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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CALIFORNIA GROCERS ASSOCIATION,

Plaintiff,

v.

CITY OF LONG BEACH,

Defendant.

UNITED FOOD & COMMERCIAL WORKERS LOCAL 324

Intervenor

Case No. 2:21-cv-00524-ODW-AS

DEFENDANT CITY OF LONG BEACH'S MOTION TO DISMISS AMENDED COMPLAINT

Hearing Date: April 26, 2021
Time: 1:30 p.m.

MOTION TO DISMISS

TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 26, 2021, at 1:30 p.m., or as soon thereafter as the Court may schedule hearing, Defendant City of Long Beach (the "City") will and hereby does move the Court to dismiss the Amended Complaint of Plaintiff California Grocers Association ("CGA") pursuant to Federal Rule of Civil Procedure 12(b)(6).

CGA's Amended Complaint and each count therein fails to state a claim for relief. The First Count fails to state a claim because the City's "Premium Pay for Grocery Store Workers Ordinance" (the "Ordinance") is not preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157–158 because it does not regulate the process of collective bargaining. The Second and Third Counts fail because the Ordinance does not violate the United States or California Equal Protection Clauses; the Ordinance is subject to, and survives, rational-basis review. The Fourth and Fifth Counts fail to state a claim because the Ordinance does not violate the Contracts Clauses of the United States or California Constitution because it does not substantially impair any of CGA members' contracts and survives the applicable deferential standard of review.

This motion is made following a conference of counsel pursuant to L.R. 7–3 which took place on March 17, 2021.

This motion is based on the accompanying Memorandum of Points and Authorities, on the full records in this matter, and on such further briefing and argument as the Court may allow.

Dated: March 24, 2021

BEST BEST & KRIEGER LLP

By: */s/ Christopher M. Pisano*
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I. INTRODUCTION

The City of Long Beach ("City"), like the rest of the state, is in the midst of a public health emergency of almost unprecedented magnitude. But the pandemic is not just a public health emergency. It has created an economic disaster as unemployment levels have spiked throughout the nation, including in the City, with millions facing eviction from their homes when moratoria expire. Despite this, Plaintiff seeks to stop a local law (the "Ordinance') by the City that provides a modicum of economic relief to front-line grocery workers. They have faced and continue to face increased risks to their personal health and safety as they keep the City's food distribution system functioning in these extraordinary times.

The California Grocers Association's ("CGA" or "Plaintiff") challenges to this Ordinance fail as a matter of law. Plaintiff first claims that the Ordinance is preempted. However, the NLRA does not preempt state or local wage or other labor regulations; it preempts only laws that interfere with "economic weapons of self-help, such as strikes and lockouts." *Golden Estate Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 614–15 (1986); *Fort Halifax Packing Company v. Coyne,* 481 U.S. 1, 20–21 (1987). This does not apply here.

Next, CGA argues that the Ordinance violates the Equal Protection Clauses of the United States and California Constitutions. This claim fails because the Ordinance is subject to and survives the deferential rational basis standard. In light of this deferential standard, CGA contends that the Ordinance is subject to strict scrutiny because it implicates "fundamental" contractual rights. Plaintiff is wrong. For nearly a century, courts have uniformly rejected the notion that the "freedom to contract" (or to be free from "governmental interference with their contracts") is a fundamental right triggering any form of heightened scrutiny. *See, e.g., West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 391–99 (1937). State and local economic regulations are subject to deferential rational-basis review. *See, e.g., International Franchise Ass'n, Inc. v. City of Seattle,* 803 F.3d 389, 407 (9th Cir. 2015).

Finally, CGA claims the Ordinance violates the U.S. and California Contract Clauses. This claim is meritless because the Ordinance is a valid exercise of the police power, and every employment contract is entered into with further state or local regulation being foreseeable. Even if Plaintiff could clear these and other threshold hurdles, the Ordinance easily survives the applicable deferential standard of review.

Recognizing these settled principles of law, the United States District Court for the Western District of Washington recently dismissed, with prejudice, a functionally identical complaint in the matter *Northwest Grocery Association v. City of Seattle*, 2021 WL 1055994 (W.D. Wash. Mar. 18, 2021). This Court should likewise dismiss Plaintiff's complaint, with prejudice.

II. FACTUAL BACKGROUND

A. The Ordinance and the City's Efforts to Protect Workers

At the outset of the pandemic, the City Council made it a priority to protect workers. Because in-person service sectors are prevalent within the City and were so hard hit by the pandemic, the City Council made it a public priority to implement policies alleviating the economic suffering of its lower wage and disadvantaged residents. In May 2020, the City Council adopted three ordinances providing job protections and benefits to low income workers.

At issue here, the City enacted the Premium Pay for Grocery Workers Ordinance (the "Ordinance"), codified in Chapter 5.91 of the Long Beach Municipal Code. This Ordinance provides for a wage increase of $4 per hour for essential grocery workers, and prohibits employers from circumventing this increase by reducing compensation or earning capacity "*as a result of this ordinance*." Ordinance §§ 5.91.050(A); 5.91.060(A),(B), emphasis added.[1] It does

[1] Plaintiff's First Amended Complaint indicates that the Ordinance is attached to the First Amended Complaint as Exhibit A. (ECF No. 47, ¶ 18.) However, that Exhibit seems to have been inadvertently omitted from the First Amended Complaint. The full Ordinance was attached as Exhibit A to both submissions of the original Complaint. (ECF No. 2 at pp. 14–26; ECF No. 9 at pp. 15–27.) Further

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not prevent an employer from taking *any* action (e.g,, termination, reduction in hours) as long as it is not a response to the Ordinance. *Id.* at 5.91.060(A),(B).

The Ordinance is a modest, temporary, emergency measure, and by its own terms expires 120 days after its enactment. (*Id.* at Section 5.91.050(C).) In enacting this Ordinance, the Long Beach City Council legislatively determined that:

> [G]rocery 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.
>
> [G]rocery 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; . . .
>
> [G]rocery 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 . . .
>
> [E]stablishing 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.

(ECF No. 9 at pp. 17:5–18:3 (emphasis added).)

III. LEGAL ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) requires a claim to be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12. "A

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reference to sections of the Ordinance, which is located in full at ECF No. 9 at pp. 15–27, shall be in the form "Ordinance § [___]."

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motion to dismiss under [Rule 12(b)(6)] 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001)). Dismissal "is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Id*. at 1242.

Plaintiff's claims are not based on a cognizable legal theory and Plaintiff fails to allege facts to plausibly demonstrate entitlement to any relief. This Court should grant Defendant's motion to dismiss.

B. The Ordinance is Not Preempted by the NLRA

CGA's first count for declaratory and injunctive relief is based on a theory that the Ordinance is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157–158. (ECF No. 47, ¶¶ 22–30.) Plaintiff's theory is wrong, and the Motion should be granted as to this Count.

1. **There is a Strong Presumption Against Preemption**

Federal preemption cases are guided by two key principles: (1) "the purpose of Congress is the ultimate touchstone in every pre-emption case" and (2) "the assumption that the State's historic police powers are not preempted" absent Congress' "clear and manifest purpose" to preempt the exercise of those powers. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191 (9th Cir. 2018) (citations and internal quotation marks omitted). "Pre-emption of employment standards within the traditional police power of the State should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (internal quotations omitted). This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Fort Halifax, a *Machinists* preemption case, is clear: "pre-emption should not be lightly inferred... [because] the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S.

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1, 21 (1987). It is well-established that NLRA preemption should not be presumed. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 888, 891 (9th Cir. 2018) *cert. denied* 139 S.Ct. 2744 (2019) (expressly applying presumption against preemption in context of *Machinist* preemption challenge, and holding that presumption applies with "particular force" when challenged law does not interfere with process of bargaining or self-organization) (citing *Fort Halifax*, 482 U.S. at 21; *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)); *see also Rhode Island Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 667 F.3d 17, 29 (1st Cir. 2011) (acknowledging presumption against *Machinists* preemption).

2. **The Ordinance is Not Preempted**

The Supreme Court and the Ninth Circuit repeatedly have held that substantive state labor standards are not preempted by the NLRA. *See, e.g.*, *Fort Halifax*, 482 U.S. at 20–22; *National Broadcasting Co., Inc. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996); *Babler Brother v. Roberts*, 995 F.2d 911 (9th Cir. 1993) (state law mandating premium overtime wages for non-union employees working on public construction projects was not preempted). The Ordinance is a substantive labor standard benefitting union and non-union grocery workers as individuals, and does not conflict with the NLRA, which regulates the *process* of collective bargaining. Indeed, courts in the Central District have rejected similar challenges to the City of Los Angeles' living wage ordinances. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles* 119 F.Supp.3d 1177, 1179 (C.D. Cal. 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016); *Fortuna Enters., L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000 (C.D. Cal. 2008).

The NLRA is "concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metro. Life Ins. Co.*, 471 U.S. at 753. Pursuant to this principle, the Supreme Court has established two narrow doctrines of preemption by federal labor law: *Garmon* and *Machinists*. In briefing

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to date, Plaintiff has exclusively focused on the *Machinists* doctrine which prohibits states from "imposing additional restrictions on economic weapons of self-help." *Fort Halifax Packing*, 482 U.S. at 19.

In *Fort Halifax Packing*, 482 U.S. 1, the Supreme Court held that a Maine statute requiring employers, in the event of a plant closing, to provide a one-time severance pay absent a collective bargaining agreement on the subject was not preempted by the NLRA. The company argued that the Maine law was preempted because it intruded upon the bargaining activities of the parties, i.e., it undercut its ability to withstand a union's demand for severance pay. *Id*. at 20.[2] The Supreme Court rejected this argument and found that Maine's severance payment law was a valid and unexceptional exercise of its police power. *Id*. at 22. The Court reasoned that such a substantive labor standard provides protections to individual union and nonunion workers alike, and thus neither encourages nor discourages bargaining processes. *Id*. at 21–22. The *Fort Halifax Packing* Court held that the mere fact that a state statute regulates matters over which the parties may bargain cannot support a claim of pre-emption. *Id*. at 21–22.

In *Viceroy Gold Corp*, 75 F.3d 482, the Ninth Circuit held that a California labor standard was not subject to *Machinists* preemption under the NLRA. California Labor Code section 750 prohibited mine workers from working more than eight hours a day. *Id*. at 485. This statute was later amended to create an exception to the eight-hour shift limitation "when the employer and a labor organization representing employees of the employer have entered into a valid collective-bargaining agreement where the agreement expressly provides for the wages, hours of work, and working conditions of the employees." *Id*. at 485–86. Viceroy Gold Corporation, an operator of a gold processing facility, argued that as a result of the statutory prohibition, its mine facility was at a competitive

[2] *Compare with* ECF No. 47, ¶ 26 ("The Ordinance . . . empower[s] the UFCW or other collective bargaining units to secure a wage rate they could not otherwise have obtained.")

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disadvantage compared to union mines, it was vulnerable to pressure to unionize, and it was less operationally efficient. *Id*. at 486, 488. The Ninth Circuit rejected the gold processing company's claim that section 750 was preempted by the NLRA. *Id*. at 489–90. The Court reasoned that even though the eight-hour shift limitation may be burdensome to some employers and employees who preferred a 12-hour work schedule, it "undoubtedly" qualified as a minimum safety protection for non-union mine workers, while permitting a longer workday through the protections provided by the collective bargaining process. *Id*.

More recently, in *American Hotel and Lodging Association v. City of Los Angeles*, 834 F.3d 958, 963 (9th Cir. 2016), the Ninth Circuit held that a Los Angeles living wage ordinance was not preempted, explaining:

> Under *Machinists* preemption, at issue here, the NLRA prohibits states from restricting a "weapon of self-help," such as a strike or lock-out.
>
> Minimum labor standards, such as minimum wages, are not subject to *Machinists* preemption. Such minimum labor standards affect union and nonunion employees equally, neither encouraging nor discouraging [] collective bargaining processes. . . . [T]hese standards are not preempted, because they do not "regulate the mechanics of labor dispute resolution." Rather, these standards merely provide the "backdrop" for negotiations. Such standards are a valid exercise of states' police power to protect workers. . . .
>
> It is no surprise, then, that "state minimum benefit protections have repeatedly survived *Machinists* preemption challenges," because they do not alter the process of collective bargaining. . . .

Id. at 963–65 (Internal citations omitted).

Even in light of this authority, Plaintiff contends the Ordinance is preempted because, according to Plaintiff, the ordinance is not in fact a "minimum wage" or similar "minimum labor standard," but rather a "mandatory hourly bonus." (ECF No. 47, ¶ 27.) This is a distinction without a difference.

Both the Supreme Court and this Circuit have held that labor standards other than minimum wage laws, or laws that otherwise set benefit "floors", are not

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preempted. Indeed, the Supreme Court specifically found that non-minimum wage laws regulating employment are not subject to *Machinists* preemption. *Fort Halifax*, 482 U.S. at 21 (law mandating lump sum severance payments); *Metro Life Ins. Co.*, 471 U.S. at 758 (law mandating mental health).

In *American Hotel and Lodging Association*, 834 F.3d 958, the Ninth Circuit considered a Los Angeles ordinance that, among other things, required employers to provide paid leave and required that service charges pass through to employees. *Id*. at 962. The Ninth Circuit held that no portion of the Los Angeles Ordinance was preempted. *Id*. at 964–65.

In *National Broadcasting Co., Inc.*, 70 F.3d 69, the Ninth Circuit considered a state law that set an overtime premium of double an employees' regular rate in the absence of a collective bargaining agreement. *Id*. at 70. If the parties had bargained for a premium pay rate, they were relieved of the requirement to pay double the regular rate. *Id*. However, the law required that the bargained for "premium wage rates for overtime work" must be "not less than one dollar ($1.00) per hour more than the minimum wage." *Id*. The Ninth Circuit rejected a claim that the law was preempted, explaining that "such state minimum benefit protections have repeatedly survived *Machinists* preemption challenges." *Id*. at 71. The law provided a fixed, premium pay rate (at least one dollar more per hour than the minimum wage) that could not be modified in the bargaining process. Indeed, the law applied a set rate equally to the lowest and highest-paid workers without regard to previously bargained wages. There is no meaningful distinction between the Ordinance and the law approved in *National Broadcasting Co., Inc.* both of which involve a premium rate of pay that parties could not bargain away.

In short, neither a mandated lump severance payment, mandatory mental health benefits, paid leave, minimum premium overtime rates, nor the supplemental pay required by the Ordinance are preempted under long-standing Ninth Circuit and Supreme Court authority, despite the fact that none of these are "minimum wage or

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labor standards" as Plaintiff interprets the phrase. *Cf Northwest Grocery Association,* 2021 WL 1055994, at *4 ("The fact that the benefit applies across wage level may indeed distinguish it from a minimum wage law, *but not from a minimum benefit law*, as was upheld in *Metropolitan Life*.) (emphasis in original.)

3. The Ordinance Does Not Prohibit All Actions to Mitigate Labor Costs

In ruling on CGA's motion for a preliminary injunction, this Court suggested that the Ordinance could be preempted if it "really does prohibit *any* collective bargaining by grocers to mitigate increased labor costs that result from the Ordinance." (ECF No. 41 at p. 7:16–20 (emphasis in original).) Any such concern can be alleviated by looking at the plain language of the Ordinance. On its face, the Ordinance does not prohibit an employer from taking "*any* [action] to mitigate increase labor costs that result from the Ordinance." Rather, it prevents an employer from taking exactly two actions, and only if those actions are taken "as a result of [the] Ordinance going into effect." Ordinance § 5.91.060.

First, it prevents an employer from unilaterally "tak[ing] any action" to reduce a "grocery worker's compensation." This provision means what is says: An employer may not, as a result of the $4 wage increase, resort to the expedient of reducing all employees' base pay by $4 per hour or some other amount to nullify or weaken the effect of the Ordinance. To the extent an employer may otherwise do so consistent with collective bargaining agreements and otherwise applicable law, the Ordinance does not prevent an employer from modifying any employment terms besides direct compensation; whether paid vacation, free meals, employee discount, or any other "perk" or employment term besides direct compensation.

Second, it prevents an employer from unilaterally "tak[ing] any action" to "limit a grocery worker's earning capacity." This provision also means what it says: An employer may not, as a result of the ordinance going into effect, take a direct action that limits an employee's ability to earn money. While slightly broader in

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scope than the prohibition on reduction in direct compensation, the prohibition is still cabined to direct actions that limit an employee's ability to earn their base compensation plus the $4 per hour supplement. An employer may not, as a direct result of the ordinance going into effect, reduce employee hours across the board to keep an employee's total take home pay static. An employer may not, as a result of this Ordinance going into effect, refuse to schedule employees who otherwise would have been assigned shifts during the 120 day period the Ordinance is in effect. An employer *may* however, without violating the Ordinance, modify any employment terms besides direct earning capacity; whether vacation time, free meals, employee discounts, or any other "perk" or employment term.

These common sense interpretations of the phrases "reduce a grocery worker's compensation" and "limits a grocery worker's earning capacity" are supported by definitions elsewhere in the Ordinance. As this Court noted, if the City intended the employer conduct prohibited by Section 5.91.060 to be all encompassing, the drafters of the Ordinance "could have said so in the Ordinance. They did not." (ECF No. 41 at p. 8:5–12.)

The drafters of the Ordinance did, however, include a definition of "adverse action" describing a broader range of conduct than simply reducing compensation or limiting earning capacity. Section 5.91.020 of the Ordinance, "Definitions," defines "Adverse action" to mean:

> [R]educing 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 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.

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(Ordinance § 5.91.020;emphasis added.)

While the defined term "Adverse action," is not used elsewhere in the Ordinance, the fact that this definition recognizes a distinction between "reducing the compensation" and other acts that could mitigate increased costs, such as "temporarily or permanently denying or limiting . . . incentives or bonuses" is strong evidence that the drafter of the Ordinance did not intend the prohibitions in Section 5.91.060 to have the all-encompassing scope alleged by Plaintiff.

If the City truly intended Section 5.91.060 to prohibit the broad range of conduct imagined by CGA, it could have used language as or more expansive as the definition of "Adverse action" in section 5.91.060. It did not do so.

Or, simpler still, "if the drafters of the Ordinance meant to prohibit employees from offsetting labor costs by lowering any form of compensation 'in any way,'" they could have drafted section 5.91.060 to state: "No hiring entity shall, as a result of this Ordinance going into effect, take any 'adverse action' against any grocery worker." They did not do so.

To the extent CGA proffers a different interpretation of the Ordinance that CGA contends supports a finding of preemption, the City's reasonable interpretation of its own ordinance is entitled to some deference. *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990) ("The ordinance can certainly be read in other ways, but we conclude that it is readily susceptible to the City's interpretation. We therefore adopt the City's narrower construction. *See Frisby v. Schultz*, 487 U.S. 474, 480–84, 108 S.Ct. 2495, 2500–01, 101 L.Ed.2d 420 (1988) (Court's narrow construction of ordinance supported by representations of town counsel as to town's interpretation).")

In short, the Ordinance does not mean "something beyond what it says," and its plain meaning, as informed by the context of the Ordinance as a whole, demonstrates that the Ordinance does not prohibit employers from engaging in collective bargaining. (ECF No. 41 at pp. 7–8.)

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4. The Ordinance Does Not Dictate a Bargaining Result

In the specific context of collective bargaining, the Ordinance facially does not prohibit any bargained employment term, but merely provides a $4 increase to whatever terms are agreed upon. If, because of the backdrop of the Ordinance, CGA's members take a bargaining position that involved, for example, refusing to increase base pay or reducing vacation days, and a union agrees to this term, this would not run afoul of the Ordinance.

Nor does the Ordinance prevent an employer and bargaining unit from adopting any particular term in a collective bargaining agreement. The Ordinance merely provides that whatever agreement is reached is supplemented by an additional $4 per hour for a time period of 120 days.

Indeed, the Ordinance does not prevent bargaining on any topic besides the single topic of a $4 an hour wage supplement. Stated differently, it takes a single "chip" (or topic) off the table, and provides a new backdrop of bargaining with this "chip" removed – as *every other* state substantive labor law does. See *Northwest Grocery Association*, 2021 WL 1055994, at *4 ("But in *Bragdon*, the determinative issue was that the ordinance dictated the mix *entirely*, leaving *nothing* to bargain over (citation). The Ordinance here simply *affects* the mix . . . this is not sufficient to establish an NLRA preemption argument, as is true of *any* minimum labor standard.") (emphasis in original).

While employees and employers cannot bargain around state minimum wage laws, state laws prohibiting child employment, occupational safety laws, laws against workplace discrimination, or a host of other substantive state labor laws, this does not render these laws preempted – those laws simply provide a backdrop for bargaining as the Ordinance does here. *See, e.g.*, *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981) (minimum wage laws not preempted); *Associated Builders & Contractors of California Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 820 (S.D. Cal. 2017), *aff'd sub nom. Interpipe*

Contracting, 898 F.3d 879 (noting child labor laws not preempted); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863–64 (9th Cir. 1987) (California's Occupational Safety and Health Act requirements not preempted).

While Plaintiff's members cannot bargain to remove the $4 per hour wage increase, they are (1) not obligated to accept any other demand or to refrain from taking any bargaining position; (2) not obligated to pay any retroactive "hero" or supplemental wage; (3) not obligated to provide any other particular benefit; and (4) not obligated to pay the supplemental wage once the 120-day ordinance expires. Nor is a union obligated to accept any bargaining position taken by a grocer. And, if the parties cannot reach an agreement on a new collective bargaining agreement, the full panoply of "economic weapons of self-help" remain available to each. *See Fort Halifax Packing*, 482 U.S. at 19 (*Machinist* preemption prohibits states from "imposing additional restrictions on economic weapons of self-help")

Finally, the precise contours of the meaning of "compensation" and "earning capacity" are not ripe for adjudication, and this Court does not have before it an individual who has suffered a concrete and particularized injury that involves these definitions. *See generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 512 (1984) ("Finally, we also decline to reach the validity of § 93(b)'s second sanction—prohibition of a union's administration of its pension or welfare funds—despite the Court of Appeals' unanimous holding that the sanction is expressly pre-empted by § 514(a) of ERISA, 29 U.S.C. § 1144(a) . . . Because the Commission never imposed this sanction on Local 54, we are presented with no concrete application of state law. The issue is hence not ripe for review, and the Court of Appeals' holding that the federal ERISA pre-empts this sanction must therefore be vacated.").

This Court is not faced with a matured dispute between an employer and an employee over whether a concrete action taken by an employer in fact reduced "compensation" or limited "earning capacity," and whether that action was

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motivated by the enactment of the Ordinance. The pertinent and ripe question here is whether the Ordinance is facially preempted by the NLRA because it "restrict[s] a weapon of self-help, such as a strike or lock-out." *Am. Hotel & Lodgin Ass'n*, 834 F.3d at 963 (quoting *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Rels. Comm'n*, 427 U.S. 132, 146 (1976).) The Ordinance, by its express terms, does not do so, and it is not preempted.

5. ***Bragdon* does not apply to the Ordinance.**

To the extent Plaintiff attempts to rely on *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), such reliance would be misplaced. *Bragdon* is factually distinct and more recent precedent abrogates the case's broader *dicta*.

In *Bragdon*, the Ninth Circuit held that a Contra Costa County ordinance that required construction employers to pay "prevailing wages" which were determined solely by reference to established collective-bargaining agreements, was preempted by the NLRA. *Bragdon*, 67 F.3d at 502. "This manner of setting wages, the court held, gave employers what amounted to a Hobson's choice—they had either to accept the results of third parties' collective bargaining processes or enter into a collective bargaining agreement themselves." *Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 1011 (C.D. Cal. 2013), *aff'd in part, appeal dismissed in part*, 614 F. App'x 867 (9th Cir. 2015).

The Ninth Circuit subsequently tightly cabined *Bragdon*'s holding to its particular set of facts—a municipal ordinance mandating wages based exclusively on third-party collectively bargained rates. *Associated Builders & Contrs. of S. Cal. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004) ("*Bragdon* must be interpreted in the context of Supreme Court authority and our other, more recent, rulings on NLRA preemption."); *id.* at 991, fn. 8 ("In invalidating Contra Costa County's prevailing wage ordinance, we carefully distinguished, for purposes of preemption, state-established minimum wage regulations, which we acknowledged to be lawful."); *Cal. Grocers Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 200 (2011) ("[T]he Ninth

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Circuit Court of Appeals has effectively repudiated *Bragdon*, and a majority of other circuits have limited *Bragdon* to its facts."); *Assoc. Builders & Contractors of Cal. Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 823–24 (S.D. Cal. 2017) ("Plaintiffs ignore that the Ninth Circuit has retreated from its holding in *Bragdon*."). The premium pay required by the Ordinance here is not tied to any collective bargaining agreement, and is not preempted under *Bragdon*.

Even to the extent that dicta in *Bragdon* can be read to endorse an essentially new strand of NLRA preemption, through which sufficiently "onerous" minimum labor standard can be preempted by the NLRA, a $4 per hour wage supplement is a far cry from the type of extreme regulation that could fall into such a novel type of preemption. In *Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d 1177, the court reasoned that a wage standard would have to be extreme beyond reason to even potentially face such preemption:

> Notably, Plaintiffs cannot identify a single case where any court held that a minimum labor standard was so onerous that it rendered the statute preempted. This makes sense. Establishing preemption in this context is hard to do, and the Supreme Court has cautioned that "preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax*, 482 U.S. at 21, 107 S.Ct. 2211. The Court ventures to guess that a minimum wage standard would need to have a degree of outrageousness—an amount that is completely arbitrary and has no rational basis with respect to its intended purpose—for it to be considered an extreme case that compels preemption

Id. at 1191–92. On appeal in the *American Hotel & Lodging Association* matter, the Ninth Circuit had no need to even address the alleged "onerousness" of the ordinance at issue. *Am. Hotel & Lodging Ass'n*, 834 F.3d 958. Instead, the Ninth Circuit correctly recognized that, based on its own and Supreme Court precedent, the relevant inquiry was whether the challenged Ordinance was a "minimum labor standard" or whether the challenged ordinance attempted to "regulate the mechanics of collective bargaining" – an inquiry that is agnostic as to the alleged onerousness of

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a labor standard. *Id.* at 963–65.

C. The Ordinance Does Not Unconstitutionally Impair Contracts

Plaintiff's Fourth and Fifth Counts are based on allegations that the Ordinance violates the Contracts Clause of the United States Constitution and the Contracts Clause of the California Constitution. Plaintiff's claims fail.

Both the state and federal constitutions prohibit impairment of contracts. U.S. Const., art. I, § 10; Cal. Const., art. I, § 9. However, "the prohibition against any impairment of contracts is 'not an absolute one and is not to be read with literal exactness.'" *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). Accordingly, the contract clause "prohibition must be accommodated to the inherent police power of the State," *Energy Reserves Group, Inc. v. Kan. Power and Light Co.*, 459 U.S. 400, 410 (1983), safeguarding the vital interests of the people, because such powers are "paramount to any rights under contracts between individuals." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

Importantly, courts apply a highly deferential standard to regulations that allegedly impart private contracts, analogous to the familiar "rational basis" test. "Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412–13 (internal citations omitted); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) (upholding a municipal living wage ordinance that altered contractual expectations because "[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power."); *Ass'n of Surrogates & Supreme Court Reporters Within City of N.Y. v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991) ("[L]egislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test[.]"); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d

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732, 737 (7th Cir. 1987) (where government is not a party, courts assess whether the government adopted a law that it "rationally could have believed would lead to improved public health and welfare").

1. The Ordinance Does not Substantially Impair Any Contractual Relationship

In determining whether a law violates the Contract Clause, the first question is whether the challenged law constitutes a "substantial impairment" of contracts. *Energy Reserves*, 459 U.S. at 411. Plaintiff contends that the contractual term "impaired" is any agreed upon wage embodied in whatever Collective Bargaining Agreement or employment contracts exist. However, a state or local mandate that an employer pay minimum wages or a wage premium does not substantially impair the employer's employment contract or collective bargaining agreement; no parties may remove themselves from state regulation by simply entering into a private contract on topics that are otherwise the property subject of state or local regulation, and then contending that those contracts are "substantially impaired" by foreseeable state regulation. *See United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 23 (1977) ("Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements")

Further, this threshold condition is not met when the challenged law is a valid exercise of the police powers. *Energy Reserves*, 459 U.S. at 411 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)) ("[t]he Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them'").

Here, because the Ordinance is addressed to working conditions and wages, it is a valid exercise of the City's power to protect the safety and welfare of the people, and Plaintiff cannot meet this requirement.

Additionally, given the broad authority of the City to regulate working conditions, Plaintiff is "operating in a heavily regulated industry" and so additional

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workplace laws cannot be said to substantially impair their contracts. *Energy Reserves*, 459 U.S. at 413 (natural gas producers did not have their contracts impaired where state regulated the intra-state prices they could charge because "State authority to regulate natural gas prices is well established" even though Kansas had never before regulated those prices); *Gen. Offshore Corp. v. Farrelly*, 743 F. Supp. 1177, 1198 (D.V.I. 1990) (finding working conditions were heavily regulated as defined by *Energy Reserves*, because "[o]ccupational safety, collective bargaining, minimum wages, worker's compensation, and other areas of legislation have left few aspects of the workplace unregulated."); *Olson v. California*, 2020 WL 6439166, at *11 (C.D. Cal. Sept. 18, 2020) ("[A] court is less likely to find substantial impairment when a state law 'was foreseeable as the type of law that would alter contract obligations.'") (quoting *Energy Reserves*, 459 U.S. at 416). It has been foreseeable to employers that local or state regulation would require them to pay more for employees' labor or provide additional or different benefits or working conditions since at least 1937. *See generally West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

2. **The Ordinance has a Significant and Legitimate Purpose**

Even if Plaintiff had made a showing sufficient to meet the threshold question, it still has not demonstrated a constitutionally cognizable impairment of contract. If there were a "substantial impairment," Plaintiff would still need to show that the challenged law does not have a "significant and legitimate" public purpose under a rational basis standard. *Energy Reserves*, 459 U.S. at 411-412. "Unless the State itself is a contracting party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 412–13; *see also RUI One Corp.*, 371 F.3d at 1150 (upholding wage ordinance that altered contracts because "[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power.").

Government regulation of purely private contracts is subject to the same

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deferential review applied to other forms of economic and social legislation. *See Energy Reserves*, 459 U.S. at 412–13. As under equal-protection analysis, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*; *Olson*, 2020 WL 6439166, at *11 ("AB 5 fits within the State's authority to regulate employment relationships and thus satisfies the public purpose test imposed in a Contracts Clause challenge.").

The parties agree grocery provision services are critical to addressing the pandemic. (*See* ECF No. 47, ¶ 2.) Preserving these essential services, and providing heightened compensation to ensure worker retention, are a "significant and legitimate" public purpose. (*Northwest Grocery Association*,2021 WL 1055994 at *8 ("[The City] argue[s] that compensating grocery employees for the 'substantial risks of working during the COVID-19 emergency promotes retention of these vital workers' which is 'fundamental to protecting the health of the community.' . . . These are the sorts of 'significant and legitimate' public purposes required to survive a Contacts Clause analysis. . . . Plaintiffs fail to state a claim based upon a Contracts Clause violation.")

The Supreme Court summarized the issue with invading legislative findings in *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945). There, rejecting a contracts clause challenge to a state law forbidding foreclosures in response to the Great Depression, the Court identified the many factual determinations it would be required to make about "not only the range and incidence of what are claimed to be determining economic conditions . . . but also to resolve controversy as to the causes and continuity of such [economic] improvements. . . ." *Hahn*, 326 U.S. at 234. The Court recognized that "[m]erely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary." *Id.*

Moreover, though no emergency is required, *id.* at 412, the fact that the City is responding to an emergency, with temporary legislation, also forecloses

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Plaintiff's challenge. *See, e.g., Blaisdell*, 290 U.S. at 444-447 (finding a Minnesota foreclosure moratorium did not violate the contract clause because, *inter alia*, it was a response to the emergency created by the Great Depression).

D. The Ordinance Does Not Violate Equal Protection Guarantees

Plaintiff's Second and Third Counts allege that the Ordinance violates the Equal Protection Clause of the United States Constitution and the Equal Protection Clause of the California Constitution. Plaintiff's claims fail.

Choices about the scope of economic regulations are fundamentally political choices. Courts therefore review laws challenged as violating equal protection under the deferential "rational basis" test. As the Supreme Court has explained,

> Social and economic legislation... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. . . . This is a heavy burden....

Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 331-332 (1981) (internal citations omitted). This test is the "most relaxed and tolerant form of judicial scrutiny," *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), reflecting a strong preference for resolution of policy differences at "the polls not [in] the courts." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955). In conducting a rational basis review, a court will uphold a challenged law "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Any plausible basis suffices, even if it did not underlie the action, *id.*, and even if no party raised that basis in argument. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988). Because it is "entirely irrelevant for constitutional purpose" whether the rational basis was the actual motivation for a law, "the absence of legislative facts explaining the distinction on the record has no significance in

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rational-basis analysis." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (internal citations, quotation marks omitted.) Put another way, legislative decisions may be based on rational speculation. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979).

Further, controlling Ninth Circuit authority renders Plaintiff's claim meritless. In *RUI One Corp.*, 371 F.3d 1137, the Ninth Circuit rejected an equal protection challenge to a living wage city ordinance that targeted only employers of a certain size within a certain zone of the City of Berkeley. *Id.* at 1156. The Berkeley ordinance required employers located in the Berkeley Marina with six or more employees, and revenues of $350,000 or more per year, to pay employees a "living wage." *Id.* at 1145. The Ninth Circuit considered the plaintiff's argument that the purported reasons for the law were not the real reasons motivating the enactment of the Berkeley ordinance, but rather it was a ploy to help unionize hotels in the Marina. *Id*. at 1155. The Ninth Circuit refused to conduct a more searching review of the legislative motivations, however, finding that it was "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* (quotations omitted). The plaintiff also argued that the Berkeley ordinance was unconstitutional because it imposed the living wage only on Marina businesses, and not on other businesses in other areas of the city. *Id*. The Ninth Circuit rejected this argument noting that "[s]uch legislative decisions are 'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'" *Id.* (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 316.) Moreover, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.* (quotations omitted). Thus, the Ninth Circuit concluded that it was "certainly rational ... for the City to treat Marina businesses differently from their competitors outside the Marina." *Id*. at 1156. In light of *RUI One*, there is a rational basis for the Ordinance.

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Indeed, the Ordinance is supported by a more than rational basis. The City, in a quintessential exercise of legislative discretion, determined that the Ordinance:

> 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 service . . . during the COVID-19 emergency.

(ECF No. 9 at pp. 17–18.)

1. The Ordinance is Not Subject to Strict Scrutiny

In an effort to avoid rational basis scrutiny, Plaintiff implies that strict scrutiny applies because the Ordinance interferes with its members' "right to be free from unreasonable governmental interference with their contracts." This argument is meritless. The notion that employers have a "fundamental right" to freely contract for labor without governmental regulation, subject laws to heightened scrutiny under either an equal protection or due process inquiry, has not been the law since the *Lochner* era.

For purposes of an equal protection, fundamental rights include such rights as the right to vote and the right to procreate. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n. 3 (1976) (*per curiam*) (citing *Roe v. Wade*, 410 U.S. 113 (1973) (right of uniquely private nature); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *William v. Rhodes*, 393 U.S. 23 (1968) (First Amendment Rights); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate)). *See also Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (fundamental rights include "those ties that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs")(internal quotes and citations omitted); *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir.1996) (fundamental rights protect "against a State's interference with personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, as

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well as with an individual's bodily integrity ... These areas represent a realm of personal liberty which the government may not enter."). No court for decades has held that this narrow field of "fundamental rights" extends to the right to enter or enforce contracts, much less the right to purchase labor at a particular price.

In contrast, "freedom of contract is a qualified, and not an absolute, right[;]" "there is no absolute freedom to do as one wills or to contract as one chooses." *Parrish*, 300 U.S. at 392 (1937); *accord Blaisdell*, 290 U.S. at 428 ("prohibition [on impairment of contracts] is not an absolute one and is not to be read with literal exactness . . . ."); *Nebbia v. People of State of New York*, 291 U.S. 502, 523 (1934) ("neither property nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows").

For nearly a century, courts across the United States have uniformly rejected the *Lochner* era notion that the "freedom to contract" or to be free from "governmental interference with their contracts" is a fundamental right triggering any form of heightened scrutiny. (*See, e.g.*, *Parrish*, 300 U.S. at 392 ("Liberty [of contract] implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303–04 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude."); *Id.* at 306 ("Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. *Morey* . . . so far departs from proper equal protection analysis in cases of exclusively economic

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regulation that it should be, and it is, overruled."); *Allstate Ins. Co. v. Dorr*, 411 F.2d 198, 200 (9th Cir. 1969) ("At an earlier period, though not much earlier, in our legal history many attacks were made upon legislation, usually state legislation, on the asserted ground that the legislation deprived persons of liberty of contract . . . In the year 1937 . . . the Supreme Court, in the case of *West Coast Hotel Co. v. Parrish*, . . . , held valid a statute of the State of Washington fixing minimum wages for women and minors. **The Supreme Court has not for several decades, invalidated any state economic regulations on the liberty of contract ground.**") (emphasis added); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 424–25 (1952) ("The only semblance of substance in the constitutional objection to Missouri's law is that the employer must pay wages for a period in which the employee performs no services . . . . But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.").

Indeed, courts have repeatedly held that laws which "interfere with" or burden contractual rights are subject only to the deferential rational basis test. *See, e.g.*, *International Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015) ("The district court properly cited the rational-basis standard. . . . It is legitimate and rational for the City to set a minimum wage based on economic factors, such as the ability of employers to pay those wages."); *RUI One Corp.*, 371 F.3d at 1154 (analyzing living wage standard under rational basis test); *Associated Builders and Contractors of California Cooperation Committee, Inc. v. Becerra*, 231 F.Supp.3d 810, 827 (S.D. Cal. 2017) (applying rational basis review to prevailing wage law modification); *Etere v. City of New York*, 2009 WL 498890, at *2 (S.D.N.Y., Feb. 24, 2009) ("To the extent that Plaintiff relies on that portion of Article I, Section 10 prohibiting laws impairing the obligation of contracts, he evokes the language in *Lochner v. New York*, 198 U.S. 45 (1905).")

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Courts now use rational basis review for economic regulation, and no longer view liberty of contract as a fundamental right. Indeed, in *United States v. Williams*, 124 F.3d 411, 422 (3rd Cir. 1997), the Third Circuit Court of Appeal expressly held that a law which affects the right to contract did not trigger strict scrutiny.

Most recently, the United States District Court for the Western District of Washington recently rejected precisely the "strict scrutiny" argument pressed by Plaintiff here, explaining that "courts have routinely applied rational basis review to regulations implicating economic relationships and, by extension, contracts. . . . The Ordinance is subject to rational basis review. (*Northwest Grocery Association*,2021 WL 1055994 *6 (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *RUI One Corp.*, 371 F.3d at 1154; *Jackson Water Works, Inc. v. Pub. Utilities Comm'n of State of Cal.*, 793 F.2d 1090, 1093–94 (9th Cir. 1986); *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015)).

In short, because the right to be free from "governmental interference with their contracts" is not one of the few fundamental rights so "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" to warrant strict scrutiny, the deferential rational basis test applied. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). For the reasons explained above, the Ordinance survives rational basis review.

IV. CONCLUSION

For all of the aforementioned reasons, this motion should be granted and Plaintiff's claims should be dismissed with prejudice.

Dated: March 24, 2021

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