PAUL L. MORE, Bar No. 228589
pmore@msh.law
LUKE DOWLING, Bar No. 328014
ldowling@msh.law
McCracken, Stemerman & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201

Attorneys for Intervenor United Food & Commercial Workers Local 324

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION, a California non-profit organization,

Plaintiff,

v.

THE CITY OF LONG BEACH, a charter municipality,

Defendants,

UNITED FOOD & COMMERCIAL WORKERS LOCAL 324

Intervenor.

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

INTERVENOR UNITED FOOD & COMMERCIAL WORKERS LOCAL 324's MOTION TO DISMISS AMENDED COMPLAINT

[Fed. R. Civ. P. 12(b)(6)]

Judge: Hon. Otis D. Wright II

Date: April 26, 2021

Time: 1:30 PM

Location: Courtroom 5D

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, United Food & Commercial Workers Local 324 (the "Union") will and hereby does move the Court to dismiss the Amended Complaint in this action pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff California Grocers Association's Amended Complaint fails to state a claim for relief because (1) the City of Long Beach's "Premium Pay for Grocery Store Workers Ordinance" (the "Ordinance") is not preempted under the *Machinists* doctrine of federal labor-law preemption because it does not regulate the process of collective bargaining; (2) the Ordinance does not violate the Contracts Clauses of the U.S. or California Constitutions because it does not substantially impair any of CGA members' employment contracts or collective bargaining agreements, and is in any case, reasonably based to address a public purpose; and (3) the Ordinance does not violate the U.S. or California Equal Protection Clauses because it does not implicate any fundamental right and readily passes rational-basis review.

This motion is made following the 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

/s/Paul L. More
Paul L. More

PAUL L. MORE, Bar No. 228589
pmore@msh.law
LUKE DOWLING, Bar No. 328014
ldowling@msh.law
McCracken, Stemerman & Holsberry, LLP
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San Francisco, CA 94105
Telephone: (415) 597-7200
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UNITED FOOD & COMMERCIAL WORKERS LOCAL 324

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

INTERVENOR UNITED FOOD & COMMERCIAL WORKERS LOCAL 324's MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

[Fed. R. Civ. P. 12(b)(6)]

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INTRODUCTION

California deems grocery store workers to be "essential" because of the critical role they play in the State's food system during the COVID-19 pandemic. These workers face significant risks on the job, and for a time during the pandemic's early phases, many grocery companies provided them with "hero" or "hazard" pay to acknowledge these risks. Many of those same companies have seen significant increases in revenues and profits during the pandemic, as restaurants and other retail food sources have closed. Yet most companies phased out the additional compensation that they paid their frontline workers last year, even as COVID-19 cases surged in Southern California. In response, the City of Long Beach passed the "Premium Pay for Grocery Store Workers Ordinance" ("Ordinance"). The Ordinance mandates that large grocery stores in the City pay their non-supervisory workers an additional four dollars per hour to compensate them for working in close proximity to the public.

The California Grocers Association ("CGA") asks the Court to strike down the Ordinance for reasons that the Supreme Court and Ninth Circuit have rejected for decades. First, the CGA claims that the Ordinance is preempted under the *Machinists* doctrine of federal labor preemption because it purportedly interferes with grocery companies' union negotiations. But federal labor law does not preempt state substantive employment standards because those standards do not regulate the process of collective bargaining. *See, e.g. Metro. Life Ins. Co. v. Mass*, 471 U.S. 724, 753 (1985); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19–20 (1987); *Am. Hotel & Lodg. Ass'n v. City of L.A.*, 834 F.3d 958, 963–65 (9th Cir. 2016). CGA's claim that the Ordinance should be struck down under *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 2005) is based on a misunderstanding of that case and a premature (and mistaken) interpretation of the Ordinance.

Next, the CGA claims the Ordinance violates the U.S. and California Contract Clauses. CGA does not adequately plead this theory, failing to identify which contractual terms the Ordinance supposedly impairs. Even if it had, a state or

municipal wage mandate does not "substantially impair" an employment contract to pay something inferior. *See Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983). If that were the law, the government would have no ability to set minimum wages, overtime, vacation pay, or rest breaks, because an employer could simply point to an employment agreement in which it contracted to pay less. Even if there some basis for arguing that the Contracts Clause is implicated by a wage requirement, the Ordinance meets the deferential standard of review that applies to economic regulations that impair purely private contracts. *Id*. at 412-13.

Finally, the CGA argues that the Ordinance violates the U.S. and California Equal Protection Clauses. Faced with California and Ninth Circuit precedent holding classifications like those in the Ordinance constitutional under rational-basis review, CGA argues that the Ordinance is subject to strict scrutiny because it "implicates" companies' "fundamental right" to contract freely. Even though it has no legitimate contracts-clause claim, CGA argues that merely asserting that its existing employment contracts are "implicated" by regulation is sufficient to require strict scrutiny under the Equal Protection Clause. Doc. 47, ¶34. Courts rejected this notion when they discarded *Lochner*-era substantive due-process doctrine. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–99 (1937); *Nebbia v. N.Y.*, 291 U.S. 502, 523 (1934).

Economic regulations like the Ordinance are subject to rational-basis review. *See, e.g.*, *Int'l Franch. Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004). There are obvious rational bases for the Ordinance's classifications and requirements.

This Court already concluded that CGA has failed to establish a likelihood of success under these theories. Doc. 41, at 4. A federal district court in Seattle agreed with this Court's reasoning, rejecting identical challenges to a hazard-pay ordinance in Seattle. *Northwest Grocery Ass'n v. City of Seattle*, No. 21-cv-00142-JCC, 2021 WL 1055994 (W.D. Wash March 18, 2021). The Court should now dismiss CGA's complaint under Rule 12(b)(6) for failure to state a claim.

STATEMENT OF FACTS

Grocery store employees are "essential workers" in California, but many employers have not treated them that way. Grocery workers face significant risks of contracting COVID-19 due to their regular customer contact and the difficulty in maintaining social distancing in retail stores.[1] At the outset of the pandemic, many grocery chains introduced temporary "hazard" (or "appreciation" or "hero") pay for their frontline workers, generally a small premium on hourly wages. By the summer, however, as the first wave of the pandemic waned, most discontinued the pay: "As nonessential businesses reopened in May and June, retail employers signaled they were returning to 'normal'—just weeks before COVID-19 cases spiked during a second peak."[2] Even as they reneged on their commitment to workers on the pandemic's frontlines, major grocery store chains were enjoying significant increases in profits, as restaurants and other retail food venues shut down.[3]

Municipal governments in California have stepped in to require large grocery companies to compensate their employees for the risks that they are taking on our behalf. On January 19, 2021, the City passed the Ordinance, the first of many in California. The Ordinance requires covered grocery stores to provide their non-

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[1] *See* Lan F-Y, Suharlim C, Kales SN, *et al*. "Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA," OCCUP. ENVIRON. MED. (Oct. 30, 2020) (finding that grocery-store workers with customer contact were five times more likely to contract COVID than those who did not have customer contact and that 20% of sampled grocery workers had the virus), available at: https://oem.bmj.com/content/oemed/early/2020/10/11/oemed-2020-106774.full.pdf.

[2] Molly Kinder, Laura Stateler, and Julia Du, "Windfall profits and deadly risks: How the biggest retail companies are compensating essential workers during the COVID-19 pandemic," BROOKINGS INSTITUTE (November 2020), available at: https://www.brookings.edu/essay/windfall-profits-and-deadly-risks/.

[3] *Ibid*. (finding that Krogers experienced a 90% increase in profits over 2020 and that Albertson's saw a 153% increase, far higher than the average increase for all retailers analyzed by the Brookings Institute researchers).

supervisory workers an hourly wage premium of four dollars. Ordinance, §5.91.050. It covers grocery employers with 300 or more employees nationwide and an average of fifteen employees in stores in the City. *Id.* at § 5.91.040.

The Ordinance's intent is to "compensate[] grocery store workers for the risks of working during a pandemic[,]" as such workers face "magnified risks of catching or spreading the COVID-19 disease because the nature of their work involves close contact with the public[.]" *Id.* at §5.91.005. Mandating higher pay also "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." *Id*.

The City Council passed the Ordinance as an emergency measure so that it would take effect immediately, and the Ordinance expires after 120 days unless the City extends it. *Id.* at §5.91.050(C). In order to ensure that workers actually benefit from the additional pay, the Ordinance prohibits grocery stores from reducing a covered worker's compensation or earning capacity "as a result of this Ordinance going into effect," and establishes a burden-shifting procedure for assessing whether a covered employer has done so. *Id.* at §5.91.060.

Since the City passed the Ordinance, many other cities have followed suit, including Los Angeles County, Oakland, San Jose, and Seattle, Washington.[4] CGA responded to the Ordinance's passage by filing the instant Complaint, and it has filed identical lawsuits against hazard-pay ordinances adopted other cities.[5] The Western District of Washington recently dismissed an identical challenge to a Seattle hazard-pay ordinance. *Northwest Grocery Ass'n v. City of Seattle*, 2021 WL 1055994.

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[4] Los Angeles County Ordinance 2021-0004U; Oakland Mun. Code Ch. 5.96; San Jose, Cal., Grocery Store Employee Hazard Pay Premium Ordinance (Feb. 9, 2021); Seattle, Wash., Grocery Employee Hazard Pay Ordinance (Feb. 3, 2021).

[5] *California Grocers Association v. City of Oakland*, Case No. 21-cv-00863-DMR (N.D. Cal.); *California Grocers Association v. City of Montebello*, Case No. 21-cv-01011-FLA-AGR (C.D. Cal.).

ARGUMENT

I. The NLRA Does Not Preempt the Ordinance.

Whether a state or local law is preempted is a question of law that is properly resolved on a motion to dismiss. *See, e.g.*, *Fortuna Enter. L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1003-04 (C.D. Cal. 2008); ("Since this is a facial challenge to the Ordinance, there is no need for further development of the facts."); *see also Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997).[6]

CGA's Complaint and injunction briefs proceed from misunderstandings about federal labor law's relationship to state employment standards.

A. *Machinists* preemption applies to state laws that regulate the bargaining process, not substantive employment protections.

CGA's argues that the Ordinance is preempted under the *Machinists* doctrine of federal labor preemption. Doc. 47, ¶24 (citing *Lodge 76, Int'l Ass'n of Machinists v. Wisc. Emp't Relations Comm'n*, 457 U.S. 132 (1976)).

Under the *Machinists* doctrine, "[s]tates are . . . prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes and lockouts,

[6] CGA asserts a facial challenge, rather than an as-applied one, because it seeks an injunction to prevent the Ordinance's enforcement under any circumstances. *See Am. Hot. & Lodg. Ass'n v. City of L.A.*, 119 F.Supp.3d 1177, 1194 (C.D. Cal. 2015); Doc. 47, at pp. 13-14. To the extent that CGA argues that its amended complaint is intended to raise "as-applied" challenges to the Ordinance, based on particular collective-bargaining agreements, bargaining relationships, or individual employment contracts, CGA lacks associational standing to raise factually specific claims on behalf of its individual members. *City of S. Lake Tahoe Retirees Ass'n v. City of S. Lake Tahoe*, No. 15-cv-02502, 2017 WL 2779013, at *3 (E.D. Cal. June 27, 2017) ("Regardless of what relief the association seeks, as-applied constitutional challenges are inherently ill suited to association-level litigation."); *Ass'n of Christian Sch. Int'l v. Stearns*, 678 F. Supp. 2d 980, 985–86 (C.D. Cal. 2008) ("Even if Plaintiffs' individualized declaratory relief request did not prohibit associational standing, the individualized nature of Plaintiffs' as-applied claims would bar standing."), *aff'd* 362 F. App'x 640, 644 (9th Cir. 2010) ("The plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require 'individualized proof'[.]").

unless such restrictions presumably were contemplated by Congress." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614–615 (1986). State activity is preempted under this doctrine "on the theory that preemption is necessary to further Congress['s] intent that 'the conduct involved be unregulated because [it should be] controlled by the free play of economic forces.'" *Fort Halifax*, 482 U.S. at 19–20 (quoting *Machinists,* 427 U.S. at 140) (second edit in original). Thus, *Machinists* preemption—like the NLRA itself—is "concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain[.]" *Metro. Life Ins. Co. v. Mass*, 471 U.S. 724, 753 (1985) (emphasis added); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1068–69 (9th Cir. 2007); *cf. Machinists*, 427 U.S. at 135-36 (state law punishing peaceful union strike as unfair labor practice preempted); *Teamsters v. Morton,* 377 U.S. 252, 260 (1964) (state law prohibiting unions from using the "economic weapon" of secondary boycotts during labor disputes preempted).

State and local laws that establish substantive employment standards are not preempted under *Machinists* because they do not interfere with the collective bargaining process. The Supreme Court has made this point repeatedly. In *Metropolitan Life Insurance Company v. Massachusetts*. Massachusetts required health insurance plans, including collectively bargained plans, to have certain mental health benefits. *Metro. Life*, 471 U.S. at 748. The employer argued that this interfered with its right to bargain for a lower level of health insurance benefits than those mandated by state law. *Id.* at 751. The Court rejected this argument:

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. . . . Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."

Id. at 755 (internal quotation and citation omitted). Congress legislated against a

backdrop of state employment protections, yet "there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Id*. at 756.

In *Fort Halifax Packing Company v. Coyne*, the Court held that a Maine law requiring companies to pay their workers severance when they closed large plants was not preempted. The employer argued "that the Maine law intrudes on the bargaining activities of the parties because the prospect of a statutory obligation undercuts the employer's ability to withstand a union's demand for severance pay." *Fort Halifax*, 482 U.S. at 20. The Court disagreed: "This argument—that a State's establishment of minimum labor standards undercuts collective bargaining—was considered in and rejected in *Metropolitan Life Ins. Co. v. Massachusetts*[.]" *Id.* The Court continued:

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations.

Id. at 21. The fact "that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption[.]" *Ibid.*

Both unions and employers negotiate from state-law baselines. "Absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it." *Ibid*. If an employer and a union do not agree on a just-cause provision, then the at-will employment rule applies to the union's members. *See* Cal. Labor Code §2922. California's at-will employment rule is not preempted because it gives employers something that they would otherwise have to bargain for, any more than state and local wage mandates are. *Am. Hotel & Lodging Ass'n*, 834 F.3d at 963 ("[S]tate action that intrudes on the mechanics of collective bargaining is preempted, but state action that sets the stage for such bargaining is not.").

Courts in this Circuit have repeatedly applied *Metropolitan Life* and *Fort Halifax* to uphold substantive labor standards over *Machinists* challenges, stressing in each case the fundamental difference between state substantive employment protections and state laws that regulate the collective-bargaining process. *See, e.g.*, *Am. Hotel & Lodg. Ass'n*, 834 F.3d at 963–65 (city ordinance requiring higher minimum wages and compensated time off for employees of large hotels not preempted); *Nunn,* 356 F.3d at 990 (minimum wages and benefits for state-registered apprentices on public and private construction projects not preempted); *Viceroy Gold Corp. v Aubry*, 75 F.3d 482, 489–90 (9th Cir. 1996) (overtime regulation that applied only to miners not preempted); *Nat. Broad. Co. v. Bradshaw*, 70 F.3d 69, 71–73 (9th Cir. 1995) (state overtime protection for the broadcast industry not preempted); *Kyne v. Ritz-Carlton Hotel Co*., 835 F.Supp.2d 914, 929 (D. Haw. 2011) (hotel service-charge ordinance not preempted); *Fortuna Enter. L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1006–12 (C.D. Cal. 2008) (living-wage ordinance that applied to hotels in area adjacent to airport not preempted); *Columbia Sussex Mgmt., LLC v. City of Santa Monica*, No. 219CV09991ODWSKX, 2020 WL 5358505, at *7 (C.D. Cal. Aug. 28, 2020) ("The Workload Limitation Provision and its corresponding Waiver 'do not regulate the mechanics of labor dispute resolution,' but instead 'provide the "backdrop" for negotiations,' similar to other state minimum labor standards.").

Ninth Circuit courts upheld all of these targeted employment standards based on the basic difference between substantive employment standards and regulation of the collective bargaining process.

B. The Ordinance establishes a substantive labor standard and does not regulate the collective-bargaining process.

CGA does not allege that the Ordinance directly regulates the process of collective bargaining. Instead, it argues that the Ordinance interferes with collective bargaining by "empower[ing] the UFCW or other collective bargaining units [*sic*] to secure a wage rate they could not otherwise have obtained from the employer at a

unionized or non-union grocery store." Doc. 47, ¶26. This is the same argument made by the employer and rejected by the Supreme Court in *Fort Halifax*. *See* 482 U.S. at 20 (rejecting employer's argument that Maine law was preempted because it "undercut[] an employer's ability to withstand a union's demand for severance pay"). A unionized employer is not prohibited from negotiating additional pay for its employees, including additional hazard pay. But both union and non-union employers are required to provide the mandated hazard pay regardless of the outcome of those negotiations. Doc. 41, at 8 ("inability to reject a particular union demand is insufficient to establish preemption").

CGA also claims that the Ordinance "is not a minimum labor standard[]" but rather a "mandatory hourly bonus for a specific group of workers, regardless of the wage negotiated in the current collective bargaining agreements or other employment agreements." Doc. 47, ¶27. If CGA's argument is that only minimum-wage laws are exempt from *Machinists* preemption and not laws that mandate bonuses or premium-pay on top of a variable regular wage rate, the argument is baseless. *See, e.g.*, *Ft. Halifax*, 482 U.S. at 20-22 (upholding statute requiring week's pay for each year of employment as severance); *Bradshaw*, 70 F.3d at 72 (law requiring double-rate overtime in broadcast industry); *Northwest Grocery Ass'n*, 2021 WL 1055994, *7.

Similarly, the fact that the Ordinance applies to employees of large grocery companies is irrelevant. *See, e.g.*, *Am. Hotel & Lodg. Ass'n*, 834 F.3d at 963–65 (minimum-wage law that applied to non-supervisory workers at large hotels in Los Angeles not preempted); *Viceroy Gold Corp.*, 75 F.3d 489-90; *Bradshaw*, 70 F.3d at 72; *Fortuna Enter.*, 673 F.Supp.2d at 1006–12 (minimum-wage ordinance that applied to large hotels in the district surrounding LAX not preempted). That the City targeted large businesses in one industry does not support preemption: "It is now clear in this circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *Nunn*, 356 F.3d at 990; *Cal. Grocers Ass'n v. City of*

Los Angeles, 52 Cal.4th 177, 193-208 (2011) (ordinance protecting large grocery stores' non-supervisory employees not preempted).

CGA further claims that the City did not adopt the Ordinance for an acceptable reason, and that "[w[hile the City has the ability to enact ordinances to further the health and safety of its citizens, the Ordinance here bears no relation to those goals." Doc. 47, ¶27. But the City's police power is not limited to health- and safety-related legislation. "'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.'" *Metropolitan Life*, 471 U.S. at 756 (quoting *Canas v. Bica*, 424 U. S. 351, 356 (1976)). Mandating premium pay for particularly difficult work is commonplace. *See, e.g.*, Cal. Labor Code §§858, 860 (finding that "[a]gricultural employees engage in back-breaking work every day" and mandating overtime premium pay for them); *California Hotel & Lodging Ass'n v. City of Oakland*, 393 F. Supp. 3d 817, 821-22 (N.D. Cal. 2019) (rejecting preemption challenges to ordinance requiring premium pay for assignment of heavy workloads to hotel housekeepers); *Columbia Sussex Mgmt*, 2020 WL 5358505, at *7 (upholding similar law over *Machinists* preemption challenge). Mandating additional pay to compensate grocery workers for the risks that they face is "a valid and unexceptional exercise of the [City's] police power." *Metropolitan Life*, 471 U.S. at 758.

CGA also argues that the Ordinance is preempted because it is "designed" to benefit UFCW Local 324. Doc. 47, ¶¶16-17. To the extent that CGA is arguing that the Ordinance is preempted because it is the result of unions exercising their First Amendment right to lobby for legislation benefiting their members, that argument is baseless. "Congress did not intend for the NLRA's . . . preemptive scope to turn on state officials' subjective reasons for adopting a regulation or agreement." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1026 (9th Cir. 2010) (refusing to consider plaintiffs' argument that the community college district had "ulterior motives"

to "reward the unions"); *Livadas, v. Bradshaw,* 512 U.S. 107, 120 (1994) ("In labor pre-emption cases, as in others under the Supremacy Clause, our office is not to pass on the reasonableness of state policy."); *N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.").

Finally, CGA has argued that the Ordinance is preempted because it does not contain an "opt-out" provision, allowing unions and unionized employers to waive the generally applicable standard and bargain for something else. Doc. 26, at 6, 7. Some employers have argued unsuccessfully that cities' *inclusion* of a collective-bargaining opt-out supported a *Machinists*-preemption claim. *See Am. Hotel & Lodging Ass'n*, 834 F.3d at 965 ("The Supreme Court has made clear, however, that the NLRA 'cast[s] no shadow on the validity of these familiar and narrowly drawn opt-out provisions.'") (quoting *Livadas,* 512 U.S. at 120, 132); *Nat'l Broad. Co. v. Bradshaw,* 70 F.3d at 72 (upholding application of opt-out provision to broadcast-industry overtime law). But no support exists for the notion that employment laws are *required* to include collective-bargaining opt-outs that exempt unionized workers from the protection of otherwise applicable employment standards. Such a rule would improperly penalize union workers. *See Burnside*, 491 F.3d at 1070.

C. *Chamber of Commerce v. Bragdon* does not apply to the Ordinance.

CGA has relied nearly exclusively on *Chamber of Commerce v. Bragdon*, 67 F.3d 497 (9th Cir. 1995). *See* Doc. 18, at 6. But *Bragdon* is factually distinct and more recent Ninth Circuit precedent abrogates the case's broader *dicta*. CGA attacks a provision in the Ordinance that is designed to ensure that the Ordinance's wage premium is not rendered a nullity. The Ordinance prohibits employers from reducing workers' hours or their other compensation "as a result of [the] Ordinance going into effect." Ordinance, §5.91.060. This provision is similar to rules that apply to other

California employment laws for similar purposes. It does not implicate or regulate the bargaining process, and is not *Machinists* preempted.

1. *Bragdon*'s holding is limited to the delegation of bargaining authority.

Bragdon involved an ordinance that required contractors on private construction projects to provide a wage-and-benefit package that was determined exclusively by reference to unionized contractors' collective-bargaining agreements. *Bragdon*, 67 F.3d at 502. As the Ninth Circuit later explained in clarifying the case's scope, the problem with the prevailing-wage ordinance in *Bragdon* was that it required private, non-union employers to comply with the *collectively bargained* wages and benefits in the unionized sector. *Nunn*, 356 F.3d at 991. "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). For that reason, "[i]n 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." *Nunn*. 356 F.3d at 991 n.8 (citing *Bragdon*, 64 F.3d at 502). *See also Am. Hotel & Lodging Ass'n*, 834 F.3d at 965 n.5 (ordinance in *Bragdon* was preempted because "prevailing wages were defined as the per diem wages set by the state for public works projects, which in turn were based on the wages in local collective bargaining agreements, effectively forcing nonunion employers to pay what amounted to a union wage."). *Bragdon* held that the prevailing-wage ordinance before it was preempted because the ordinance made non-union contractors' wages and benefits dependent on third-parties' collectively bargaining, and thus "affect[ed] the bargaining process in a much more invasive and detailed fashion," than wage-and-hour laws. *Bragdon*, 67 F.3d at 502; *Nunn*, 356 F.3d at 991. The Ordinance does not do this.

As CGA should recognize, the Ninth Circuit has effectively limited *Bragdon* to its facts and rejected requests to strike down minimum- and premium-pay requirements like the Ordinance's based on the decision's broader *dicta*. *See Cal. Grocers Ass'n*, 52 Cal.4th at 200 ("[T]he Ninth Circuit Court of Appeals has effectively repudiated *Bragdon*, and a majority of other circuits have limited *Bragdon* to its facts."); *American Hotel & Lodging Ass'n*, 834 F.3d at 965 n.5 (distinguishing minimum-wage requirement before it from prevailing-wage ordinance in *Bragdon*); *Assoc. Builders & Contractors of Cal. Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 823–24 (S.D. Cal. 2017), *aff'd sub nom. Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018) ("Plaintiffs ignore that the Ninth Circuit has retreated from its holding in *Bragdon*, cautioning that it 'must be interpreted in the context of Supreme Court authority and . . . other, more recent, rulings on NLRA preemption.'") (quoting *Nunn*, 356 F.3d at 990); *Fortuna Enters.*, 673 F.Supp.2d at 1010 (noting the Ninth Circuit's "significant retreat from its holding in *Bragdon*" and upholding minimum-wage law that applied to workers at large hotels in airport district); *see also Rondout Elec., Inc. v. NYS Dep't of Labor*, 335 F.3d 162, 169 (2d Cir. 2003) (questioning whether *Bragdon* was decided correctly and distinguishing it); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000) (questioning compatibility of *Bragdon* with *Metropolitan Life* and *Fort Halifax* and declining to follow it).

Like other employers before it, CGA argues that the Ordinance should be held preempted because it is too burdensome for covered grocery stores. Doc. 26, at 5 (arguing that Ordinance's premium pay is preempted because it represents a "27% raise on the low range of the compensation spectrum."); Doc. 47, ¶44. But the Supreme Court has never recognized a theory that a substantive employment standard may be held preempted because a judge believes it to be too "onerous." The statute upheld in *Fort Halifax* required failing businesses that were closing their plants to pay significant amounts of severance to protect workers "from the economic dislocation

that accompanies large-scale plant closings." 482 U.S. at 6. The impact that these significant payouts might have on the business were not relevant to the Court's analysis, which focused on the fact that the law did not regulate the collective bargaining process, but only substantive employment terms. *Id*. at 20. Courts have rejected *Machinists* preemption challenges to far more "onerous" workplace laws than a temporary $4 per hour wage increase. *See, e.g., Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d at 1186 (upholding ordinance that increased minimum wages from $9 to $15.37 per hour); *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015) (statute setting permanent minimum compensation floor across all forms of compensation and benefits not preempted under *Machinists*).

CGA has relied on *American Hotel & Lodging Association* for the proposition that an overly "onerous" standard can be *Machinists* preempted, but the case held no such thing. *See* Doc. 26, at 4. Covered hotels attacked the ordinance for mandating a substantial increase in minimum wages and "disregard[ing] the hotel industry's distinction between tipped and non-tipped employees, which creates exceedingly costly compensation schemes inconsistent with hotel economies[.]" *Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d at 1186. But the trial court pointed out that "Plaintiffs cannot identify a single case where any court held that a minimum labor standard was so onerous that it rendered the statute preempted," *id*. at 1191, and it ventured 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 1192. The Ninth Circuit rejected this approach to *Bragdon* altogether, making clear that the decision in *Bragdon* was based on the fact that the ordinance tied mandated wages and benefits to collectively bargained rates, not on some judicially defined, permissible level of regulatory "stringency" or "onerousness." 834 F.3d at 965 & n.5.

2. The prohibition against reducing compensation is not preempted.

The Ordinance prohibits covered employers from "reduc[ing]a grocery worker's

compensation" or "limit[ing] a grocery worker's earning capacity" "as a result of this Ordinance going into effect." Ordinance, §5.91.060(A). The Ordinance establishes a burden-shifting approach to determine whether an employer has done so. *Id.*, §5.91.060(B).

This provision solves an obvious problem with employment regulations that mandate supplemental compensation: money is fungible, and an employer facing such a regulation can simply reduce some other form of pay (or basis for pay) in order to nullify the regulation's effect. For this reason, California prohibits employers from "manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the . . . overtime rate that will have to be paid." *Huntington Memorial Hosp. v. Superior Court*, 131 Cal.App.4th 893, 905 (2005). State law also "prohibits borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the minimum wage for a second set of hours or tasks[.]" *Oman v. Delta Air Lines, Inc*., 9 Cal. 5th 762, 781 (2020). Employers are prohibited from "mak[ing] or tak[ing] any deduction from the earnings of any employee, either directly or indirectly, to cover the whole or any part of the cost of compensation" under the State's workers' compensation statute. Cal. Lab. Code §3751. The Ordinance's prohibition against employers funding the $4 per hour hazard pay by reducing other compensation is no different from these commonplace policy solutions.

CGA alleges that the prohibition against reducing compensation or earnings capacity is preempted under *Bragdon*, asking the Court to read the Ordinance expansively to preclude employers from closing stores, reducing their workforces, or taking any other action to "control labor costs" Doc. 18, at 7; Doc. 47, ¶15. There are many problems with this line of argument.

First, although the Ordinance has been in effect for more than two months, there is no evidence (or allegation) that any grocery store has been accused of violating the Ordinance by reducing any worker's compensation or earnings capacity. There is no suggestion that any court would adopt CGA's expansive reading of the Ordinance.

CGA is asking the Court to strike down the provision based on speculation about how broadly some future court hearing a hypothetical action against a grocery employer might interpret the provision. The prudential aspect of ripeness is considered in a two prong test: "(1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration." *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 670 (9th Cir. 2004). CGA has alleged no hardship that its members face from delaying adjudication until it becomes clear whether this provision will be invoked at all, and state courts addressing concrete facts will be better situated to interpret the provision (if it is ever invoked). *See Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1033 (9th Cir. 2005) ("The interpretation of the statute is an issue of state law and no California court has interpreted that statute as applied in these circumstances. The fitness of these issues for judicial decision is poor, and the hardship to the parties is minor.").

Second, even if the Court were inclined to address the provision's scope in the abstract, it has already rejected CGA's expansive reading. Doc. 41, at 8 ("If the drafters of the Ordinance meant to prohibit employers from offsetting labor costs by lowering any form of compensation 'in any way' as CGA suggests, they could have said so in the Ordinance."). The provision is best read to prohibit reducing a worker's wages or working hours with the purpose of offsetting the $4 per hour wage increase, similar to the prohibition contained in other California employment laws. *Ibid*.; *see also Northwest Grocery Ass'n*, 2021 WL 1055994, at *8 (rejecting association's expansive reading of similar provision).

Finally, prohibiting both union and non-union employers from reducing other forms of compensation (or hours of work) to offset a mandatory wage rate is not *Machinists* preempted because it does not regulate the mechanics of the bargaining process. *Ibid*.

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II. The Ordinance does not violate the Contracts Clauses of either the United States or California Constitutions.

CGA includes causes of action claiming that the Ordinance violates the U.S. and California Contracts Clauses. Doc. 47, ¶¶42-49. But CGA's preliminary-injunction motion did not attempt to argue this claim. *See* Doc. 26, at 8-16; Doc. 41, at 16. The contract-clause causes of action appear to simply be a stalking horse for CGA's claim that the Ordinance violates equal protection. They have no merit.

"Although the text of the Contract Clause is facially absolute, the Supreme Court has long held that its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *RUI One Corp.*, 371 F.3d at 1146 (internal citations and quotation marks omitted). "The Contract Clause does not deprive the States of their 'broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.'" *Exxon Corp. v. Eagerton,* 462 U.S. 176, 190 (1983); (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22 (1977)).

Whether a regulation violates the Contract Clause is governed by a three-step inquiry: "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978)). If this threshold inquiry is met, the court must inquire whether "the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves*, 459 U.S. at 411–12 (citation omitted). Finally, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.' " *Id.* at 412–13 (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22 (1977)).

Courts apply a deferential standard to economic regulation affecting private contracts. "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 (quoting *U.S. Trust Co.,* 431 U.S. at 22–23); *RUI One Corp.*, 371 F.3d at 1150 (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 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").

A. The Ordinance does not substantially impair the terms of any employment contract or collective bargaining agreement.

CGA argues that "[t]he Ordinance substantially interferes with Members' contracts, specifically their employment agreements of collective bargaining agreements, which have specific, inflexible terms governing employee wages and compensation." Doc. 47, ¶44.

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 employment contract contains a legally enforceable term that immunizes the employer from statutes and ordinances that protect the contracting employee.

> Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements. . . . [As] summarized in Mr. Justice Holmes' well-known dictum: "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."

United States Trust, 431 U.S. at 23; *see RUI One Corp.*, 371 F.3d at 1149. Like its equal-protection argument, *see infra*, CGA's contracts-clause claim calls for a return to the *Lochner* era, when constitutional "freedom to contract" superseded state regulation.

The analysis is no different for collective bargaining agreements. As explained above, federal labor law does not preempt the application of state employment standards to unionized workers, and does not permit states to withhold employment protections based on the fact that workers are unionized. "In the *Machinists* line of cases, the Court has repeatedly repudiated the idea that the mere ability of unionized workers to bargain collectively somehow makes it permissible to give unionized employees fewer minimum labor-standards protections under state law than other employees." *Burnside*, 491 F.3d at 1068; *Metro. Life Ins.,* 471 U.S. at 755–56 ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers"). CGA members' collective bargaining agreements that do not mandate hazard pay, or that mandate hazard pay of less than $4.00, are not "impaired" by the Ordinance, any more than grocery stores' individual employment contracts are. Unless the statute in question includes an express "opt-out" provision, unionized employers may not contract around state employment protections any more than non-union ones may. *See Burnside*, 491 F.3d at 1069-70.

Even if CGA could allege how the Ordinance impairs its members' collective bargaining agreements (or other employment contracts), any such impairment would not be "substantial." *Energy Reserves*, 459 U.S. at 411 ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."). Courts regularly reject contracts-clause challenges to economic regulation of the employment relationship, which is almost

singularly subject to state regulation. *See RUI One*, 371 F.3d at 1150 ("The power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power."); *Olson v. California*, No. 19-cv-1910956, 2020 WL 6439166, at *11 (C.D. Cal. Sept. 18, 2020) (rejecting contracts-clause challenge to AB5's classification of rideshare drivers; "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 Grp.*, 459 U.S. at 416).

California employers are subject to extensive wage regulation at both the local and state levels. *See e.g.*, Cal. Labor Code §1182.12; Los Angeles Mun. Code §187.00 *et seq*. Wage regulations frequently target particular industries, and major employers within those industries. *See, e.g.*, Long Beach Mun. Code. §5.48.020 (higher minimum wage for large hotel employers). Cities and the State have singled out large grocery employers for special employment regulations. Los Angeles Mun. Code §181.00 *et seq*.; Cal. Lab. Code §2502. This Court has upheld wage increases that were greater than the additional $4 per hour that CGA complains about. *Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d at 1183 (increase in minimum wage from statewide $9.00 per hour to $15.37 per hour for hotel workers); *Fortuna Enters*., 673 F. Supp. 3d at 1002 (upholding 33% increase in minimum wages, from statewide $8.00 per hour to $10.64). In light of this already extensive regulation of CGA members' wage terms and employment relationships, an additional $4.00 per hour wage mandate cannot be considered a "substantial" impairment.

B. Even if it substantially impaired CGA members' contracts, the Ordinance has a reasonable public purpose.

Government regulation of purely private contracts is subject to the same 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 Ordinance's public purpose and rational bases are described below. CGA's argument that there is no reasonable or legitimate reason for the City to mandate hazard pay is in obvious conflict with the fact that CGA's own members considered such pay appropriate compensation for the COVID-related risks that those workers faced during the first wave of the pandemic. *Cf.* Doc. 47, ¶3; *supra*, nn. 2, 3.

III. The Ordinance does not violate the U.S. or California Equal Protection Clause.

A. There is no fundamental "freedom to contract."

The absurdity of CGA's equal-protection argument is demonstrated by the fact that under it, a plaintiff who challenges the economic regulation of a private contract under the Contracts Clause itself must demonstrate that the regulation lacks *any reasonable basis*, while the same economic regulation is subject to *strict scrutiny* under the Equal Protection Clause when a plaintiff merely asserts that the regulation "implicates" the Contracts Clause. Doc. 47, ¶34; Doc. 26, at 11-12 (positing theory under which "the Ordinance need not *violate* the Contracts Clause to trigger heightened scrutiny under the Equal Protection Clause."). If CGA were correct, all federal and state legislation that mandated employment standards (and any other regulation that allegedly impaired a contract and thus "implicated" the Contracts Clause) would face strict scrutiny.

CGA's "fundamental right to be free from unreasonable governmental interference with [] contracts" under the Equal Protection Clause does not exist. *Cf.* Doc. 9 ¶ 34; Doc. 26, at 11; *Lochner*, 198 U.S. at 53 (statute imposing work-hour limitation "interferes with the right of the contract between employer and employe[e]s[.]"). Courts have refused to recognize a fundamental liberty of contract for many years. *West Coast Hotel Co.*, 300 U.S. at 391 ("The Constitution does not speak of freedom of contract."); *cf. Chicago Bd. of Realtors*, 819 F.2d at 745 ("The

plaintiffs have brought their case in the wrong era."). Fourteenth Amendment theories based on freedom from contractual impairment "have been long superseded by [the Supreme Court's] approach to the Contract Clause developed over the past three decades, subjecting only state statutes that impair a specific (explicit or implicit) contractual provision to constitutional scrutiny," and striking down regulations affecting private contracts only if they lack a rational basis. *RUI One Corp.*, 371 F.3d at 1151; *Energy Reserves*, 459 U.S. at 412–13. CGA cannot reinvigorate a baseless contracts-clause claim through the backdoor of the Equal Protection Clause.

B. The Ordinance is subject to rational-basis review.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993).

Courts in this Circuit subject regulation of the employment relationship to rational-basis review because such laws do not implicate fundamental constitutional rights. *See, e.g.*, *Int'l Franch. Ass'n*, 803 F.3d at 407 (district court correctly applied rational-basis review to law requiring franchised employers to pay higher minimum wage); *RUI One Corp.*, 371 F.3d at 1154 (applying rational-basis review to law requiring employers in city marina district to pay living wage); *Fortuna Enters.*, 673 F. Supp. 2d at 1013 (applying rational basis to minimum-wage law that applied to large hotels in district surrounding LAX); *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1061 (9th Cir. 2018) (rejecting equal-protection challenge to requirement that ready-mix companies pay prevailing wages); *Fortuna Enters*., 673 F. Supp. 2d at 1013 (rejecting equal-protection challenge to minimum-wage law covering large hotels in proximity of LAX); *Woodfin Suite Hotels LLC v. City of Emeryville*, No. 06-cv-1254-SBA, 2006 WL 2739309, at *21 (N.D. Cal. Aug 23, 2006) (rejecting equal-protection challenge to minimum-wage ordinance that applied to large hotels).

Every employer can say that a wage regulation stands "in defiance of [its] existing contractual relationships" to pay less. Doc. 26, at 15. This does not allow the employer's equal-protection challenge to avoid rational-basis review.

C. The Ordinance is a rational response to the COVID-19 pandemic.

The Ordinance easily meets rational-basis review. The City Council decided that "[r]equiring grocery stores to provide premium pay to grocery workers compensates grocery workers for the risks of working during a pandemic." Ordinance, §5.91.005. The Council found that "[g]rocery store 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." *Ibid*. The City's conclusion that grocery workers face a particular risk of contracting COVID-19 is clearly rational. It is borne out by at least one study by occupational epidemiologists and is Cal/OSHA's current risk assessment. *See supra*, n.1.[7] Requiring employers to pay additional compensation for work that is particularly risky or arduous is commonplace in California, *see supra*, Part I.B, and is the basis, for example, of the statutory overtime wage premium. Cal. Labor Code §510.

The Ordinance also explains that the additional hazard pay will "better ensure

[7] *See* California Dept. of Industrial Relations, "Cal/OSHA Issues Citations to Grocery Stores for COVID-19 Violations," Release No. 2020-83 (Sept. 30, 2020) ("Grocery retail workers are on the front lines and face a higher risk of exposure to COVID-19," said Cal/OSHA Chief Doug Parker. "Employers in this industry must investigate possible causes of employee illness and put in place the necessary measures to protect their staff."), available at: https://www.dir.ca.gov/DIRNews/2020/2020-83.html. *See also* Centers for Disease Control and Prevention, "What Grocery and Food Retail Workers Need to Know about COVID-19" (Nov. 12, 2020) ("As a grocery or food retail worker, potential sources of exposures include close contact for prolonged periods of time with a customer with COVID-19 and touching your nose, mouth, or eyes after handling items, cash, or merchandise that customers with COVID-19 have touched."), available at: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-food-retail-workers.html.

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." *Id.* The link between higher wages and employee retention is both rational and well-established, and the City has a legitimate interest in reducing turnover in grocery stores patronized by the public, so that employees experienced in COVID-19 safety protocols remain on the job. *Concerned Home Care Providers*, 783 F.3d at 91 ("legislative purpose of stabilizing the workforce, reducing turnover, and enhancing recruitment and retention of home care workers" provided rational basis for wage-parity law); *Northwest Grocery Ass'n*, 2021 WL 1055994, at *6 ("promot[ing] retention of these vital workers" was rational basis for hazard-pay ordinance); *California Grocery Ass'n*, 52 Cal.4th at 210 ("ensur [ing] stability and continuity" at large grocery stores was a rational basis for ordinance).[8]

Many of CGA's arguments are attempts at misdirection. For example, it has argued that "paying these workers an extra $4 an hour . . . will not protect anyone from coronavirus infection." Doc. 26, at 15. The Ordinance is not intended to protect grocery workers from COVID-19, but to *compensate* them for the risk of contracting it.

CGA disputes the City's policy judgments, arguing that mandating additional pay does not promote employee retention but "will do just the opposite—raising costs to the extent that at least some stores are forced to raise prices or shut down, threatening to leave many workers without employment entirely." Doc. 26, at 15. But even if CGA's view of labor economics were correct, "a state action need not *actually* further a legitimate interest; it is enough that the governing body '*could have rationally decided* that' the action would further that interest." *Rancho Santiago Cmty. Coll.*

[8] *See* California Dept. of Industrial Relations, "COVID-19 Infection Prevention in Grocery Stores" (October 27, 2020) (detailing extensive training requirements and safety protocols for reducing the risk of COVID-19 transmission in grocery stores), available at: "https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Grocery Stores.pdf?eType=EmailBlastContent&eID=77f0ecd5-92cc-447a-9968-e0a061eac2ef.

Dist., 623 F.3d at 1031 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)); *Beach Commc'ns.*, 508 U.S. at 313-14 ("Where there are plausible reasons for [legislative] action, our inquiry is at an end."); *cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) ("Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee[.]").

CGA complains that Ordinance violates Equal Protection because other "similarly situated large retailers and other essential employees" are not also subject to it. Doc. 25, at 2. But legislative line-drawing of this kind is "'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'" *RUI One Corp.*, 371 F.3d at 1155 (quoting *Beach Commc'ns*, 508 U.S. at 316). The City was not required to address every category of essential worker or none at all: "'[R]eform 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.'" *Beach Commn'ns*, 508 U.S. at 326 (quoting *Williamson v. Lee Optical of Ok., Inc.*, 348 U.S. 483, 489 (1955)). The City's focus on large grocery employers was rational, as these employers are more likely to be able to afford the mandated wage premium.

Finally, CGA argues that the Ordinance's "stated objectives are merely an attempt to impose a public policy rationale on interest-group driven legislation for labor unions and, in particular, for UFCW [Local] 324." Doc. 47, ¶35. But "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315; *RUI One Corp.*, 371 F.3d at 1155 (employer's argument that minimum-wage law's stated reasons "were not the real reasons" and that City "was instead motivated by a desire to help in the unionization campaign at a Marina hotel" irrelevant).

CONCLUSION

CGA's constitutional claims are all barred by decades of established law. The Court should dismiss the Amended Complaint with prejudice for failure to state a claim.

Dated: March 24, 2021

Respectfully Submitted,

McCRACKEN, STEMERMAN & HOLSBERRY, LLP

By: */s/Paul L. More*
PAUL L. MORE
LUKE DOWLING

Attorneys for Intervenor United Food & Commercial Workers Local 324

CERTIFICATE OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: 595 Market Street, Suite 800, San Francisco, California 94105.

On March 24th, 2021, I served a copy of the foregoing document

INTERVENOR UNITED FOOD & COMMERCIAL WORKERS LOCAL 324's MOTION TO DISMISS

on the interested party(s) in this action, as follows:

By ECF System - Court's Notice of Electronic Filing:

William F Tarantino
Byung-Kwan Park
Robert Santos Sandoval
Morrison and Foerster LLP
425 Market Street
San Francisco, CA 94105
415-268-7000
Fax: 415-268-7522
Email: wtarantino@mofo.com
Email: bpark@mofo.com
Email: RSandoval@mofo.com

Tritia M Murata
Morrison and Foerster LLP
707 Wilshire Boulevard Suite 6000
Los Angeles, CA 90017-3543
213-892-5200
Fax: 213-892-5454
Email: tmurata@mofo.com

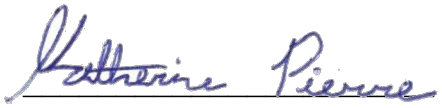
Attorneys for California Grocers Association

Christopher M Pisano
Best Best and Krieger LLP
300 South Grand Avenue 25th Floor
Los Angeles, CA 90071
213-617-8100
Fax: 213-617-7480
Email: christopher.pisano@bbklaw.com

Attorneys for City of Long Beach

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 24th Day of March, 2021, at San Francisco, California.



Katherine Pierre