers significant benefits to workers and consumers, especially in the circumstances of the ongoing pandemic.

The Ordinance differs from ordinary police power regulation in two significant ways. First, the Ordinance interferes fundamentally and irrationally with multiple aspects of how a company like Instacart can operate its business. In addition to imposing a form of arbitrary price control—which economists across the ideological spectrum view as harmful and irrational—the Ordinance goes further by blocking companies

from responding in an economically rational manner to such a measure. The Ordinance not only forbids the companies to pass certain costs along to consumers but also dictates what geographic areas the companies must serve and what level of access the companies must provide on their proprietary platforms. Those extraordinary restrictions amount to aggressive intrusions into those companies' operations.

Second, the Ordinance purports to serve not employees needing protection from employers with superior bargaining power but rather independent workers who contract with companies like Instacart in order to be matched with consumers seeking the services those workers provide. Those workers are free to use Instacart's tech-enabled platform as often or as little as they like, and can switch to a competitor platform at any time or use multiple platforms simultaneously to maximize their interests. In the competitive marketplace created by companies like Instacart, compensation for workers already has increased substantially due to increased consumer demand. Requiring the platforms also to pay an arbitrary per-delivery surcharge in this context makes no sense.

In the end, the Ordinance reflects a fundamental misunderstanding of the gig economy and the operations of companies like Instacart, which provide substantial value to workers, consumers, and the broader economy. The Ordinance threatens to destroy that value, harming not only the

businesses the City has targeted but also the workers and consumers it purports to help.

Under Washington law, cities may not use their police power to enact arbitrary or irrational measures that do not serve the general welfare. The Ordinance at issue here, especially when viewed in light of Instacart's allegations—as it must be at this stage—is just such a measure. The trial court's denial of the City's motion to dismiss Instacart's constitutional claims should be affirmed.

ARGUMENT

I. The Ordinance Differs Significantly From Ordinary Exercises Of Police Power, Such As Wage And Working-Condition Regulations

Although the City suggests that the Ordinance at issue in this case should be treated as if it were a typical police-power regulation—such as a minimum-wage law, a requirement for overtime pay, or a restriction intended to guarantee that working conditions meet certain safety standards—the Ordinance differs from those ordinary exercises of the police power in significant ways. The Ordinance not only imposes a form of price control in the form of a per-delivery surcharge but also fundamentally restricts how companies like Instacart can operate their businesses by prohibiting them from recouping that cost from consumers or even making operational changes to adjust for the impact of that cost. In

addition, the ordinary justifications for wage and working-condition regulation have no application here. The Ordinance affects workers who are in control of their own hours, where they work, and the amount of money they earn in a given time period. Those unusual features of this case reinforce the soundness of the trial court's decision to deny the motion to dismiss and to permit the plaintiffs to explore the factual landscape here through discovery. *See generally Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wn.2d 563, 571, 444 P.3d 582 (2019); *see also* CP 493 (discussing the "unique nature of this ordinance").

A. The Ordinance Interferes With Companies' Operations On A Fundamental Level

The Ordinance does far more than require payment of a new premium-pay surcharge on each delivery. It also bars companies like Instacart from passing those mandatory cost increases on to consumers; prohibits those companies from changing their service areas; and mandates that the companies provide access to their platforms for any delivery worker, even if the level of demand changes such that the number of consumers seeking matches with delivery workers goes down. *See* First Amended Complaint ("FAC") ¶¶ 2, 4. Those kinds of impositions are nothing like ordinary regulations of wages, hours, and working conditions. They intrude into the companies' management of their businesses at the

most basic level, controlling how they provide services as well as what prices they charge. Such regulatory micromanagement might be appropriate for a public utility or natural monopoly, but it is not rationally imposed on companies in a competitive market. *See generally Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

As a general matter, when a state or local government exercises its police power to regulate the economy—for example, by requiring overtime pay or setting a minimum wage—businesses subject to those regulations are free to react in ways that are economically rational. Typically companies pass at least some of the additional costs they incur on to consumers in the form of slightly higher prices or a different range or level of service. *See, e.g.*, Hugh Rockoff, *Price Controls*, Library of Economics and Liberty, https://www.econlib.org/library/Enc/PriceControls.html. They may also scale back their businesses or adjust their operations to save costs in various ways in lieu of increasing consumer prices. *See, e.g.*, Thomas Sowell, *Basic Economics: A Citizen's Guide to the Economy* 29 (2000).

Even where such steps are available to businesses in response to price controls, such controls may themselves be irrational. Economists have—with near unanimity—roundly condemned control of prices as harmful to everyone affected. *See, e.g.*, Alec Stapp, *Price Controls Won't*

Fix What's Ailing the Restaurant Industry at 8, Progressive Policy Institute (Feb. 2021) ("[E]conomists dislike price controls and favor market clearing price mechanisms."), https://www.progressivepolicy.org/wp-content/uploads/2021/02/PPI_Price-Controls-Restaurant-Industry.pdf; Jeffrey H. Birnbaum, *Keep Prices Out of Control*, Fortune, June 25, 2001 at 36 ("Two words rarely appear in the same sentence: economists and consensus. But on the issues of price controls, they belong together," because "[t]he famously divided profession agrees that government-imposed price caps generally don't work and, in fact, only make matters worse."); Thomas Sowell, *Basic Economics*, at 29 (economists are in "virtually unanimous agreement that declines in product quantity and quality are the usual effects of price controls"); Walter Block, Preface in *Rent Control: Myths & Realities* xiv (1981) ("[e]conomists who have researched [the] effects" of price controls for rent "are virtually unanimous" that such controls are bad policy). Here, for example, the Ordinance imposes an arbitrary per-delivery surcharge that itself does not make economic sense.

But the Ordinance goes far beyond typical regulatory measures by blocking businesses from responding in an economically rational manner to the government's imposition of increased costs. In doing so, it tells companies like Instacart how to run their businesses on a granular level—including by dictating what geographic areas those companies must cover

and what level of access they must provide to platform users. It is one thing to impose such requirements on regulated utilities, but quite another to impose them on businesses operating in a fluid and competitive market.

In that way, the Ordinance strays far beyond what courts have recognized as valid exercises of the police power and into areas where courts have found that the police power cannot reasonably be said to reach. *See, e.g.*, *Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 578-79, 502 P.2d 1197 (1972) (striking down statute requiring medical plan to pay fees to non-contracting providers); *Spokane Cnty. v. Valu-Mart, Inc.*, 69 Wn.2d 712, 719-21, 419 P.2d 993 (1966) (same as to statute prohibiting sales of certain household items to state residents on Sundays); *State v. Spino*, 61 Wn.2d 246, 250, 377 P.2d 868 (1963) (same as to statute criminalizing the setting of fires to dispose of worthless property); *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 642-43, 209 P.2d 270 (1949) (same as to statute prohibiting certain commercial solicitation activities by photographers); *cf. Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) ("[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary."); *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 440-41, 254 P.2d 29 (1953) (striking down statute fixing minimum prices to be charged by dry-cleaning establishments as not a reasonable exercise of the police power); *Christian*

v. La Forge, 194 Or. 450, 476-77, 242 P.2d 797 (1952) (same as to statute empowering board to set minimum prices for barber service); *In re Kazas*, 22 Cal. App. 2d 161, 174-75, 70 P.2d 962 (1937) (same as to provision fixing minimum prices for barber service in particular city).

The City contends that its unusual and multi-faceted set of severe restrictions on a particular type of legislatively disfavored business must be considered *per se* justified under the police power so long as it can conceive of any after-the-fact rationale, despite the allegations in Instacart's amended complaint. *See* Opening Br. 18-29. But if that were so, the City would be "virtually unrestricted and unlimited in its exercise of the police power"—a rule this Court has rejected. *Ketcham*, 81 Wn.2d at 579. Because "[t]he police power is not plenary," the rationale for its exercise "must pass the judicial test of reasonableness," *Spokane County*, 69 Wn.2d at 719-20, and must be grounded in the reality of the provision itself and the history of its enactment—the government's proffered rationale "cannot be fantasy." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013). The trial court here properly recognized as much when it allowed this case to proceed to discovery.

B. The Justifications For Wage and Working-Condition Regulations Are Inapplicable To Workers Who Use A Third-Party Platform To Find And Manage Their Own Work

The Ordinance differs from legitimate exercises of the police power in both the extensiveness of its restrictions and its lack of any real justification.

Traditional exercises of the police power, such as minimum wage, overtime, and safety regulations, correct a particular kind of imbalance in bargaining power. *See Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 595, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379 (1937); *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 952, 416 P.3d 1, 232 Cal. Rptr. 3d 1 (2018). Employees generally need to earn money to put food on the table and keep a roof over their heads. Some employees live in areas where few employers exist and find it difficult to move to an area where more employers are hiring. And even in places where there are many employers, employees may well be unwilling to leave their jobs based on the speculative possibility of obtaining higher pay elsewhere. Such employees may have little choice but to accept the local employers' conditions of employment—even if their wages for a week's work are substandard, their working conditions involve undue exposure to unsafe chemicals, or they are required

to work 80 hours a week. Wage and working-condition regulations are tailored to correct that bargaining imbalance.

But that justification does not make sense as applied to platforms like Instacart. *See* John O. McGinnis, *The Sharing Economy As an Equalizing Economy*, 94 Notre Dame L. Rev. 329, 363 (2018) (discussing the "faulty assumption upon which many potential regulations" of the gig economy "rest—namely, that jobs in the sharing economy, like driving for Uber or renting out a property through Airbnb, are no different than other jobs with fixed hours and work arrangements, such as working in a restaurant or retail industries"). For instance, a platform company that matches consumers with shoppers cannot, by its very nature, involve any abusive overtime requirement. Shoppers who use Instacart to provide their own grocery delivery services can be on the platform whenever they choose and for as long as they choose; they have a flexible relationship with Instacart. *See* FAC ¶ 42. That kind of flexible relationship is very different indeed from the traditional, top-down working relationships that form the basis for traditional wage and working-condition regulations.

More generally, using a platform company like Instacart gives shoppers an enormous amount of control over how much money they bring home in any given week and over their other working conditions. Shoppers choose where and whether they want to shop on a particular day, how many

times they shop, which particular orders (large or small) they want to purchase and deliver for a consumer, and what time they start and finish. They also choose whether they want to offer their services to consumers via only a single platform, like Instacart, or via multiple platforms—and they may even perform different types of services for platform users in the course of a single day or week. *See Saleem v. Corp. Transp. Grp., LLC*, 854 F.3d 131, 144 (2d Cir. 2017); McGinnis, *supra*, at 363 ("Setting one's own hours can be significantly beneficial because it allows individuals to pursue other work and interests, address personal issues or limitations, and generally maximize the efficiency with which they go about contributing to society."). Traditional wage and working-condition laws are intended to protect another kind of worker entirely: one who is unable to meaningfully increase the amount of her weekly pay packet, or to resist being placed into working conditions that she finds disagreeable, because an employer has complete discretion over her hours of work and over where and how she performs that work. *See Dynamex*, 4 Cal. 5th at 952.

Workers who use a platform company to match with consumers who need services also have decreased economic dependence on such a company in another respect: those workers manage their own capital investments. A shopper who delivers groceries by car decides whether to buy, lease, or rent that car and on what terms. That shopper also decides exactly how to

manage her costs, like vehicle maintenance, insurance, and gasoline, and makes her own choices about what is most cost-effective and efficient. Even if a shopper stops using the Instacart platform, she continues to benefit from her investments: unlike an employee of a company with a fleet of delivery vehicles, she keeps and continues to have use of her car. Again, she is not at the mercy of an employer who dictates aspects of her work that she cannot change; she has significant control over her own "economic destiny." Steven Cohen & William B. Eimicke, Colum. Sch. of Int'l Affairs, *Independent Contracting Policy and Management Analysis* 16 (Aug. 2013), http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf. And because her economic dependence is much less than that of workers who are at employers' mercy, the basic justification for wage and working-condition laws is much less applicable. The Ordinance lacks any such justification, and simply fails to reckon with basic realities of the gig economy.

II. The Ordinance Is Unreasonable And Harmful

Instacart's brief persuasively explains in detail why it has adequately alleged that the ordinance is unreasonable and harmful, and was motivated not by the general welfare but instead by animus against companies like Instacart. *Amicus* focuses here on one aspect of that argument: the extent to which the Ordinance is unnecessary and

counterproductive in light of all of the benefits that the operations of Instacart and similar platform companies confer on workers and the economy, especially during a pandemic. Although the amicus brief filed by the National Employment Law Project and other *amici* in support of the City (the "NELP brief") argues otherwise, those arguments lack merit.

As described above, the hallmark of Instacart and similar platforms is flexibility—both for shoppers and for the consumers who match with those shoppers and use their services. Workers in the gig economy can use these platforms whenever they want, wherever they want, for as long as they want. They can even operate on multiple platforms, including platforms of different types such as ride-sharing, restaurant delivery, and grocery delivery, picking and choosing at any given time the services that they wish to provide. *See Saleem*, 854 F.3d at 144.

That flexibility confers significant economic benefits. It allows workers who have traditional full-time jobs to supplement their income. *See* JPMorgan Chase & Co. Inst., *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility* at 24 (2016), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmc-institute-volatility-2-report.pdf. It increases labor force participation and hours worked for the underemployed. *See* McKinsey Global Institute, *Independent Work: Choice, Necessity, and the Gig*

Economy at 84 (2016). It provides a means for the unemployed to enter the workforce and earn a meaningful income. *See id.* at 85-86. And it "enables people to specialize in doing what they do best and raises their engagement . . . mak[ing] them more productive," including "through better skill matching of the right person for the right job." *Id.* at 87. The transactions facilitated by those platforms also put capital assets like vehicles to greater use, which "improve[s] capital productivity as underutilized assets and spare capacity are put to work." *Id.* at 86.

The flexibility enabled by platforms like Instacart also has important personal benefits for workers. Studies have shown that people with greater flexibility in their work enjoy higher job satisfaction and better physical and mental health, along with other positive outcomes. *See, e.g.*, James T. Bond & Ellen Galinsky, *National Study of the Changing Workforce: Workplace Flexibility and Low-Wage Employees* at 12, Families and Work Institute (2011).

Unsurprisingly, workers highly value those attributes of the gig economy. *See* McKinsey, *Independent Work* at 41. Indeed, the vast majority of workers participating in the gig economy describe the experience positively. *See* Morning Consult & Chamber Technology Engagement Center, *New Economy Report: Polling Presentation* at 26, 27 (Feb. 22, 2018). One survey of on-demand workers using online platforms

found that 91 percent reported that they valued being able to control when, where, and how they work. *See* Intuit TurboTax & Intuit QuickBooks, *Dispatches from the New Economy: The On-Demand Economy Worker Study* at 10 (2017), https://intuittaxandfinancialcenter.com/wp-content/uploads/2017/06/Dispatches-from-the-New-Economy-Long-Form-Report.pdf. In another recent poll, a majority of new freelance workers reported that there was "no amount of money that would convince them to take a traditional job." Edelman Intelligence & Upwork, Inc., *Freelance Forward 2020*, at 43 (Sept. 2020), https://www.upwork.com/documents/freelance-forward-2020.

Those benefits of the gig economy extend across a diverse workforce, with a growing number of workers seeking out the flexible arrangements the platforms facilitate. *See* McKinsey, *Independent Work* at 41; *see also* Edison Research, *The Gig Economy* at 4 (December 2018), http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf (noting that nearly a third of Hispanic and African-American adults work in the gig economy); Fran Maier, Lynn Perkins & Anna Zornosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018*, at 3 (Sept. 5, 2018), https://blog.urbansitter.com/wp-content/uploads/2018/09/Cant-Stop-Wont-Stop-Her-Side-Hustle_-Women-in-the-Gig-Economy-

2018.pdf (noting the prevalence of women in the gig economy and the satisfaction reported by the vast majority of women participants). As a result, "millions of Americans [w]ork in jobs that didn't even exist 10 or 20 years ago." President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015); *see also, e.g.*, Aaron Smith, *Shared, Collaborative, and On Demand: The New Digital Economy* at 5, Pew Research Center (2016), https://www.pewresearch.org/internet/2016/05/19/the-new-digital-economy; Morning Consult & Chamber Technology Engagement Center, *New Economy Report* at 21.

For consumers, platforms like Instacart provide expanded choice, access, and convenience. *See* McKinsey, *Independent Work* at 88. For example, "[d]igitally enabled services are providing consumers with access to services that were once inconvenient to obtain—or that may not even have existed before." *Id.* at 87; *cf. also* Federal Trade Commission, *Comments on Chicago Proposed Ordinance O2014-1367*, at 3 (Apr. 15, 2014) (noting that ridesharing companies have helped to meet previously unmet demand and improved service in traditionally underserved areas).

Grocery delivery, in particular, is increasingly identified by researchers and policymakers as a potential solution to the longstanding problem of "food deserts." Isabella Gomez Sarmiento, *How Online Grocery Delivery Could Help Alleviate Food Deserts*, NPR (Dec. 19, 2019),

https://www.npr.org/sections/thesalt/2019/12/19/787465701/how-online-grocery-delivery-could-help-alleviate-food-deserts; *see also* Suzanne Le Mignot, *South Shore Grocer Partners With Instacart To Bring Relief To Food Desert*, CBS Chicago (June 17, 2020), https://chicago.cbslocal.com/2020/06/17/south-shore-local-market-instacart-food-desert-delivery. Research also shows that people who shop for groceries online make healthier food selections. *See* Tawanna R. Dillahunt *et al.*, *Online Grocery Delivery Services: An Opportunity to Address Food Disparities in Transportation-scarce Areas*, CHI 2019, May 4-9, 2019, https://dl.acm.org/doi/pdf/10.1145/3290605.3300879. And government food-assistance programs increasingly have begun integrating with grocery delivery providers, which offer a seamless and stigma-free experience for customers that may help end food insecurity. *See* Mia Jackson, *The Pandemic Taught the U.S. How to Solve Its Hunger Problem*, The Daily Beast (Oct. 25, 2021), https://www.thedailybeast.com/online-markets-and-grocery-delivery-grew-big-during-the-pandemic-they-could-solve-americas-hunger-problem.

In a pandemic, all of those benefits loom especially large. The economic opportunity available to workers through platforms like Instacart is especially valuable now, as consumer demand for grocery delivery (and correspondingly, worker compensation) has surged while other sources of

income have been less reliable. *See* Aaron Randle, *I Feel Like a Hero: A Day in the Life of a Grocery Delivery Man*, N.Y. Times, May 18, 2020. The flexibility that gig work offers has been especially important, and in some cases essential, to working parents, caretakers, and others whose responsibilities outside of work have increased in this time period, many of whom might have been forced to drop out of the workforce altogether if not for the gig economy. *See* Rebecca Henderson, *How COVID-19 Has Transformed The Gig Economy*, Forbes (Dec. 10, 2020), https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy/?sh=1f1ac8536c99. Moreover, through the Coronavirus Aid, Relief, and Economic Security ("CARES") Act passed by the U.S. Congress, gig-economy workers have been eligible for Paycheck Protection Program funds that are not available to traditional employees. *See Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 910-11 (N.D. Cal. 2020).

The Ordinance significantly burdens Instacart and similar companies and, in doing so, threatens all of the benefits that flow from allowing shoppers and consumers to find each other on a matching platform. As Instacart alleges, because the Ordinance not only imposes a form of price control but also blocks Instacart from taking economically rational action in response—and freezes or restricts numerous aspects of the company's operations as discussed above—it threatens to cause "financially

unsustainable damages" and "leaves grocery-delivery businesses with no path to profitability." FAC ¶¶ 8, 50. Thus, if the Ordinance is permitted to go into effect, there is a real risk that companies like Instacart will be forced to exit the local market entirely, depriving workers and consumers of the benefits the platforms provide.

Even if platform companies are able to continue operating under the strictures of the Ordinance, by dictating the geographic areas the companies must serve and the access they must provide to workers on their platform, the Ordinance would destroy the dynamic market that allows the platforms to generate those benefits. The fundamental basis of the platforms' operations is that, as users increase on one side of the platform (for example, as consumer demand increases), the other side of the platform can increase in response (in this example, increased compensation draws more shoppers onto the platform). But if companies are required to guarantee shoppers available demand, and to guarantee consumers in certain geographic regions available supply, the companies cannot rely on that mechanism to balance the market in real time. Instead, they would need to try to predict supply and demand and adjust their offerings so that they meet, in the manner of a centralized government planner. Compared to the companies' dynamic, market-based platform system, that command-and-control approach will inevitably produce misjudgments, inefficiencies, and loss of value for both

shoppers and consumers. And as difficult as it would be for larger players like Instacart to predict in advance how to line up supply and demand, small companies and new entrants would find it impossible, creating an enormous barrier to entry that would stifle competition and innovation.

The NELP brief supporting the City makes several contrary arguments, but all lack merit. First, NELP argues (at 9-15) that workers in the gig economy lack workplace protections based on their classification as independent contractors rather than employees. But the fact that Washington law classifies workers that way—unsurprisingly, in light of the flexibility described above—is not addressed by the Ordinance. NELP's arguments are not relevant to the legal issues in this case—and their purportedly empirical observations, drawing mostly from advocacy papers describing compensation and working conditions in other parts of the country,[2] are not well founded. NELP's non-evidence-based assertions and unsupported assumptions about Instacart's business model should be given no weight, and its hyperbolic rhetoric (at 15) likening gig work to a form of "violence" should be dismissed out of hand.

[2] NELP also cites an "interview" with a single delivery worker in Seattle, as well as an advocacy paper by an organization whose mission is "to call for new laws and policies that make [gig-economy] companies pay up." Working Washington, *#PayUp* (last accessed Dec. 29, 2021), https://payup.wtf.

Second, NELP argues (at 15-20) that gig-economy workers "cannot set their own rates." But no person or company can set rates unilaterally in a market economy. Gig-economy workers, like other contractors, determine their rates by arriving at a market price where supply meets demand. To the extent the gig economy is unique at all in this respect, its uniqueness lies only in the speed at which those standard market dynamics play out, as tech-enabled platforms like Instacart are able to continuously incorporate real-time data to adjust market prices. That dynamic modern system benefits workers as well as customers—indeed, in a Pew survey last month, a wide majority of gig workers reported that the platforms they work with are fair when it comes to how jobs are assigned and how much they are paid. *See* Monica Anderson *et al.*, *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/how-gig-platform-workers-view-their-jobs. NELP's bald assertions about gig workers' supposed inability to negotiate prices simply ignore the economic reality of the platforms.

Finally, NELP argues (at 20-24) that gig-economy workers' classification as independent contractors—which it mistakenly deems the result of "corporate labeling" rather than Washington law—has created certain financial hardships. But again, NELP's continued objection to that aspect of state law has nothing to do with the legal issues here. The per-

delivery surcharge imposed by the Ordinance does not address the financial hardships that NELP claims exist—and that argument has nothing to say about the other aspects of the Ordinance that restrict platform companies' operations. And the brief's attempt to contradict the complaint's well-pled assertions that Instacart workers are already earning more during the pandemic than they did previously, *see* FAC ¶ 31, is unsupported and erroneous and cannot be credited.

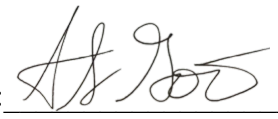
CONCLUSION

For the foregoing reasons, the Court should affirm the denial of the City's motion to dismiss Instacart's constitutional claims.

In compliance with RAP 18.17, I certify that this brief contains 4,848 words.

RESPECTFULLY SUBMITTED this 3rd day of January, 2022

MUNGER, TOLLES & OLSON LLP

By: 

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of January, 2022, I caused this brief to be served on counsel for all parties via the Court's electronic filing system, and emailed a courtesy copy of the brief to:

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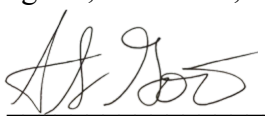

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January 03, 2022 - 3:11 PM

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Appellate Court Case Number:	99771-3
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