No. 21-55174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA GROCERS ASSOCIATION,
a California non-profit organization,

Plaintiff - Appellant,

v.

CITY OF LONG BEACH, a charter municipality,

Defendant - Appellee,

UNITED FOOD & COMMERCIAL WORKERS LOCAL 324,

Intervenor - Defendant-Appellee.

Appeal from the United States District Court for Central California, Los Angeles,
Case No. 2:21-cv-00524, Hon. Otis D. Wright II

OPENING BRIEF FOR PLAINTIFF-APPELLANT CALIFORNIA GROCERS ASSOCIATION

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MARCH 19, 2021

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), plaintiff-appellant California Grocers Association states that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

Dated: March 19, 2021

s/ James R. Sigel
James R. Sigel

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JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying a preliminary injunction in a civil case. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). The district court denied an injunction against Defendant-Appellee City of Long Beach on February 25, 2021. Plaintiff-Appellant California Grocers Association (CGA) timely filed a notice of appeal on February 26, 2021. 2-ER-18. This Court has jurisdiction under 28 U.S.C. § 1292(a). CGA has standing to sue on behalf of its members because "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019) (internal quotation marks and citations omitted); *see* 4-ER-568.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that a local ordinance mandating that a narrow subset of grocery stores provide employees with bonus hourly pay (1) was not preempted by the National Labor Relations Act and (2) did not violate the Equal Protection clauses of the U.S. and California constitutions?

STATUTORY AUTHORITIES

The full text of the relevant ordinance appears in an addendum to this brief.

INTRODUCTION

The City of Long Beach has responded to the risks that essential workers face from the ongoing pandemic with an unprecedented law. In a purported effort to "protect and promote the public health, safety, and welfare," the City enacted a "Premium Pay For Grocery Workers" Ordinance. 4-ER-581. The Ordinance does not impose any public health measures or otherwise protect essential workers from the virus. Instead, it targets a narrow band of businesses within the city—certain medium- and large-sized grocery stores. It exempts all other businesses that employ essential workers, including many retailers that also sell groceries. It orders these targeted grocers to pay most of their employees an additional $4 hourly bonus on top of whatever they already make, be it $15 or $50 an hour. And it forbids any contracting around its terms. Covered employers face civil sanctions if they continue to abide by employment contracts and collective bargaining agreements they have reached with their employees' union. They face the same sanctions if they negotiate any alternative to the Ordinance's mandated bonus pay.

This novel measure cannot be reconciled with the governing requirements of California and federal law. The Ordinance suffers from at least two fatal defects. *First*, the Ordinance violates the Supremacy Clause because it interferes with the federal regulatory scheme governing collective bargaining created by the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (NLRA). The Ordinance is

no run-of-the-mill minimum wage law or similar baseline labor standard. Instead, it dictates the terms of collective bargaining agreements, mandating that parties accept a term that a local union—the very same one that sponsored the Ordinance—had unsuccessfully demanded in ongoing negotiations. As this Court has held, the NLRA preempts such requirements because they displace the bargaining process Congress intended to protect.

Second, the Ordinance also violates the Equal Protection clauses of both the U.S. and California constitutions. Not only is the Ordinance harsh, it is arbitrary and unfair. By forcing a narrow subset of grocers to deviate from their existing contractual arrangements, the Ordinance treats them differently than other similarly situated employers of frontline workers. That unequal treatment implicates fundamental rights against the impairment of contracts. And it cannot be justified by any of the City's stated purposes: the Ordinance has little if anything to do with health, safety, or job retention. Because the Ordinance's classification of disfavored employers is not narrowly tailored to address any legitimate purpose, it violates Equal Protection.

While perhaps well-intentioned, the Ordinance also has had severe negative repercussions. Grocers were already operating on thin margins, with some losing money as they implement costly measures intended to keep workers safe. Many of them cannot withstand a sudden, across-the-board, $4 hourly wage increase. Since

the Ordinance went into effect, two stores have closed, and others may soon follow. The result is lost jobs, higher food prices, or both.

In an effort to prevent these unintended consequences, CGA asked the district court for preliminary injunctive relief from the Ordinance's onerous (and illegal) requirements. But the district court denied the request, concluding that CGA had demonstrated no likelihood of success on the merits. That conclusion rested on two central premises. First, the court believed that the Ordinance does not—as it expressly says—prevent covered employers from negotiating with their employees to offset the costs imposed by the Ordinance's mandated wage hike. And second, the court thought that the Ordinance need only satisfy deferential basis review to withstand constitutional challenge, even though it unilaterally alters the existing contracts of a disfavored subset of grocers. In both respects, the district court erred. This Court should reverse the district court's order and direct it to enter a preliminary injunction precluding enforcement of the City's unconstitutional Ordinance.

STATEMENT OF THE CASE

A. Factual Background

1. California grocery stores and the pandemic

CGA is a non-profit, statewide trade group that has served as the voice of California's grocers for 120 years. 4-ER-568. CGA has worked with its members

to address challenges created by nearly every aspect of the COVID-19 pandemic, helping grocers tackle everything from supply-chain problems to vaccination logistics. 4-ER-568.

Grocery stores operate on razor-thin margins. The average profit margin in the grocery industry was just 1.4% in 2019, with a significant number of stores operating with net losses. 2-ER-95. Indeed, "net profit margins as a percent of sales in the grocery industry are among the lowest of any major sector of the economy." 2-ER-97. While grocery sales and accompanying profits temporarily increased with panic-buying at the outset of the pandemic, those gains began to subside by the end of 2020. 2-ER-98.

Nevertheless, since the pandemic's onset, CGA members have taken extraordinary steps to keep their doors open to the public. Like other essential businesses, they have adopted rigorous, science-driven safety measures to protect customers and employees alike, while continuing to provide a high level of service. 4-ER-566. Those accomplishments have come at a considerable price: paid leave, in-store cleaning, employee masks, plastic barriers at check-outs and service counters, and additional staffing and capital costs for scaling up of e-commerce, curbside and home delivery, have all ballooned grocers' expenses. 2-ER-98.

At the same time, grocers have gone to great lengths to compensate frontline workers for their efforts in a challenging environment. Throughout this difficult

period, California grocers have bargained with their employees, both those represented by a union and those who are not, to reach mutually acceptable terms of compensation and benefits. Grocers of all stripes have provided "appreciation pay," "hero bonuses," and "thank you pay" to their employees. 4-ER-566. Some of California's largest grocers even joined forces with the United Food and Commercial Workers International union (UCFW) to urge federal and state governments to designate grocery store employees as emergency first responders. 4-ER-566-67.

2. The Long Beach Ordinance

Apparently spurred by a report on high retailer profits at the outset of the pandemic, 3-ER-554-55, as well as lobbying efforts by UCFW Local 324, 2-ER-70, the City of Long Beach passed a "Premium Pay for Grocery Workers Ordinance" on January 19, 2021. 1-ER-2. The Ordinance requires a certain subset of retailers selling groceries to pay a $4 per hour premium to their non-management employees, without regard to any existing bonus, base pay, paid time off, or any other monetary or non-monetary benefits currently offered by employers. 1-ER-2-3.

The Ordinance's stated purpose is to "promote the public health, safety, and welfare" during the COVID-19 pandemic. 4-ER-581. The Ordinance declares that it "protects public health, supports stable incomes, and promotes job retention by ensuring the grocery workers are compensated for the substantial risks, efforts, and

expenses they are undertaking." 2-ER-580-81. But the Ordinance does not impose health or safety measures of any kind. Instead, the Ordinance governs the economic relationship between certain grocers and their employees.

In its central provision, Section 5.91.050, the Ordinance directs covered stores to "provide each grocery worker with premium pay consisting of an additional Four Dollars ($4.00) per hour for each hour worked." 4-ER-584. They must provide such increased pay "for a minimum of one hundred twenty (120) days," a period that may be "extended by City Council." 4-ER-584. The Ordinance specifies that the term "[g]rocery worker . . . does not include managers, supervisors[,] or confidential employees." 4-ER-582-83.

The Ordinance applies only to those stores that "devote[] seventy percent (70%) or more of [their] business to retailing a general range of food products." 4-ER-582-83. To be covered, these stores must also "employ[] over three hundred (300) grocery workers nationally and employ[] more than fifteen (15) employees per grocery store in the City of Long Beach." 4-ER-582-83.

The Ordinance also bars employers from taking any action (including in bargaining with their employees) to control the labor cost increases that the Ordinance will necessarily cause. Section 5.91.060 provides: "No hiring entity shall, as a result of this Ordinance going into effect" either "[r]educe a grocery worker's compensation" or "[l]imit a grocery worker's earning capacity."

4-ER-584-85. The Ordinance contains no exception for stores operating under a collective bargaining agreement or in the process of negotiating such an agreement.

Failure to immediately comply with any of the Ordinance's requirements exposes covered geocers to severe penalties. 4-ER-587-88. Any workers "that suffer financial injury as a result of a violation of this Ordinance" may bring suit for "the payment of any unpaid compensation plus interest due to the person and liquidated damages in an additional amount of up to twice the unpaid compensation." 4-ER-587. Such workers may also recover "reasonable attorney fees" and "a reasonable penalty payable to any aggrieved party if the aggrieved party was subject to prohibited retaliation." 4-ER-587. These penalties are "cumulative," and are "not intended to be exclusive of any other available remedies, penalties, fines, and procedures." 4-ER-586-87.

3. Collective bargaining at affected grocers

CGA estimates that approximately 29 grocery stores in Long Beach meet the Ordinance's coverage criteria. 3-ER-562. Those stores are owned and operated by 14 grocery chains, including CGA members Kroger, Albertson's, and Gelson's. 3-ER-562.

As one might expect, these stores have existing agreement with their employees governing terms such as wages and hours—agreements that the Ordinance effectively overrides. Many of the covered stores employ members of

UCFW Local 324. 4-ER-569; 1-ER-4. Those employers and employees are parties to collective bargaining agreements that govern the terms of employment, including wage scales. 4-ER-569. Food 4 Less, which is affiliated with CGA member Kroger, is currently engaged in negotiations with UFCW Local 324. 3-ER-557. As part of those negotiations, UFCW has demanded that Food 4 Less pay employees a premium of $2 per hour for all hours worked during the pandemic, including retroactive payments going back to May 28, 2020. 3-ER-557.

4. The Ordinance's impact

Every grocery store covered by the Ordinance will suffer lasting harm to its business. Given grocers' already thin profit margins, the added labor costs resulting from the Ordinance render continued operation financially untenable for many stores. 2-ER-76; 2-ER-99.

That is because labor costs are the grocery industry's largest expense—behind only the wholesale cost of food itself. 2-ER-99. Labor costs account for more than 13% of gross sales of grocers nationwide, and between 14 and 18% in California. 2-ER-99. A mandated $4 hourly bonus increases labor costs by approximately 22%, resulting in total labor costs equivalent to nearly 20% of annual sales. 2-ER-99. Such an increase in costs represents more than double the industry's 2020 profit margins and three times historical rates. 1-ER-9.

Two stores have already closed because of the Ordinance. 2-ER-58. More are likely to follow if it remains in place.

B. Procedural History

1. CGA's suit and request for preliminary relief

The day the Ordinance went into effect, CGA filed suit against Long Beach. It claimed that the Ordinance was preempted by the NLRA and violated the Equal Protection and Contracts clauses of the U.S. and California constitutions. 4-ER-571-76. It requested declaratory and injunctive relief. 4-ER-576.

CGA simultaneously sought an ex parte Temporary Restraining Order enjoining any enforcement of the Ordinance and an order to show cause why a preliminary injunction should not issue. 4-ER-593. The district court denied the ex parte application for a TRO and ordered briefing and argument on preliminary injunctive relief. 3-ER-544.

UFCW Local 324 soon moved to intervene. It cited the need "to defend its interest as a principal proponent of the Ordinance and its members' interests in the Ordinance's increased pay." 2-ER-29. The district court granted the motion, which was unopposed. 2-ER-27.

2. The district court's order denying a preliminary injunction

The district court denied CGA's request for a preliminary injunction. 1-ER-17. In its order, the court focused entirely on the legal merits of CGA's

preemption and Equal Protection claims, concluding that CGA was unlikely to prevail on either. 1-ER-4. As a result, the court did not address any of the other factors governing the issuance of a preliminary injunction.

In rejecting CGA's preemption claim, the district court correctly recognized that a law's "substantive requirements could be so restrictive as to virtually dictate the results of the collective bargaining and self-organizing process" and thus be preempted by the NLRA. 1-ER-6. The court also acknowledged that if the Ordinance prohibits "collective bargaining by grocers to mitigate increased labor costs that result from the Ordinance," then CGA's preemption arguments were "compelling." 1-ER-7.

But the court nonetheless concluded that CGA was unlikely to prevail on this claim, reasoning that the Ordinance did not foreclose grocers from contracting around its terms. The court declared that Section 5.91.060—which, again, precludes covered employers from reducing workers' "compensation" or "earning capacity" in response to the Ordinance's wage premium (4-ER-584-85)—did not prohibit these grocers from "lowering any form of compensation 'in any way'" as a result of the Ordinance's mandated wage premium. 1-ER-8. The court criticized CGA for not offering "evidence" that this provision should be read more broadly. 1-ER-8. And the court further concluded that the provision was severable from the Ordinance's remaining provisions (1-ER-8-9)—notwithstanding the City's

representation that Section 5.91.060 was needed to prevent grocers from "nullifying the ordinance." 2-ER-24.

Addressing CGA's Equal Protection claims, the district court first concluded that rational basis review, and not heightened scrutiny, applied. The court recognized that when a challenged classification "imping[es] upon the exercise of a 'fundamental right,'" more stringent review is required. 1-ER-10 (citation omitted). And, the court observed, whether such scrutiny "applies to a classification" that burdens the rights protected by the Contract Clause—as CGA contends is the case here—"appears to be a novel question." 1-ER-11. But the court refused to apply such scrutiny for three reasons: (1) wage regulations are generally within the "police power"; (2) there is a separate standard for determining whether a regulation violates the Contract Clause; and (3) the Contract Clause may not protect a "fundamental right" even though it "appears in the Constitution." 1-ER-11-12.

The district court then determined that the Ordinance satisfied the deferential rational basis standard. The court agreed with CGA that "the Ordinance 'does not protect or promote public health.'" 1-ER-17. But emphasizing that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," the court concluded that the City's assertion that certain grocers had "reaped significant profits" sufficed to support the conclusion that the Ordinance was rationally related to the goal of "fairly

compensating grocery workers for the hazards they encounter as essential workers." 1-ER-13-14, 1-ER-17 (quotation marks and citation omitted).

SUMMARY OF ARGUMENT

I.A. Contrary to the district court's conclusion, CGA is likely to prevail on the merits of its preemption claims. The NLRA preempts state and local labor laws that effectively dictate the outcome of collective bargaining. The Ordinance does just that. It mandates that covered grocers accede to a key term demanded by a local union in contract negotiations. And it precludes grocers and unions from bargaining for any alternative. Because those requirements displace the collective bargaining process, they are preempted.

The district court did not dispute these governing legal principles. Instead, it concluded that CGA was unlikely to prevail because, the court believed, the statute was much more forgiving than its plain language dictates. But the Ordinance is unambiguous: covered employers cannot reduce an employee's "compensation" or "earning capacity" as a result of the law. Those broad terms encompass any conceivable policy on which employers might attempt to negotiate an alternative to the premium pay mandate. The Ordinance's defective provisions are also not severable from the rest of the law. And even if they were severable, the proper response would be to enjoin those preempted provisions, not leave them in place.

B. CGA is also likely prevail on its Equal Protection claims. The Ordinance arbitrarily targets a subset of retailers selling groceries, requiring them to alter their existing contractual arrangements and pay their employees a set hourly bonus. That mandate should be subject to heightened scrutiny because it substantially burdens grocers' fundamental right to be free from legislative impairment of existing contracts.

The district court erred in instead subjecting the Ordinance to rational basis review. While wage and employment laws may fall within a state's general police power, that does not mean that such laws are exempt from heightened scrutiny. The critical question for Equal Protection purposes is whether the Ordinance implicates some other protected "fundamental" right or interest by causing the sort of harm that would require the government to justify the burden it has imposed. The right against contract impairment is just such a fundamental right, expressly guaranteed by both the California and U.S. constitutions. And contrary to the district court's suggestion, there can be little question that the contracts of CGA's members were impaired by the Ordinance, which substantially altered the contracts' central terms governing employee compensation.

The Ordinance cannot survive heightened scrutiny. While the City's stated purposes of promoting public health and job retention are legitimate purposes in the abstract, they bear no rational relationship to the Ordinance's mandated premium

pay. To the contrary, receiving a higher wage cannot protect anyone from COVID-19, and the resulting increased labor costs will force stores to close, costing jobs rather than protecting them. And even assuming that the Ordinance bears some relationship to the purpose of "compensating" essential workers for their exposure to risk, it is not narrowly tailored to serve that interest, as heightened scrutiny demands. The City has provided no basis for thinking that a $4 hourly wage increase has any relationship to such risks, or that the targeted grocers are different in any meaningful way from the other similarly situated retailers exempt from the Ordinance's scope.

II. CGA also satisfied the remaining requirements for injunctive relief. The Ordinance causes grocers irreparable harm: not only is it unconstitutional, it threatens to drive grocers out of business and alter the course of collective bargaining. The balance of equities also favors CGA because the government has no legitimate interest in continuing to enforce an unconstitutional law. And an injunction would be in the public interest by preventing store closures and price increases in the midst of a global pandemic.

This Court should reverse the district court's order and direct it to issue a preliminary injunction.

STANDARD OF REVIEW

This Court reviews the district court's grant or denial of a preliminary injunction for abuse of discretion. *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 760 (9th Cir. 2004). A plaintiff is entitled to preliminary injunctive relief when it shows: (1) it is "likely to succeed on the merits;" (2) it is "likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in [its] favor;" and (4) an injunction "is in the public interest." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009).

In evaluating the district court's assessment of those factors, this Court accepts the district court's factual findings unless clearly erroneous, *id.*, but it reviews de novo the "district court's interpretation of the underlying legal principles." *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) (internal quotation marks omitted). The district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard." *Harris*, 366 F.3d at 760 (internal quotation marks omitted).

ARGUMENT

I. CGA IS LIKELY TO PREVAIL ON THE MERITS

A. CGA Is Likely To Prevail On Its Claims That The Ordinance Is Preempted By The NLRA

CGA is likely to prevail on its preemption claim. The NLRA preempts state and local laws that effectively dictate the outcome of the collective bargaining

process. The Ordinance does just that. Not only does it strictly mandate premium pay, it precludes affected employers and their employees from contracting around the law's terms. It therefore cannot withstand NLRA preemption.

1. The NLRA preempts the Ordinance

a. The NLRA preempts local laws that dictate the substantive terms of collective bargaining agreements

Federal preemption of state and local laws is rooted in the Constitution's Supremacy Clause, which provides that federal law is "the supreme Law of the Land." U.S. CONST. art. VI, § 2, cl. 2. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985) (internal citations and quotation marks omitted). Either way, "in any pre-emption analysis, the purpose of Congress is the ultimate touchstone." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (internal citation omitted).

Congress enacted the NLRA in 1935 to encourage collective bargaining, curtail disruptive labor and management practices, and promote industrial peace. The statute contains no express preemption provision. "Nonetheless, the Supreme Court has recognized two implicit preemption mandates" under the NLRA: *Garmon* preemption and *Machinists* preemption. *Am. Hotel & Lodging Ass'n v. City of Los*

Angeles, 834 F.3d 958, 963 (9th Cir. 2016). Only *Machinists* preemption is relevant here.

In *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Emp. Rels. Comm'n*—the decision from which *Machinists* preemption derives its name—the Supreme Court made clear that the NLRA requires certain conduct to remain "unregulated because [it must be] left to be controlled by the free play of economic forces." 427 U.S. 132, 140 (1976) (internal quotation marks omitted). When unionized employees refused to work overtime and a state employment authority issued a cease and desist order, the Supreme Court held the order preempted because it "attempt[ed] to influence the substantive terms of collective-bargaining agreements." *Id*. at 153. Accordingly, this Court has recognized that a "State's attempt to influence the substantive terms of collective-bargaining agreements [is] inconsistent with the federal regulatory scheme" of the NLRA. *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 500 (9th Cir. 1995).

To be sure, not all state and local laws that affect the substance of collective bargaining agreements are categorically preempted. Courts have upheld laws, including minimum wage ordinances, that "merely provide the 'backdrop' for negotiations." *Am. Hotel & Lodging Ass'n*, 834 F.3d at 963. For example, in *American Hotel & Lodging Association*, this Court considered a series of hotel wage laws, including an ordinance that established "a total cash minimum wage of $12.28

per hour as of 2014," and an expanded $15.37 minimum wage for "hotels with 150 or more rooms." *Id.* at 961. Crucially, both minimum wage ordinances included opt-out provisions for hotels covered by collective bargaining agreements and hardship waivers for employers to avoid layoffs or closures. *Id*. at 961-62. Because the ordinances were not "so restrictive as to virtually dictate the results of the contract" and merely provided a "backdrop" for the parties' negotiations, the Ninth Circuit held they were not preempted. *Id*. at 964-65 & n.5 (internal quotation marks omitted).

But the result of the inquiry may be different when the state law is not so forgiving. In *Bragdon*, this Court considered a wage ordinance that was narrowly targeted at particular jobsites in a particular industry: "certain types of private industrial construction projects" in Contra Costa County "costing over $500,000." 64 F.3d at 498. Unlike an across-the-board minimum wage or another similar general rule, this ordinance prescribed rates "derived from the combined collective bargaining of third parties in a particular locality." *Id*. at 502. And the ordinance's strict terms were particularly intrusive because they "affect[ed] not only the total of the wages and benefits to be paid, but also the division of the total package that is paid in hourly wages directly to the worker and the amount paid by the employer in health, pension, and welfare benefits for the worker," thus "plac[ing] considerable pressure on the contractor and its employees to revise the labor agreement." *Id*.

Those features, this Court held, made the ordinance much different than "the isolated statutory provisions of general application approved in" some other NLRA preemption cases, and "more properly characterized as an example of 'an interest group deal in public-interest clothing.'" *Id*. at 502-03 (internal citation omitted). Because the ordinance "virtually dictate[d] the results of" collective bargaining, the Court found it conflicted with the NLRA. *Id*. at 501. As *Bragdon* thus makes clear, "in extreme cases, substantive requirements could be so restrictive as to virtually dictate the results of the [collective bargaining and self-organizing process]," and are therefore preempted. *Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d 1177, 1187 (C.D. Cal. 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016) (alternations in original) (internal citation and quotation marks omitted).

b. The Ordinance dictates the substantive terms of collective bargaining agreements

The NLRA preempts the Ordinance because its requirements "virtually dictate the results of" collective bargaining. *Bragdon*, 64 F.3d at 501. The Ordinance's severe and narrowly targeted restrictions suffer from the same defects as the law in *Bragdon*. Its targeted coverage criteria fit just 29 stores operated by 14 chains. 4-ER-562. Most of those stores employ members of a single union, UCFW 324. 4-ER-569; 1-ER-4. The mandated $4 per hour premium applies to all non-management employees whether they make $15 per hour as a clerk or $65 per hour as a pharmacist—a 27% wage increase on the lower end of the compensation

spectrum. 4-ER-584. And the Ordinance prohibits any bargaining around these terms, barring covered employers from "[r]educ[ing] a grocery worker's compensation" or "[l]imit[ing] a grocery worker's earning capacity" in any way "as a result of this Ordinance going into effect." 4-ER-584-85.

Those requirements simultaneously dictate a key collective bargaining term—premium pay—and forbid any contractual adjustment of those terms. Covered store Food 4 Less, for example, is currently engaged in negotiations for a new collective bargaining agreement, in which UCFW Local 324 has made an express demand for hourly premium pay during the pandemic. 3-ER-557. By enacting the Ordinance, the City ended any negotiation on that term, effectively rewriting the contract as it saw fit. And that is to say nothing of the many other stores in Long Beach covered by collective bargaining agreements that set wage scales negotiated between employers and UCFW Local 324 that the Ordinance has effectively displaced.

For those reasons, the Ordinance is not a "minimum labor standard[]" at all. *Cf. Am. Hotel & Lodging Ass'n*, 834 F.3d at 963. Rather than provide a floor from which employers and workers bargain, it mandates bonus pay on top of negotiated wages while outlawing any further compromise that might conceivably offset compliance with that mandate. Because the Ordinance thus "virtually dictate[s] the results of" collective bargaining, it is preempted. *Bragdon*, 64 F.3d at 501.

2. The district court's attempt to salvage the Ordinance fails

The district court did not dispute any of the above legal principles, or even—for the most part—their application here. To the contrary, the court noted that the minimum labor standard cases cited by the City "were upheld largely because they merely provided a 'backdrop' for negotiation," and "would all be distinguishable from the present action" under CGA's reading of the Ordinance. 1-ER-7. And the court asserted that "[i]f the Ordinance really does prohibit any collective bargaining by grocers to mitigate increased labor costs that result from the Ordinance, then CGA's position is fairly compelling." 1-ER-7.

Nevertheless, the district court concluded that CGA had no likelihood of prevailing on this claim. The court reached that conclusion only by misconstruing the Ordinance, declaring that it does not prohibit "lowering any form of compensation 'in any way'" as a result of the mandated wage increase. 1-ER-8. But the Ordinance's plain language is both clear and categorical: it bars *any* bargaining that accounts for increased labor costs caused by the Ordinance. 4-ER-584. And, contrary to the district court's further assumption (1-ER-8-9), these strict provisions are not severable from the rest of the law. In committing this pair of legal errors, the district court necessarily abused its discretion. *Harris*, 366 F.3d at 760.

a. The Ordinance's prohibition on negotiating alternatives to premium pay is categorical

The Ordinance unambiguously prohibits bargaining around the premium pay mandate. "As in all statutory interpretation, '[courts'] inquiry begins with the statutory text, and ends there as well if the text is unambiguous.'" *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1265 (9th Cir. 2021) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "[W]hen the statutory language is unambiguous, the plain meaning controls." *Afewerki v. Anaya Law Grp.*, 868 F.3d 771, 778 (9th Cir. 2017) (internal quotation marks and citation omitted).

The meaning of Section 5.91.060, the key disputed provision of the Ordinance, is clear. It provides that "[n]o hiring entity shall*, as a result of* this Ordinance going into effect, take *any* of the following actions: 1. Reduce a grocery worker's compensation; 2. Limit a grocery worker's earning capacity." 4-ER-584 (emphases added). Those terms are not reasonably open to multiple interpretations. Any attempt to negotiate alternatives to the Ordinance's premium pay mandate would lead to policies that arose "as a result of" the law because the Ordinance would be their but-for cause. *Cf. Kwikset Corp. v. Superior Ct.*, 51 Cal.4th 310, 326 (2011) ("The phrase 'as a result of' in its plain and ordinary sense means 'caused by . . . .'") (internal quotes and citation omitted). So if a covered store decreases any worker's wages, benefits, hours, or work opportunities to account for increased labor costs caused by the Ordinance, it will have violated the law. And because those are the

only bases on which covered employers and employees could possibly negotiate an alternative policy that accounts for the City's mandated wage bump, they have no ability to agree to anything but the City's dictated terms.

The district court disagreed because it believed the Ordinance merely prohibits cutting "wages" or "hours." 1-ER-8. It faulted CGA for not offering "evidence" to support an alternative reading. 1-ER-8. But of course, the interpretation of the Ordinance is a legal issue, not a factual question requiring "evidence." *See Desire*, 986 F.3d at 1265. And contrary to the district court's interpretation, the Ordinance's plain language cannot be read to limit its prohibition to "wages" or "hours."

That is because the terms "compensation" and "earning capacity" are far broader than the district court's cramped reading. "[C]ompensation" is not just wages, but all "[r]emuneration and other benefits received in return for services rendered." *Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019). Courts routinely use the word "compensation" to include benefits of all kinds, not just wages or salaries. *See, e.g.*, *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 546 F.3d 639, 659-60 (9th Cir. 2008) (healthcare benefits); *Ingalls Shipbuilding, Inc. v. Dir., Off. of Workers' Comp. Programs, Dep't of Lab.*, 519 U.S. 248, 251 (1997) (death benefits); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 (1989) (retirement benefits).

"[E]arning capacity" is also a capacious term. It means "[a] person's ability or power to earn money," not merely the hours they are assigned by their employer. *Earning Capacity*, BLACK'S LAW DICTIONARY (11th ed. 2019); s*ee Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932) ("Earning capacity means fitness and readiness and willingness to work, considered in connection with opportunity to work.").

Under the plain meaning of the Ordinance, employers thus cannot, for example, give employees an option between premium pay and enhanced health benefits because reducing either baseline would "[r]educe a grocery worker's compensation." Employers are likewise prohibited not only from reducing workers' hours, but also from offering paid time off to avoid increased labor costs. Even if an employer were to offer paid time off at the premium hourly rate, that too could violate the Ordinance's restriction on reducing "earning capacity" if the employee missed out on any additional wage opportunities such as overtime. Delaying routine or scheduled raises or promotion would similarly reduce "earning capacity" by keeping employees in lower-earning positions.

Indeed, it is hard to conceive of any bargained-for alternative that could mitigate resulting labor costs without affecting workers' "compensation" or "earning capacity" in some way. The district court identified none.

Instead, assuming that its reading of the Ordinance was correct, the district court simply declared that "the inability to reject a particular union demand is insufficient to establish preemption." 1-ER-8. In support, it cited a case where the challenged statutory requirement was entirely "optional, since it applie[d] only in the absence of an agreement between employer and employees." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 3 (1987). The Ordinance, however, contains no such exception. To the contrary, alternative agreements here are strictly forbidden under Section 5.91.060. The Ordinance thus "affects the bargaining process in a way that is incompatible with the general goals of the NLRA." *Bragdon*, 64 F.3d at 504.

b. The Ordinance's preempted provisions are not severable

Nor are the Ordinance's defective provisions severable from the rest of the statute. *Contra* 1-ER-8-9. The district court's severability analysis started and ended with the Ordinance's severability clause. *See* 4-ER-588 ("The provisions of this Ordinance are declared to be separate and severable."). The court said that "if section 5.91.060 could be applied in a manner that is preempted by the NLRA, only that application of section 5.91.060 would be invalid" because "[t]he Ordinance includes a clear severability provision." 1-ER-8-9 (emphasis omitted). But that misapprehends both the nature of CGA's legal challenge and the effect of the Ordinance's severability provision.

To start, the Ordinance's entire premium pay scheme, including the $4-per-hour mandate in Section 5.91.050, is preempted. Section 5.91.060's prohibition on reducing "compensation" or "earning capacity" in response to this mandate may be the most obviously problematic provision, but it is by no means the sole aspect of the Ordinance that runs afoul of *Machinists*. Even without Section 5.91.060, the Ordinance would be preempted because it dictates a key collective bargaining term. As explained above, the Ordinance singles out 29 stores operated by 14 chains, then requires that all of them provide the same wage bump to all covered employees on top of whatever compensation those particular covered stores were paying its employees. *Supra* pp. 20-22. Because, just as in *Bragdon*, the Ordinance thus "virtually dictate[s] the results of" collective bargaining, it is preempted. 64 F.3d at 501. Severing Section 5.91.060 therefore would not save the rest of the Ordinance.

Regardless, even if Section 5.91.060 could be considered in isolation for purposes of preemption, the district court's analysis was flawed. While the court relied entirely on the Ordinance's severability provision, under California law the presence of a severability clause merely "establishes a *presumption* in favor of severance." *Cal. Redev. Ass'n v. Matosantos*, 53 Cal.4th 231, 270 (2011) (emphasis added). Such a clause is "not conclusive." *Santa Barbara Sch. Dist. v. Superior Ct.*, 13 Cal.3d 315, 331 (1975) (internal quotation marks omitted).

Instead, courts must also "consider three additional criteria: The invalid provision must be grammatically, functionally, and volitionally separable." *Cal. Redev. Ass'n*, 53 Cal.4th at 271 (internal quotation marks and brackets omitted). Grammatically separable means "the invalid parts can be removed as a whole without affecting the wording or coherence of what remains." *Id*. (internal quotation marks omitted). Functional severability "depends on whether the remainder [of the statute] is complete in itself." *Santa Barbara Sch. Dist*., 13 Cal.3d at 331 (internal quotation marks omitted). To be functionally severable, "[t]he remaining provisions must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations." *People's Advoc., Inc. v. Superior Ct.*, 181 Cal.App.3d 316, 332 (1986). Volitional severability, in turn, "depends on whether the remainder [of the statute] is complete in itself and would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute." *Santa Barbara Sch. Dist.*, 53 Cal.4th at 331 (internal quotation marks omitted).

While Section 5.91.060 might be grammatically separable, it is neither functionally nor volitionally separable from the Ordinance's other provisions. The entire point of the Ordinance is "[r]equiring grocery stores to provide premium pay to grocery workers" as an "additional" bonus on top of their negotiated wages. 4-ER-581-84. That purpose would be defeated if employers could simply reduce

wages or other earnings by the same amount as the mandated premium.[1] As counsel for the City acknowledged during argument below: "What this section, 5.91.060, is really designed to do is essentially say, Grocery stores, you can't lessen their pay in response to this ordinance because that would have the effect of nullifying the ordinance." 2-ER-24. Section 5.91.060 is thus "inextricably connected to" the premium pay mandate "by policy considerations," and the City would not have bothered "had it foreseen the partial invalidation of the statute." *People's Advocate*, 181 Cal.App.3d at 319; *Santa Barbara Sch. Dist*., 53 Cal.4th at 331.

More fundamentally, the district court's statutory analysis seemed to rely on the intuition that if the Ordinance allowed for collective bargaining, it would not be preempted. *See* 1-ER-8-9; *cf. Nat'l Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 69 (9th Cir. 1995) (rejecting preemption challenge to law that provided an express carve-out for workplaces "covered by the terms of a collective bargaining agreement providing specified minimum overtime benefits"). But "a court may not use severability as a fig leaf for judicial legislation." *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014); *see Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) ("[I]t is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict

[1] The employees at CGA's members' stores are generally paid well above any applicable minimum wage. *See* 2-ER-97.

with constitutional limitation."). The Ordinance does not contain an exception for collective bargaining. No manner of statutory interpretation or severability analysis can add one in. To hold otherwise would disregard "the separation-of-powers principle that only legislatures ought to make positive law." *Vivid Ent.*, 774 F.3d at 573 (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995)).

Finally, and in any event, even if Section 5.91.060 was both the sole provision of the Ordinance preempted by the NLRA and severable from rest of the Ordinance, that would not mean CGA had no likelihood of success in this lawsuit. To the contrary, CGA would have shown a probability of prevailing on the aspect of its preemption claim challenging this provision. And because Section 5.91.060 causes CGA's members irreparable harm, and the City and the public have no legitimate interest in the enforcement of a provision preempted by federal law (*see infra* Part II), that aspect of the Ordinance, at the very least, should be preliminarily enjoined. The district court erred in concluding otherwise.

B. CGA Is Likely To Prevail On Its Claims That The Ordinance Violates Equal Protection

CGA is also likely to prevail on a second and independent claim: that the Ordinance violates the Equal Protection Clauses of the U.S. and California constitutions. *See* U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7(a). These provisions ensure that "all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and "secure every

person within the State's jurisdiction against intentional and arbitrary discrimination," *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotation marks omitted).

The Ordinance contravenes these essential requirements by arbitrarily forcing a specified subclass of grocers to deviate from their existing contractual arrangements and pay their employees a $4 an hour wage bump. The Ordinance does not, however, impose that same contract-altering obligation on other similarly situated employers of frontline workers—including many who *also* sell groceries. This unfair and unequal treatment cannot withstand constitutional scrutiny.

1. The Ordinance is subject to heightened scrutiny

a. The Ordinance burdens grocers' fundamental rights

The district court concluded that the Ordinance did not contravene the state and federal Equal Protection clauses only because the court believed that the highly deferential rational basis standard applies to CGA's Equal Protection claims. 1-ER-11-14. In reaching that conclusion, the court erred. Because the Ordinance substantially burdens grocers' fundamental right to be free of legislative interference in their existing contracts, it instead demands heightened scrutiny.

It is well established that where a law discriminates among similarly situated parties in a manner that burdens another fundamental constitutional right, that law is subject to heightened scrutiny. *See Plyler v. Doe* 457 U.S. 202, 216-17 (1982). This

is true under both federal and California law. *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1310-11 (9th Cir. 1982); *Long Beach City Emps. Ass'n v. City of Long Beach*, 41 Cal.3d 937, 948 (1986). Because "[t]he Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises," the U.S. Supreme Court has "treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.'" *Plyler*, 457 U.S. at 216-17. Likewise, the California Supreme Court has held that any "legislative classification" that "infringes upon a fundamental interest" must be "justified by a compelling governmental interest." *Long Beach City Emps. Ass'n*, 41 Cal.3d at 948.

Here, heightened scrutiny is warranted because the Ordinance implicates the rights secured by the federal and state Contract Clauses. There should be little question that the right guaranteed by the federal Contract Clause is "fundamental." The "key" to whether a right is "fundamental" for purposes of "guaranteeing equal protection of the laws" is whether that right is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). The Contract Clause plainly meets that requirement. Indeed, the Contract Clause predated even the enactment of the Bill of Rights, reflecting the importance the Framers placed on ensuring that no "State . . . pass any . . . Law impairing the Obligation of Contracts." (U.S. CONST., art. I, § 10, cl. 1.) For more than two

centuries, the Supreme Court has applied this provision to strike down state laws that seek to alert the contractual rights held by private parties. *Fletcher v. Peck*, 10 U.S. 87, 139 (1810) (striking down a state law purporting to annul a land grant); *see also*, *e.g.*, *Hepburn v. Griswold*, 75 U.S. 603, 623 (1868) (characterizing this "most valuable provision of the Constitution" as an expression of the "fundamental principle[]" that no law should "interfere with or affect private contracts"). Like the right to travel or the right to vote, the right to be free of legislative interference in existing contracts "occupies a position fundamental to the concept of our Federal Union." *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (internal quotation marks omitted). Any differential burdens the City imposes on that right therefore demand heightened scrutiny. *Id.* at 630-31.

The same is true under California law. In fact, the California Supreme Court has recognized an even broader set of "fundamental interest[s]" that warrant special scrutiny under the state constitution. *Serrano v. Priest*, 18 Cal.3d 728, 763, 766 (1976) (holding that "education is a fundamental interest"); *see also, e.g.*, *Long Beach City Emps. Ass'n*, 41 Cal.3d at 948 ("privacy" right implicated by polygraph examinations); *People v. Olivas*, 17 Cal.3d 236, 245, 251 (1976) ("personal liberty interest" in being free from incarceration and parole); *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 17 (1971) (right to "pursue a lawful profession"). In recognizing this array of "fundamental interests," the California Supreme Court has emphasized that

whether the California constitution expressly protects a given interest is "to be accorded significant consideration." *Serrano*, 18 Cal.3d at 768 n.48; *see, e.g.*, *Long Beach City Emps. Ass'n*, 41 Cal.3d at 943 ("fundamental" right to privacy guaranteed in CAL. CONST., art. I, § 1). And like the federal constitution, the California constitution has long expressly prohibited the passage of any "law impairing the obligation of contracts." CAL. CONST., art. I, § 9; *see Robinson v. Magee*, 9 Cal. 81, 82-83 (1858). This interest in avoiding the impairment of contractual obligations is at least as "fundamental" as the other interests the California Supreme Court has held trigger heightened scrutiny. *Serrano*, 18 Cal.3d at 767-68.

The Ordinance burdens the fundamental rights protected by these constitutional provisions. CGA's members have existing contractual agreements with the unions representing their employees. *See* 3-ER-562-63; 3-ER-557. The Ordinance, however, alters the basic terms of these agreements. Whereas the contracts set specific hourly wages that CGA's members will pay and enables them to reduce their employees' hours, the Ordinance compels CGA's members to increase the hourly wages paid and precludes them from reducing hours in response. *Compare* 3-ER-562-63, *with* 4-ER-584-85. With the ordinance, the City has thus unilaterally impaired these contractual obligations, precluding grocers from exercising their bargained-for contractual rights. *See, e.g.*, *Allied Structural Steel*

Co. v. Spannaus, 438 U.S. 234, 244, 246 (1978) (law that "retroactively modif[ied] the compensation that the company had agreed to pay its employees" was a "substantial impairment of a contractual relationship" under federal Contract Clause); *Sonoma Cnty. Org. of Pub. Emps. v. Cty. of Sonoma*, 23 Cal.3d 296, 308-09 (1979) (same under California law, emphasizing that "[a]n increase in wages is frequently the very heart of an employment contract").

Moreover, the City did not impose its contractual impairments on an even-handed basis. Other employers likewise employ essential workers, and often even essential workers selling groceries. Yet the City singled out a specified subclass of employers of frontline worker: grocers of a particular size that derive a sufficient percentage of their revenue from selling groceries. 4-ER-582-83. Because the Ordinance interferes with the contracts of only these apparently disfavored grocers, burdening their fundamental rights, it must satisfy heightened scrutiny. *Plyler*, 457 U.S. at 216-17; *Long Beach City Emps. Ass'n*, 41 Cal.3d at 948.

b. The district court erred in applying rational basis review

The district court acknowledged that heightened scrutiny applies when a government classification impinges on a fundamental right. 1-ER-10. It also recognized that none of the authorities the City invoked for the contrary proposition had confronted an Equal Protection challenge to a law disparately affecting the fundamental right to be free of legislation altering the terms of existing contracts.

1-ER-11. Nevertheless, the court refused to apply heightened scrutiny. 1-ER-11. None of the reasons it cited justify its departure from governing legal principles.

First, the district court declared that "[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power." 1-ER-11 (quoting *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004)). True enough. Yet it does not follow, as the district court seemed to believe, that the rational basis standard therefore applies. Rather, rational basis review is appropriate only where the challenged exercise of the police power "involves social and economic policy, *and* neither targets a suspect class nor impinges upon a fundamental right." *RUI One Corp.*, 371 F.3d at 1154 (emphasis added, quotation marks omitted). The City may well have the general authority to regulate wages and employment conditions, but that does not mean that it can wield that authority in an arbitrary manner that burdens fundamental rights. The City could not, for example, mandate a higher minimum wage for men than women, or for only those who belong to a certain church, without subjecting itself to the heightened scrutiny applicable to such classifications. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (striking down workers' compensation law that differentiated by gender). Likewise, the City cannot materially alter the existing contracts of an arbitrary subset of employers who sell groceries—or at least, it cannot

do so without demonstrating some compelling justification to which the Ordinance is narrowly tailored. *Plyler*, 457 U.S. at 216-17.

Second, the district court observed that "alleged Contract Clause violations committed in the exercise of a municipality's police power are subject to analysis under their own separate framework," and thus the court "hesitate[d]" to apply Equal Protection's heightened scrutiny standard in evaluating CGA's Equal-Protection claim. 1-ER-11-12. But *all* "fundamental" rights that trigger heightened Equal Protection scrutiny under the federal constitution must also be elsewhere "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33. The Equal Protection "fundamental rights" inquiry would serve no purpose if, as the district court believed, it were supplanted by the framework developed for analyzing an alleged violation of each of those individual rights.

In some circumstances, to be sure, the standard for analyzing whether the law has violated an enumerated right may be even more protective, thus rendering analysis under the Equal Protection Clause unnecessary. *See, e.g.*, *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) ("It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights."). But Equal Protection's heightened scrutiny standard reflects the distinct constitutional harm

that arises when government action burdens fundamental rights in a discriminatory manner. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). That standard applies whether or not the challenged action might also violate another constitutional provision. *See*, *e.g.*, *id.* at 538, 541 (holding that discriminatory sterilization law failed Equal Protection Slause's strict standards while declining to address alternative Due Process and Eighth Amendment claims); *Shapiro*, 394 U.S. at 623, 634 (holding that discriminatory benefits laws implicated constitutional right to travel and thus was subject to strict Equal Protection scrutiny without addressing whether those laws violated constitutional right to travel); *Long Beach City Emps. Ass'n*, 41 Cal.3d at 948 (applying heightened scrutiny in analyzing Equal Protection challenge to law implicating the constitutional right to privacy); *cf. Towery v. Brewer*, 672 F.3d 650, 659-60 (9th Cir. 2012) (declining to adopt the "broad proposition" that "[w]here there is no Eighth Amendment violation, . . . that necessarily means that there has been no interference with fundamental rights sufficient to trigger strict scrutiny under the Equal Protection Clause").

The critical question for Equal Protection purposes is whether the Ordinance "implicates" or "impinge[s] on" some other protected "fundamental" right or interest by causing the sort of harm that would require the government to justify the burden it has imposed. *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015); *Long Beach City Emps. Ass'n*, 41 Cal.3d at 948. For the fundamental rights

protected by the state and federal Contract Clauses, the question is thus whether the Ordinance has "operated as a substantial impairment of a contractual relationship." *Energy Rsrvs. Grp., Inc. v. Kan. Power and Light Co.*, 459 U.S. 400, 411 (1983) (internal quotation marks omitted). Whatever the framework that might be applied in determining whether the City's "substantial impairment" of the grocers' contracts *also* violates the state and federal Contract Clauses, state and federal Equal Protection requirements demand that the City's Ordinance survive heightened scrutiny.

Third, the district court asserted that although the rights secured by the Contract Clauses were expressly set out in U.S. and California Constitutions, they were not "'fundamental right[s]' for equal protection purposes." 1-ER-12. The court reasoned that these rights are not "absolute," but rather may in some circumstances be validly subordinated to legitimate government purposes. 1-ER-12. Again, the district court misunderstood the constitutional inquiry: *No* constitutional right is "absolute" in the sense the court contemplated. Even the First Amendment's protection of the freedom of speech does not, for example, preclude the government from prohibiting "falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Nevertheless, legislation disparately "affecting First Amendment interests" must withstand heightened scrutiny to satisfy the Equal Protection Clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101

(1972). Similarly, that the Contract Clauses do not prohibit *all* legislative interference with existing contracts does not render heightened scrutiny inapplicable when legislation interferes with the contracts of some but not other similarly situated parties. Rather, heightened scrutiny is the standard that the government must satisfy to demonstrate that such an exercise of its "inherent police power" (1-ER-12 (quotation marks omitted)) is permissible.

Aside from denigrating the state and federal Contract Clauses as not being "absolute," the district court provided no other basis for concluding that the rights secured by these provisions are not "fundamental." Even assuming, as the district court suggested (1-ER-12), that not all constitutionally enumerated right are "fundamental" for purposes of Equal Protection, it remains the case that whether a right is "explicitly or implicitly guaranteed by the Constitution" is the most critical factor. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33. Indeed, the sole authority on which the district court relied expressly recognized as much. *See Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 686-87 (N.D. Ohio 2004) (holding that right to information from government was not "fundamental" for Equal Protection purposes because it was not "explicitly or implicitly guaranteed by the Constitution"). If there were any doubt that the Contract Clauses' express constitutional guarantees against legislative interference with existing contracts secured "fundamental rights," the

historic pedigree of those rights and their centrality to the constitutional scheme removes it. *See supra* pp. 32-34.

Moreover, even assuming that the rights secured by the Contract Clauses are not "fundamental" for purposes of *federal* Equal Protection, they are for purposes of *California's* Equal Protection doctrine. While the district court assumed that the protections afforded by the state and federal constitutions are the same (1-ER-9), the California Supreme Court has made clear that even rights and interests that do not qualify as "fundamental" under federal law are recognized as "fundamental" under California law. *See Serrano*, 18 Cal.3d at 764 (observing that "state equal protection provisions . . . are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable"). Yet the district court did not address California law at all.

Fourth and finally, the district court suggested that CGA had not shown that the Ordinance substantially impaired its members' contracts, asserting that CGA had not identified "any terms of the allegedly impaired contracts" and that the court could not "determine whether the Ordinance 'substantially impairs' the contractual relationships between CGA's members and their workers without knowing the nature of those relationships." 1-ER-16. The district court appears to have simply overlooked CGA's evidence demonstrating that its members have collective

bargaining agreements with its employees that (as one would expect) govern such crucial terms as the employees' wages. *See* 3-ER-562-63; 3-ER-557. There was no dispute about the existence of these contracts.

Nor was the "nature of those [contractual] relationships" (1-ER-16), or the substantiality of the Ordinance's interference with them, any mystery. These were employment relationships; as courts have long recognized, provisions governing employees' wages generally lie at "the very heart" of such contractual agreements. *Sonoma Cnty. Org. of Pub. Emps.*, 23 Cal.3d at 308-09; *see Spannaus*, 438 U.S. at 242. The Ordinance also effected no small change in those relationships. To the contrary, as CGA's evidence demonstrated, the Ordinance's alteration of the targeted grocers' existing agreements with the unions representing their employees were expected to raise labor costs by approximately 20%. 3-ER-559; *see* 2-ER-74-76 (detailing the substantial increase in costs caused by the Ordinance). There can be no question that subjecting the CGA's members to such additional costs was a "substantial" impairment of their existing contracts. *E.g. Sonoma Cnty. Org. of Pub. Emps.*, 23 Cal.3d at 303, 308-09 (alteration of contracts that reduced wages by approximately 2.5% constituted a substantial impairment). Heightened scrutiny was therefore warranted.

2. The Ordinance fails heightened scrutiny

The City thus must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest" to satisfy the requirements of Equal Protection. *Plyler*, 457 U.S. at 217; *see Long Beach City Emps. Ass'n*, 41 Cal.3d at 948 (under California law, "the burden is on the City to demonstrate that the classifications drawn . . . are justified by a compelling governmental interest and that the distinctions drawn are necessary to further that purpose"). The City cannot meet that demanding standard here. Indeed, the City has never attempted to argue that the Ordinance could withstand such scrutiny.

None of the purported purposes cited in the Ordinance itself—to "protect[] public health," address "economic insecurity," and "promote[] job retention" 3-ER-579-81—could possibly justify the law. While these may be legitimate government objectives in the abstract, none has any relationship to the mandate the City actually enacted, let alone to its apparently arbitrary decision to limit that mandate to a certain subset of businesses that sell groceries. Paying these workers an extra $4 an hour, and forbidding CGA's members from reducing hours in response, will not protect anyone from the pandemic. An employee making $26 an hour instead of $22 is just as likely to be infected (and perhaps more so, if the Ordinance diverts funds that might otherwise have been used to institute actual protective measures). Likewise, requiring employers whose employees are

currently employed to pay those employees more does not address the economic insecurity caused by the pandemic or promote job retention. Instead, it does just the opposite—raising costs to the extent that at least some stores are forced to shut down, and threatening to leave many workers without employment entirely. 2-ER-58.

Nor could any of the evidence the City submitted below suffice to demonstrate that the Ordinance had any relationship to these asserted purposes. The declarations from City employees with actual knowledge of the relevant health and economic concerns are perhaps most telling. Dr. Anissa Davis, the City Health Officer, outlined the health threat posed by COVID-19 and the difficulties the City has faced in combatting the virus. 2-ER-114-15. Nowhere did Dr. Davis say anything even suggesting that requiring certain grocers to pay their employees an extra $4 an hour might somehow support those efforts. *See* 2-ER-112-15. Similarly, John Keisler, the City's Director of Economic Development, explained that the economic effects of the "shut-downs" necessitated by the pandemic have fallen hard on Long Beach, particularly among certain racial and socio-economic groups. 2-ER-119-20. He described measures the City has taken to confront this mounting unemployment problem, such as "prohibiting employers from using the pandemic and resulting shut-down orders as an excuse to exchange existing workers with new and perhaps lower-wage workers." 2-ER-121. Never did he suggest that an Ordinance requiring certain employers who are *not* subject to these shut-down orders to uniformly raise

their employees' wages might somehow similarly address the economic issues caused by the shut-downs. *See* 2-ER-119-21.

Recognizing the weakness of the City's asserted purposes and supporting evidence, the district court cited a different purpose: "fairly compensating grocery workers for the hazards they encounter as essential workers." 1-ER-17; *see* 1-ER-13. But even assuming that this rationale might satisfy the rational basis inquiry, not even the district court suggested that it could withstand heightened scrutiny. The City has provided no reason for thinking that the $4 hourly increase it mandated has any relationship to the particular risks that might confront workers at CGA members' stores—who are in one of many subsets of frontline workers, and not at added risk compared to other similarly situated workers. *See* 2-ER-31, 2-ER-50-51. Nor has the City provided any reason to think that the particular subset of retailers that employ at least 300 individuals nationwide and make 70% of their sales in groceries was somehow undercompensating their workers as compared to the many other similarly situated retailers that *also* employ frontline workers, and may also sell groceries. The most the City could muster was evidence suggesting that some grocers (and not necessarily the precise class of grocers covered by the Ordinance) had earned increased profits at the outset of the pandemic, many months before the Ordinance was enacted. *See* 1-ER-13. Such evidence provides no compelling justification for now requiring the specific grocers the City targeted—

many of which are *losing* money (2-ER-74-76)—to alone pay additional wages that other similarly situated employers have no obligation to pay.

Because the City did not and cannot show that its required $4 wage increase on the specified subclass of grocers was narrowly tailored to meet any legitimate interest, CGA is likely to succeed on the merits of its Equal Protection claims.

II. CGA SATISIFIED THE OTHER PRELIMINARY INJUNCTION REQUIREMENTS

Because the district court erroneously concluded that CGA had demonstrated no likelihood of success on the merits, it did not address the other requirements for a preliminary injunction. 1-ER-17. As CGA demonstrated, however, each of the remaining factors also weighs in favor of granting the requested relief.

A. The Ordinance Causes Irreparable Harm

The Ordinance has caused, and will continue to cause, CGA's members irreparable harm. That is true both because CGA's members are being subjected to the application of an unconstitutional law—irreparable harm in and of itself—but also because of the Ordinance's severe economic impact on grocery stores already operating on razor-thin margins.

In these respects, this case is much like *American Trucking Assocs., Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). There, this Court held that a trucking trade association was likely to succeed in its preemption challenge to requirements imposed by the Ports of Los Angeles and Long Beach, including

requirements that governed the relationships between motor carriers and their drivers. *Id.* at 1049-50, 1056-57. Having reached that conclusion, this Court had little doubt that these motor carriers would suffer irreparable harm absent preliminary relief. *Id.* at 1058-59. As the Court explained, the motor carriers would be subjected "to conditions which are likely unconstitutional because they are preempted," and "constitutional violations" themselves "generally constitute irreparable harm." *Id.* In addition, the challenged requirements would force each motor carrier "to incur large costs which, if it manages to survive those, will disrupt and change the whole nature of its business." *Id.* at 1058. Nor, the Court concluded, did it matter that motor carriers might simply refuse to adhere to these requirements and suffer the consequences: plaintiffs seeking preliminary relief are not required to accept the "Hobson's choice" between "expos[ing] themselves to potentially huge liability" and "suffer[ing] the injury of obeying the law during the pendency of the proceedings." *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)).

The same reasoning applies here. As explained above, not only is the Ordinance preempted, it also contravenes the federal and California Equal Protection clauses. *Supra* Part I. That alone is enough to demonstrate it causes CGA's members irreparable harm. *Am. Trucking Assocs.,* 559 F.3d at 1058-59; *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (where state law is

preempted, "its application is unconstitutional"); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury." (quotation marks omitted)).

In addition, CGA's members also face irreparable economic harms—namely, the potential loss of business and closure of their stores. *See Am. Trucking Assocs.,* 559 F.3d at 1058-59. Grocers in Long Beach were already struggling with the significant increased expenses associated with health and safety measures required by the pandemic. 2-ER-98; 2-ER-74-76. The Ordinance threatens the short-term and long-term viability many of the stores to which it applies. Even in normal times, grocery stores operate on slim profit margins—generally less than 2%—and wages make up approximately 16% of their total sales. 2-ER-95. The City's mandated $4 wage bump represents a 20% increase in stores' labor costs. 2-ER-99. That sharp and sudden increase that makes operating many of these locations unsustainable. 2-ER-74-76. In the initial weeks following passage of the Ordinance, two grocery stores in Long Beach elected to close. 2-ER-58. If the Ordinance remains in place, other stores, many of which are likewise racking up consistent losses, may soon follow. 2-ER-76. This "threat of being driven out of business is sufficient to establish irreparable harm." *HiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) (quotation marks omitted); *see Am. Trucking Assocs.,* 559 F.3d at 1059 (same).

That is not to mention the irreparable harm associated with the Ordinance's interference with the labor negotiations conducted by some of CGA's members. In particular, one grocer that operates three stores in Long Beach has been negotiating collective bargaining agreements with the union representing its workers. 3-ER-557. The Ordinance, however, significantly alters the course of that bargaining, effectively dictating the parties' positions with respect to premium pay and eliminating their ability to negotiate whether and how to modify other compensation terms in response. *Supra* pp. 32-34. Once those agreements are reached, they cannot be undone. The "fundamental business changes" that the Ordinance requires therefore constitute irreparable harm for that reason as well. *FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019) (where plaintiff must "enter new contractual relationships and renegotiate existing ones," that harm "cannot be easily undone").

Nor, finally, can CGA's members simply choose to ignore the Ordinance, as the City suggested below. The Ordinance establishes a private right of action, entitling any employee deprived of the mandated wage bump to up to *three times* their unpaid wages, plus attorneys' fees, interest, and a "reasonable penalty" for "retaliation." 4-ER-587. Additional penalties might be available if violation of the Ordinance triggers the complicated tangle of federal and California wage and hour law. *See* 4-ER-586 (providing that the Ordinance's prescribed penalties are "cumulative" of any other available penalties). Concerns over such litigation are far

from speculative: in the week after the Ordinance was enacted, union workers began approaching employees at CGA member stores, telling them the union had "won" hazard pay for them, and that they should contact UFCW to assert their rights if the hazard pay was not include on their next paycheck. 2-ER-68, 2-ER-70; 2-ER-106; 2-ER-62. The mandated $4 wage bump is already unsustainable for many of CGA's members. They should not be compelled to accept the "Hobson's choice" of disregarding that requirement and subjecting themselves to the significant risk of even greater losses in penalties. *Am. Trucking Assocs.,* 559 F.3d at 1058.

B. The Balance Of The Equities And The Public Interest Weigh In Favor Of Relief

Where, as here, a governmental entity is the opposing actor, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both weigh in favor of preliminary injunctive relief in this case.

The City has no legitimate interest in the Ordinance's continued enforcement if it conflicts with federal law and is unconstitutional. As this Court has consistently held, the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Here, the Ordinance contravenes the NLRA, and "[i]t would not be equitable or in the public's interest to allow the state to continue to violate . . . federal law." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal.,*

Inc., 565 U.S. 606 (2012); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) (the public interest favors "applying federal law correctly"). "In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Cal. Pharmacists Ass'n*, 563 F.3d at 853. Likewise, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), cited with approval in *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002).

The Ordinance also has harmful effects more generally. Grocery stores cannot absorb mandatory increases in labor costs while maintaining the same level of investment in public health without either reducing operations or raising prices. *See* 2-ER-95. Already, two stores have closed, resulting in the displacement of over 150 employees. 2-ER-58. Further store closures would result in more job losses and the potential creation of food deserts where these stores used to serve local communities. 2-ER-101-02. And those stores that remain open will likely need to increase prices to do so—resulting in costs of hundreds of dollars a year for families least able to afford such additional expenses. 2-ER-100. Preliminary injunctive relief is necessary to protect both the grocers and the public from the harms associated with the City's misguided Ordinance.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed, and the case should be remanded with instructions directing the district court to issue a preliminary injunction.

Dated: March 19, 2021

Respectfully submitted,

s/ James R. Sigel

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STATEMENT OF RELATED CASES

Plaintiffs Northwest Grocery Association and Washington Food Industry Association today filed a notice of appeal in Northwest Grocery Association v. City of Seattle, No. 21-cv-00142 (W.D. Wash.) That appeal has not yet been docketed in this Court. Appellant is not aware of any other related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

Dated: March 19, 2021

s/ James R. Sigel
James R. Sigel

ADDENDUM

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AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LONG BEACH AMENDING THE LONG BEACH MUNICIPAL CODE BY ADDING CHAPTER 5.91, RELATING TO GROCERY WORKERS IN LONG BEACH, AND ESTABLISHING LABOR STANDARDS REQUIREMENTS FOR PREMIUM PAY FOR GROCERY WORKERS WORKING IN LONG BEACH; DECLARING THE URGENCY THEREOF; AND DECLARING THAT THIS ORDINANCE SHALL TAKE EFFECT IMMEDIATELY

WHEREAS, the new coronavirus 19 (COVID-19) disease is caused by a virus that spreads easily from person to person and may result in serious illness or death, and is classified by the World Health Organization (WHO) as a worldwide pandemic; and

WHEREAS, COVID-19 has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, the World Health Organization has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring dramatic interventions to disrupt the spread of this disease; and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak; and

WHEREAS, on March 4, 2020, the City of Long Beach Public Health Office issued orders temporarily shutting down restaurants, bars, and other entertainment and food establishments, except for take-out food; and

WHEREAS, on March 10, 2020, the City Council of the City of Long Beach proclaimed a civil emergency in response to new cases of COVID-19, authorizing the City Manager to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare, and alleviate damage, loss, hardship or suffering; and

WHEREAS, on March 19, 2020, California Governor Gavin Newsom issued a "Stay Home – Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes. In addition to healthcare, public health and emergency services, the "Stay Home – Stay Healthy" proclamation identified grocery stores as essential business sectors critical to protecting the health and well-being of all

Californians and designated their workers as essential critical infrastructure workers; and

WHEREAS, on March 24, 2020, in order to mitigate the effects of COVID19 within the City of Long Beach, the Long Beach Health Officer issued the "Safer at Home" Order to control the affects and spread of COVID-19 by closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes. In addition to healthcare, public health and emergency services, the "Safer at Home" Order identified grocery stores as essential business sectors critical to protecting the health and well-being of all Californians and designated their workers as essential critical infrastructure workers; and

WHEREAS, on December 3, 2020, California Governor Gavin Newsom extended the "Stay Home – Stay Healthy" proclamation; and WHEREAS, on December 3, 2020, in order to mitigate the effects of COVID-19 within the City of Long Beach, the Long Beach Health Officer extended the "Safer at Home" Order to control the affects and spread of COVID-19; and

WHEREAS, as of January 5, 2021, the World Health Organization Situation Report reported a global total of 86,833,481 cases of COVID-19, including 1,875,460 deaths; California reported 2,490,000 cases of COVID-19, including

27,038 deaths; and Long Beach reported 35,664 cases of COVID-19, including 420 deaths; and

WHEREAS, grocery stores are essential businesses operating in Long Beach during the COVID-19 emergency making grocery workers highly vulnerable to economic insecurity and health or safety risks; and

WHEREAS, grocery workers working for grocery stores are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. They work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease; and

WHEREAS, premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress; and

WHEREAS, grocery workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to the COVID-19 virus. Grocery workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus presents

an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection; and

WHEREAS, the availability of grocery stores is fundamental to the health of the community and is made possible during the COVID-19 emergency because grocery workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by working in hazardous situations; and

WHEREAS, establishing an immediate requirement for grocery stores to provide premium pay to grocery workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery workers are compensated for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency.

NOW, THEREFORE, the City Council of the City of Long Beach ordains as follows:

Section 1. The Long Beach Municipal Code is amended by adding Chapter 5.91 to read as follows:

CHAPTER 5.91

PREMIUM PAY FOR GROCERY WORKERS

5.91.005 Purpose.

As a result of the COVID-19 pandemic and the "Stay at Home" order issued by California Governor Gavin Newsom and the "Safer at Home" order issued by the City of Long Beach, this Ordinance aims to protect and promote the public health, safety, and welfare during the new coronavirus 19 (COVID-19) emergency by requiring grocery stores to provide premium pay for grocery workers performing work in Long Beach. Requiring grocery stores to provide premium pay to grocery workers compensates grocery workers for the risks of working during a pandemic. Grocery workers face magnified risks of catching or spreading the COVID-19 disease because the nature of their work involves close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease. The provision of premium pay better ensures the retention of these essential workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency. As such, they are deserving of fair and equitable compensation for their work.

5.91.010 Short title.

This ordinance shall constitute the "Premium Pay for Grocery Workers Ordinance" and may be cited as such.

5.91.020 Definitions.

For purposes of this Ordinance:

"Adverse action" means reducing the compensation to a grocery worker, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, putting a grocery worker on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a covered grocery worker for any reason prohibited by Section 5.91.090.

"Adverse action" also encompasses any action by the hiring entity or a person acting on the hiring entity's behalf that would dissuade a grocery worker from exercising any right afforded by this ordinance.

"Aggrieved party" means a grocery worker or other person who suffers tangible or intangible harm due to a hiring entity or other person's violation of this ordinance.

"City" means the City of Long Beach.

"Covered grocery worker" means a grocery worker employed directly by a hiring entity who is entitled to premium pay pursuant to this Ordinance.

"Grocery worker" means a worker employed directly by a hiring entity at a grocery store. Grocery worker does not include managers, supervisors or confidential employees.

"Grocery store" means a store that devotes seventy percent (70%) or more of its business to retailing a general range of food products, which may be fresh or packaged. There is a rebuttable presumption that if a store receives seventy percent (70%) or more revenue from retailing a general range of food products, then it qualifies as a grocery store.

"Hiring entity" means a grocery store that employs over three hundred (300) grocery workers nationally and employs more than fifteen (15) employees per grocery store in the City of Long Beach.

"Premium pay" means additional compensation owed to a grocery worker that is separate from hiring entity payments for providing services, bonuses, and commissions, as well as tips earned from customers.

"Respondent" means a grocery store, parent company or any person who is alleged or found to have committed a violation of this Ordinance.

5.91.030 Grocery worker coverage.

For the purposes of this Ordinance, covered grocery workers are limited to those who perform work for a hiring entity where the work is performed in the City of Long Beach.

5.91.040 Hiring entity coverage.

A. For purposes of this Ordinance, hiring entities are limited to those who employ three hundred (300) or more grocery workers nationally and employ more than fifteen (15) employees per grocery store in the City of Long Beach.

B. To determine the number of grocery workers employed for the current calendar year:

1. The calculation is based upon the average number per calendar week of grocery workers who worked for compensation during the preceding calendar year for any and all weeks during which at least one (1) grocery worker worked for compensation. For hiring entities that did not have any grocery workers during the preceding calendar year, the number of grocery workers employed for the current calendar year is calculated based upon the average number per calendar week of grocery workers who worked for compensation during the first ninety (90) calendar days of the current year in which the hiring entity engaged in business.

2. All grocery workers who worked for compensation shall be counted, including but not limited to:

a. Grocery workers who are not covered by this Ordinance; and

b. Grocery workers who worked in Long Beach.

5.91.050 Premium pay requirement.

A. Hiring entities shall provide each grocery worker with premium pay consisting of an additional Four Dollars ($4.00) per hour for each hour worked.

B. Hiring entities shall provide the pay required by Subsection 5.91.050 (A) for a minimum of one hundred twenty (120) days from the effective date of this Ordinance.

C. Unless extended by City Council, this ordinance shall expire in one hundred twenty (120) days.

5.91.060 Grocery worker and consumer protections.

A. No hiring entity shall, as a result of this Ordinance going into effect, take any of the following actions:

1. Reduce a grocery worker's compensation;

2. Limit a grocery worker's earning capacity.

B. It shall be a violation if this Ordinance is a motivating factor in a hiring entity's decision to take any of the actions in Subsection 5.91.060 (A) unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this Ordinance going into effect.

5.91.070 Notice of rights.

A. Hiring entities shall provide covered grocery workers with a written notice of rights established by this ordinance. The notice of rights shall be in a form and manner sufficient to inform grocery workers of their rights under this ordinance. The notice of rights shall provide information on:

1. The right to premium pay guaranteed by this Ordinance;

2. The right to be protected from retaliation for exercising in good faith the rights protected by this ordinance; and

3. The right to bring a civil action for a violation of the requirements of this Ordinance, including a hiring entity's denial of premium pay as required by this Ordinance and a hiring entity or other person's retaliation against a covered grocery worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this ordinance.

B. Hiring entities shall provide the notice of rights required by posting a written notice of rights in a location of the grocery store utilized by employees for breaks, and in an electronic format that is readily accessible to the grocery workers. The notice of rights shall be made available to the grocery workers via smartphone application or an online web portal, in English and any language that the hiring entity knows or has reason to know is the primary language of the grocery worker(s).

5.91.080 Hiring entity records.

A. Hiring entities shall retain records that document compliance with this Ordinance for covered grocery workers.

B. Hiring entities shall retain the records required by Subsection 5.91.080 (A) for a period of two (2) years.

C. If a hiring entity fails to retain adequate records required under Subsection 5.91.080 (A), there shall be a presumption, rebuttable by clear and convincing evidence, that the hiring entity violated this Ordinance for each covered grocery worker for whom records were not retained.

5.91.090 Retaliation prohibited.

No hiring entity employing a grocery worker shall discharge, reduce in compensation, or otherwise discriminate against any grocery worker for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to exercise their rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

5.91.100 Violation.

The failure of any respondent to comply with any requirement imposed on the respondent under this Ordinance is a violation.

5.91.110 Remedies.

A. The payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest provided under this Ordinance is cumulative and is not intended to be exclusive of any other available remedies, penalties, fines, and procedures.

B. A respondent found to be in violation of this Ordinance for retaliation under Section 5.91.090 shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid compensation plus interest in favor of the aggrieved party under the terms of this Ordinance, and liquidated damages in an additional amount of up to twice the unpaid compensation.

5.91.120 Private right of action.

A. Any covered grocery worker that suffers financial injury as a result of a violation of this Ordinance, or is the subject of prohibited retaliation under Section 5.91.090, may bring a civil action in a court of competent jurisdiction against the hiring entity or other person violating this Ordinance and, upon prevailing, may be awarded reasonable attorney fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation: the payment of any unpaid compensation plus interest due to the person and liquidated damages in

an additional amount of up to twice the unpaid compensation; and a reasonable penalty payable to any aggrieved party if the aggrieved party was subject to prohibited retaliation.

5.91.130 Encouragement of more generous policies.

A. Nothing in this Ordinance shall be construed to discourage or prohibit a hiring entity from the adoption or retention of premium pay policies more generous than the one required herein.

B. Nothing in this Ordinance shall be construed as diminishing the obligation of a hiring entity to comply with any contract or other agreement providing more generous protections to a grocery worker than required by this Ordinance.

5.91.140 Other legal requirements.

This Ordinance provides minimum requirements for premium pay while working for a hiring entity during the COVID-19 emergency and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for higher premium pay, or that extends other protections to grocery workers; and nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with

federal or state law. Nothing in this Section shall be construed as restricting a grocery worker's right to pursue any other remedies at law or equity for violation of their rights.

5.91.150 Severability.

The provisions of this Ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this ordinance, or the application thereof to any hiring entity, grocery worker, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this Ordinance, or the validity of its application to other persons or circumstances.

Section 2. Declaration of Urgency. This Ordinance is urgently required to provide economic relief to grocery workers in light of the COVID-19 pandemic and related state and local "Safer at Home" health orders limiting business operations. For these reasons, the establishment of labor standard requirements for premium pay for grocery workers working in Long Beach is immediately necessary.

Section 3. This Ordinance is an emergency Ordinance duly adopted by the City Council by a vote of five (5) of its members and shall take effect immediately. The City Clerk shall certify to a separate roll call and vote on the question of the

emergency of this Ordinance and to its passage by the vote of five (5) members of the City Council of the City of Long Beach, and cause the same to be posted in three (3) conspicuous places in the City of Long Beach, and it shall thereupon take effect and shall be operative immediately.

Section 4. This Ordinance shall also be adopted by the City Council as a regular ordinance, to the end that in the event of any defect or invalidity in connection with the adoption of this Ordinance as an emergency Ordinance, the same shall, nevertheless, be and become effective on the thirty-first (31st) day after it is approved by the Mayor. The City Clerk shall certify to the passage of this Ordinance by the City Council of the City of Long Beach and shall cause the same to be posted in three (3) conspicuous places in the City of Long Beach.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on March 19, 2021.

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s/ James R. Sigel
James R. Sigel