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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CALIFORNIA GROCERS ASSOCIATION,

Plaintiff,

v.

CITY OF LONG BEACH,

Defendant.

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

DEFENDANT CITY OF LONG BEACH'S SUPPLEMENTAL OPPOSITION TO CALIFORNIA GROCERS ASSOCIATION'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: February 19, 2021
Time: 10:00 a.m.

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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. COVID-19 is a virulent infectious disease that has killed more than 400,000 Americans, and infected more than 2.4 million.[1] 14,641 persons have died in Los Angeles County, and over 600 of those deaths have been residents of the City.[2]

The pandemic is not just a public health emergency. It has created an economic disaster as unemployment levels have spiked all over the nation, including in the City, with millions facing potential eviction from their homes when applicable residential moratoria expire.[3] Tragically, the brunt of the economic disaster falls upon the poorest and most disadvantaged communities, which are the least equipped to deal with the pandemic.

While there has been an extraordinary economic impact on lower wage earners and small businesses, many large corporations, like large grocery stores, and higher wage earners have prospered relatively well. As widely reported, Kroger and other grocery retailers have gained "eye popping" profits,[4] while their front line workers – who necessarily face a daily danger of COVID-19 exposure – have continued to suffer economically.

Kroger and Plaintiff's other members seek to stop a local law by the City that provides a modicum of economic relief to front-line grocery workers. They have faced and to 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. Their continued economic risk is the "status quo" Plaintiff seeks to maintain.

In enacting the Ordinance, the Long Beach City Council has decided that this

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[1] *See* Dkt. 21 (Richards Decl.), Ex. A (CDC COVID Data Tracker – United States Covid-19 Cases and Deaths by State.)
[2] Dkt. 21, Ex. V; Declaration of Dr. Anissa Davis ("Davis Decl."), ¶ 6.
[3] *See* Dkt. 21; Exs. C, D, E, F, X.
[4] *See, e.g.,* Dkt. 21, Ex. F; Declaration of John Keisler ("Keisler Decl."), ¶ 4.

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1 "status quo" is harmful the grocery store workers in the City. Dkt. 18-3, Ex. A.
2 Plaintiff's members should, as a matter of decency and compassion, support this
3 Ordinance, or better yet they should have instituted temporary wage increases. As
4 the pandemic took another turn for the worse in late 2020, Plaintiff's members
5 should have "stepped up" for their workers. They did not. Now, to stop an
6 ordinance that promotes public welfare in these extraordinary times, Plaintiff
7 sought n *ex parte* temporary restraining order. As the Court recognized in denying
8 their application, Plaintiff identified no emergency, much less one causing
9 irreparable harm. Dkt. No. 22. Indeed no such irreparable harm exists.
10 Pursuant to the Court's Order, the City submits this supplemental opposition
11 to the motion for preliminary injunction, with additional evidence in support. The
12 City incorporates herein its arguments and evidence previously submitted in
13 opposition to the *ex parte* application.

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14 **II. FACTUAL BACKGROUND**

15 **A. The Initial Response to the COVID-19 Pandemic**

16 To prepare for and respond to COVID-19, the Governor proclaimed a State
17 of Emergency on March 4, 2020. On March 19, 2020, the Governor issued
18 Executive Order N-33-20. Dkt. 21; Exs. G, H. Executive Order N-33-20 directed all
19 California residents to heed the State public health directives, which the Executive
20 Order expressly incorporated in the form of the March 19, 2020 Order of the State
21 Public Health Officer. *Id.* Observing that "[t]he federal government has identified
22 16 critical infrastructure sectors," the order provides that "Californians working in
23 these 16 critical infrastructure sectors may continue their work because of the
24 importance of these sectors to Californians' health and wellbeing." *Id.*
25 The Executive Order further provides that the State Public Health Officer
26 "may designate additional sectors as critical in order to protect the health and well-
27 being of all Californians." *Id.* On March 22, 2020 (and in subsequent updates), the
28

State Public Health Officer designated a list of "Essential Critical Infrastructure Workers." Dkt. 21; Ex. I. Included in that list are "workers supporting groceries . . . and other retail that sells good or beverage products."

On March 10, 2020, the Long Beach City Council declared a civil emergency in response to COVID-19, authorizing the exercise of emergency measures to prevent death or injury and to protect the peace, safety, and welfare, and alleviate damage, hardship, or suffering. *See* Dkt. 18-3, Ex. A at 2:2–6.

On March 24, 2020, the City of Long Beach Public Health Officer issued a "Safer at Home" order (later updated) to prevent the spread of COVID-19, which also identified grocery stores as an essential business sector critical to protecting the health and well-being of all Californians and designated their workers as essential. Dkt. 21; Ex. K; *see also* Dkt. 18-3, Ex. A at 2:15–23.

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B. Escalation of the Health Crisis in California, And The Particular Challenges Faced by the City in Addressing the Crisis

While California's early efforts to combat the public health crisis were somewhat successful, at least compared to other states, in recent months the State has seen a terrible increase in hospitalizations and deaths. This trend occurred within the City. Dkt. 21,Exs. B, W; Davis Decl.,¶ 9; Ex. 1. Hospitals throughout Los Angeles County, including the Long Beach area, are stressed to their breaking point. Dkt. 21, Exs. L, M, N; Davis Decl., ¶ 6 (The ICU hospital bed capacity in the area hospitals is currently at 11%, which is dangerously low.)

Indeed, on January 22, 2021, the Ninth Circuit recognized that"[t]he State of California is facing its darkest hour in its fight against the COVID-19 pandemic, with case counts so high that intensive care unit capacity is at 0% in most of Southern California." *S. Bay United Pentecostal Church v. Newsom*, 2021 WL 222814, at *1 (9th Cir. Jan. 22, 2021); *see also id.* at *4 ("Initially, the Blueprint appeared effective; new COVID-19 infection rates fell as summer came to a close.

But in late October, case rates began to climb, then to skyrocket exponentially. . . . Recently, Southern California has been described as the epicenter of the global pandemic. . . On January 21, 2021 the State recorded a record 736 deaths in a single day, bringing the total of Californians who have died from the virus to 35,004.")

The City has faced tremendous challenges in combatting the pandemic, which have been magnified in these recent months. For example, a significant number of City residents live in poverty. They tend to live in smaller and more crowded households, and those who have jobs are typically "frontline" workers with the type of job that requires extensive person-to-person contact, and does not allow remote working, i.e. working from home. Davis Decl., ¶¶ 7-8, Ex. 1.

As of January 27, 2021, there have been 46,833 confirmed case of COVID-19 in the City, out a total population of approximately 470,000. Davis Decl., ¶ 6. There have been 634 COVID-19 deaths of City residents. Local area hospital ICU bed capacity is currently at 11 percent. The pandemic has been particularly devastating to the poorer communities, many of which consist of a high concentration of persons of color. Davis Dec., ¶¶ 7-9, Ex. 1.

For grocery store workers in the City, the numbers fare no better. Of the 1,365 unionized grocery store workers in the City, there have been 158 reported cases. This is a positivity rate of almost 11.6% percent and that is just reported positive cases. Supplemental Declaration of Matthew Bell (Supp. Bell Decl."), ¶ 4.

C. **<u>The Economic Impact of the COVID-19 Pandemic, Including its Impact on the City</u>**

The COVID-19 pandemic has caused an economic crisis. Unemployment levels have spiked, and millions of Americans face potential eviction when applicable moratoria expire. *See, e.g.*, Dkt. 21; Exs. D, E. However, the economic impact of COVID-19 has not been felt equally, and certain industries have fared well in the pandemic, including large grocery chains. As the City shows in its

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opposition to the *ex parte* application, grocery retailers like Kroger have not only survived, but have earned huge profits in pandemic. *See, e.g.* Dkt. 21; Exs. Q, R, S, T. This evidence is well established in the City's prior briefing, and is incorporated by reference herein.

Consistent with the rest of the nation, the disparate economic impact from the pandemic has occurred in the City, due, at least in part, to the nature of its economic base. The City's economy is driven in part by in-person service sectors, which were devastated by the shut-down orders that followed the declarations of emergency. The City's Convention Center, Port and Aquarium are major draws that usually bring people to the City, and help support a number of large number of jobs in the hospitality, retail and food service industries. Many are lower wage jobs, and more importantly, they are in-person and onsite service jobs, which were lost due to "stay at home" orders. In the first month of the pandemic, unemployment claims within the City increased to 60,000, out of total civilian work force of only 232,000. Today the unemployment rate for the City sits at 12.1 percent. Keisler Decl., ¶¶ 3-5.

D. <u>The Ordinance and the City's Efforts to Protect Workers</u>

At the outset of the pandemic, the City Council made it a priority to protect workers. It recognized that COVID-19 would cause great harm not only to public health, but also to workers, particularly to poorer and disadvantaged communities. Because in-person service sectors are so prevalent within the City and were so hard hit by the pandemic, the City Council made it a priority to implement policies alleviating the economic suffering of its lower wage and disadvantaged residents. In May 2020, the City Council adopted three ordinances designed to provide job protections and benefits to low income workers. City staff has regularly briefed the City Council on potential policy changes to provide greater economic relief to those most impacted by the crisis. Kiesler Decl., ¶¶ 6-7.

The City enacted the Premium Pay for Grocery Workers Ordinance (the

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1 "Ordinance"), codified in Chapter 5.91 of the Long Beach Municipal Code
2 ("LBMC"). Dkt 18-3, Ex. A. This Ordinance provides for an increase of $4 per
3 hour for essential grocery workers, and prohibits employers from circumventing
4 this increase by reducing compensation or earning capacity "*as a result of this*
5 *ordinance*." *Id.* at section 5.91.050(A); 5.91.060(A),(B), emphasis added. It does
6 not prevent an employer from taking *any* action (e.g,, termination, reduction in
7 hours) as long as it is not a response to the Ordinance . *Id.* at 5.91.060(A),(B).

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

11 > Grocery store workers are essential businesses operating in Long
12 > Beach during the COVID-19 emergency making grocery workers
> highly vulnerable to economic insecurity and health or safety risks.
13
> Grocery workers working for grocery stores are essential workers who
14 > perform services that are fundamental to the economy and health of the
> community during the COVID-19 crisis. They work in high risk
15 > conditions with inconsistent access to protective equipment and other
16 > safety measures; work in public situations with limited ability to
> engage in physical distancing; and continually expose themselves and
17 > the public to the spread of disease; . . .
18
> Grocery workers have been working under these hazardous conditions
19 > for months. They are working in these hazardous conditions now and
> will continue to face safety risks as the virus presents an ongoing
20 > threat for an uncertain period, potentially resulting in subsequent
21 > waves of infection . . .
22
> [E]stablishing an immediate requirement for grocery stores to provide
23 > premium pay to grocery workers protects public health, supports stable
> incomes, and promotes job retention by ensuring that grocery workers
24 > are compensated for the substantial risks, efforts, and expenses they
> are undertaking to provide essential services in a safe and reliable
25 > manner during the COVID-19 emergency.

26 Dkt. 18-3, Ex. A at 3:5–4:3.

27 Shortly after enacting the Ordinance, Plaintiff brought the present lawsuit,
28

and it filed an *ex parte* application for a temporary restraining order on January 21, 2021. The application was denied on January 22, 20201. Dkt. 22.

III. LEGAL ARGUMENT

A. Standard for Preliminary Injunction

Because it is an extraordinary remedy, a plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest (the *Winter* Factors). *Winter*, 555 U.S. at 21 (2008). Alternatively, injunctive relief "is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Even under this alternative test, plaintiffs must meet all four *Winter* factors. *Id*. at 1132, 1135.

In addition, where, as here, an injunction is sought against the actions of government, a higher showing is required of imminent harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also Kim v. City of Belmont*, 2018 WL 500269, at *14 (N.D. Cal. 2018) ("The Court has held that recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers ... in the absence of irreparable injury which is both great and immediate."). The Separation of Powers Doctrine, too, counsels caution in issuing injunctions intended to control a state or local public entity. *See Lewis v. Casey*, 518 U.S. 343, 349–50 (1996).

B. Plaintiff is Unlikely to Succeed on the Merits

Plaintiff's application should be denied because Plaintiff cannot and will not succeed on the merits. Plaintiff has a misplaced reliance upon a NLRA preemption theory that has been repeatedly rejected by the United States Supreme Court, the Ninth Circuit, and California courts. Plaintiff fundamentally misunderstands the

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1 relationship between federal labor law and state law employment rights. *See Am.*
2 *Hotel and Lodging Assoc. v. City of Los Angeles*, 834 F.3d 958, 963 (9th Cir. 2016).
3 Plaintiff's constitutional claims that the Ordinance is subject to "strict
4 scrutiny" are meritless. The Ordinance, like any other wage regulation, does not
5 violate the contract clause and is not subject to any form of heightened scrutiny.
6 Economic regulations have been subject to extraordinarily deferential review since
7 the end of the *Lochner* era, and federal courts no longer strike down economic
8 regulations unless they are palpably and beyond all dispute irrational, and lacking in
9 any reasoned basis. *See generally F.C.C. v. Beach Communications, Inc.*, 508 U.S.
10 307 (1993). The notion that Plaintiff's members have a fundamental right—based
11 on "freedom of contract"—to avoid minimum wages, pay premiums, and other
12 employment regulations is an unwitting invitation to return to the *Lochner* era.

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13 1. **The Police Power Includes the Power to Regulate Wages**
14 Plaintiff's challenges to the Ordinance further fail because regulation of
15 wages and the conditions of employment is *squarely* within the police power of
16 local government, and similar regulations have withstood scrutiny for decades.
17 As the Supreme Court determined more than 80 years ago, local regulation of
18 wages is not constitutionally infirm, and employers do not have a right based in the
19 employment contract to avoid such regulation. In *West Coast Hotel Co. v. Parrish*,
20 300 U.S. 379 (1937), the Court rejected a constitutional challenge to Washington
21 State's minimum wage laws, noting the broad power of government to exercise the
22 police power to protect health, safety and welfare:
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> This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; . . . in forbidding the payment of seamen's wages in advance; in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced

> in the mine; in prohibiting contracts limiting liability for injuries to employees; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen's compensation laws.
>
> In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. . . .

Id. at 392–93, 400, numerous internal citations omitted.

"The power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004). The Ordinance does *precisely* this – it regulates wages and employment conditions, and its enactment was well within the scope of the City's police power. *See also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("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.'").

The City's police powers are even greater in the context of the ongoing public health catastrophe. More than a century ago, in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the Supreme Court recognized that public health emergencies necessarily enlarge the scope of the police powers. And when there is a public health emergency, the right "to determine for all what ought to be done" is properly lodged with political decision makers rather than courts. Accordingly, in reviewing the exercise of emergency police powers, "it is no part of the function of a court" to second guess a determination as to what method is "likely to be the most effective for the protection of the public against disease." *Id.* at 30; *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020). The Ordinance was enacted in response to both a public health emergency

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and an economic emergency, and must be appropriately reviewed under *Jacobson*.

2. Plaintiff's Constitutional Challenges are Meritless

Plaintiff's contentions that the Ordinance violates the state and federal constitutions are without merit. Even in the absence of a global emergency, the Ordinance would pass constitutional muster. "When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (citing *Hodel v. Indiana*, 452 U.S. 314, 331–332 (1981); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488–489 (1955).)

a. The Ordinance Does not Violate the Contract Clause

Plaintiff alleges that its private agreements regarding working conditions with its employees trump public laws enacted to protect the safety, health and welfare of the people in Long Beach. This argument has no merit.

Both the state and federal constitutions prohibit impairment of contracts. U.S. Const., art. I, § 10; Cal. Const., art. I, § 9. However, it has long been recognized that "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). Indeed, the "governing constitutional principle" for contract clause challenges is that:

> [W]hen a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people,"... is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232, 234 (1945).

Accordingly, the contract clause "prohibition must be accommodated to the inherent police power of the State," *Energy Reserves Group, Inc. v. Kan. Power*

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and Light Co., 459 U.S. 400, 410 (1983), safeguarding the vital interests of the people, because such police powers are "paramount to any rights under contracts between individuals." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Under these principles, the first question is whether the challenged law constitutes a "substantial impairment" of contracts. *Energy Reserves*, 459 U.S. at 411. Critically, this threshold condition is not met when the challenged law is a valid exercise of the police powers. *Id.* 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 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."). Such police power regulation of working conditions is not a substantial impairment of contracts as a matter of law and is therefore not a violation of the contract clause.

Even if Plaintiff had made a showing sufficient to meet the threshold

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question, it still has not demonstrated a constitutionally cognizable impairment of contract. If there were a "substantial impairment" of Plaintiff's contracts, 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." *Energy Reserves*, 459 U.S. at 412–13; *see 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 New York 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").

The parties agree that provision of grocery services is critical to addressing the raging pandemic. *See* Compl. at ¶ 2. Preserving this function is a "significant and legitimate" public purpose. Moreover, though no emergency is required, *id.* at 412, the fact that the City is responding to an emergency, with temporary legislation, also forecloses 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, and it was temporary, tied to the duration of the emergency).

Further, even if Plaintiff had met the threshold for this claim, it also would need to show that the City's method of addressing the pandemic is unreasonable or

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inappropriate. Plaintiff cannot meet this requirement here. In reviewing a law challenged as impairing contracts, where the law is an economic or social regulation "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977) (citing *Hahn*, 326 U.S. 230). There is no legal basis for this Court to ignore the legislative findings that underpin the Ordinance clearly establishing the reasonableness and necessity of the challenged law.

b. The Ordinance does not violate Equal Protection

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,

> [s]ocial 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, 452 U.S. at 331-332 (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*, 348 U.S. at 488. 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 legislative action, *id.*, and even if no party raised that basis in its arguments. *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, and may go unsupported by data. *See Vance*, 440 U.S. at 111.

Here, the Ordinance is supported by a more than a 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 in a safe and reliable manner during the COVID-19 emergency. Dkt. 18-3, Ex. A at 3:27–4:3.

In an effort to avoid rational basis scrutiny, Plaintiff argues "strict scrutiny" applies because the Ordinance "interferes with grocers' existing contracts" with employees to pay lower wages. Mot., at 8. This argument is *meritless*. The notion that employers have a fundamental right to preserve their employment contracts against economic regulation has not been the law since the *Lochner* era.

Specifically, Plaintiff argues that the "strict scrutiny" test applies because the Ordinance violates the contract clause. Plaintiff is wrong, for the reasons explained above. Further, to the City's knowledge, no court has ever applied strict scrutiny to an ordinance or law requiring the payment of a certain wage. To the contrary, more decisions than can be cited herein have, without difficulty, concluded that economic and employment related regulations like the Ordinance involve no fundamental right or suspect class and so are analyzed under 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. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004) (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.

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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). The Court now uses rational basis review for economic regulation, however, and no longer views liberty of contract as a fundamental right."). It is telling that Plaintiff could not cite a single decision from any Circuit or District Court in the United State that applied strict (or even intermediate) scrutiny to an even arguably analogous wage-regulating ordinance.

Instead, Plaintiff misleadingly implies that both the Supreme Court and the California Supreme Court have applied strict scrutiny to analogous wage legislation. Plaintiff is wrong. *Neither* decision indicated that "strict scrutiny" applies to contract clause challenges. *See Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 250 (1978) (invalidating a law that retroactively mandated higher level of pension funding on a contract clause basis, but not applying strict scrutiny, and invalidating the law because it applied only to businesses closing their offices in the state, did not even purport to be remedying a broad social problem, and "did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken"); *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal.3d 296, 314 (1979) (invaliding state law under contract clause, but not applying strict scrutiny).

Numerous courts have *squarely* stated that a legislative act that arguably burdens a contractual relationship is *not* subject to strict scrutiny. Rather, such enactments are subject to the familiar contract clause analysis described above. *See, e.g., Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1270 (7th Cir. 1983) ("The gist of appellants' argument is that the Court's opinion in *Allied Structural Steel v. Spannaus* (citation) indicated that impairments of private contracts were to face as

strict scrutiny as state impairments of their own contracts faced under the Court's opinion in *United States Trust*. Appellants thus argue that we must apply a stricter scrutiny to the MPPAA than this court utilized in *Nachman*. We find no merit whatever in appellants' argument.") *Baptiste v. Kennealy*, 2020 WL 5751572, at *4 (D. Mass., Sept. 25, 2020) ("Plaintiffs generally argue that their claims require strict scrutiny of the Moratorium and that it fails that test because there were in April 2020 ways less burdensome for landlords to serve the admittedly significant state interest in combatting the pandemic. . . . As explained in this Memorandum, distinct tests apply to each of plaintiffs' claims. None are subject to strict scrutiny. Plaintiffs' claims concerning the Article I Contracts Clause . . . are subject to rational basis review."); *Heights Apartments, LLC v. Walz*, 2020 WL 7828818, at *12 (D. Minn., Dec. 31, 2020) ("But the EOs need not be drawn with surgical precision to avoid constitutional infirmity. Contracts Clause analysis is not, after all, strict scrutiny. . . The EOs need not be narrowly tailored to prevent the spread of COVID-19, nor do they even need to be 'necessary.' . . . As such, the Landlords' Contracts Clause claim fails as a matter of law."). Indeed, if Plaintiff was correct, then no minimum-wage, overtime, or other employment protection could be operative, at least as applied to workers who were employed prior to the law's enactment. Obviously, that is not the law.

Finally, 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

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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 the Ninth Circuit's decision in *RUI One*, it is clear that there is a rational basis for the Ordinance at issue here.

3. The NLRA Does not Preempt the Ordinance

The Supreme Court and the Ninth Circuit repeatedly have held that substantive state labor standards are not preempted by the National Labor Relations Act ("NLRA"). *See*, *e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22 (1987); *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996). The Ordinance is a substantive labor standard benefitting union and non-union grocery workers as individuals, and does not conflict in any way with the NLRA, which regulates the *process* of collective bargaining. For that reason, courts in the Central District have

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1 rejected similar challenges to the City of Los Angeles' living wage ordinances. *See*
2 *Am. Hotel & Lodging Ass'n v. City of Los Angeles* 119 F.Supp.3d 1177, 1179 (C.D.
3 Cal. 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016); *Fortuna Enters., L.P. v. City of Los*
4 *Angeles*, 673 F.Supp.2d 1000 (C.D. Cal. 2008).

5 The NLRA, 29 U.S.C. §§ 157-158 is "concerned primarily with establishing
6 an equitable *process* for determining terms and conditions of employment." *Metro.*
7 *Life Ins. Co. v. Mass.*, 471 U.S. 724, 753 (1985) (emphasis added). Pursuant to this
8 principle, the Supreme Court has established two doctrines of preemption by
9 federal labor law: *Garmon* and *Machinists*. Plaintiff's moving papers exclusively
10 focus on the *Machinists* doctrine which prohibits states from "imposing additional
11 restrictions on economic weapons of self-help." *Fort Halifax Packing*, 482 U.S. at
12 19, citing *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986).

13 In *Fort Halifax Packing*, 482 U.S. at 21, one of the seminal cases on
14 *Machinists* preemption, the Supreme Court held that a Maine statute requiring
15 employers, in the event of plant closing, to provide a one-time severance pay absent
16 a collective bargaining agreement on the subject was not preempted by the NLRA.
17 The company argued that the Maine law violated the *Machinists* strand of the
18 NLRA because it intruded upon the bargaining activities of the parties, i.e., it
19 undercut its ability to withstand a union's demand for severance pay. *Id*. at 20;
20 (*compare with* Westmoreland Decl. Dkt. 18-2 at ¶ 8.) The Supreme Court rejected
21 this argument and found that Maine's severance payment law was a valid and
22 unexceptional exercise of its police power. *Id*. at 22. The Court reasoned that such a
23 substantive labor standard provides protections to individual union and nonunion
24 workers alike, and thus neither encourages nor discourages the collective-
25 bargaining processes that are the subject of the NLRA. *Id*. at 21-22.

26 The Court in *Fort Halifax Packing* further reasoned that pre-emption should
27 not be lightly inferred in this area, since the establishment of labor standards falls
28

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within the traditional police power of the state. *Id*. at 21. The mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for "there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues...that may be the subject of collective bargaining." *Id*. at 21-22.

In *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995), the Ninth Circuit held that a California law that imposed double rate overtime pay for all broadcasting employees, unless the employees are covered by a collective bargaining agreement providing specified minimum overtime benefits, was not preempted by the *Machinists* doctrine of the NLRA. The Ninth Circuit, in applying "well-settled Supreme Court authority," ruled that the state law did not interfere with the collective bargaining process because "such state minimum benefit protections have repeatedly survived *Machinists* preemption challenges." *Id*. at 70, 71, citing *Metropolitan Life*, 471 U.S. at 754-55.

A year later, in *Viceroy Gold Corp*, 75 F.3d 482, the Ninth Circuit again held that a California labor standard was not preempted by the *Machinists* doctrine of the NLRA. California Labor Code section 750 prohibited mine workers from working more than eight hours a day. *Id*. at 485. Section 750 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 485-486. A gold processing company argued that as a result of the statutory prohibition, its mine facility was at a competitive 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 under the *Machinists* doctrine. *Id*. at 489-490.

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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.*

Most 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 963–965 (Internal citations omitted).

The declarations submitted by Plaintiff are in many respects identical to the evidence of preemption rejected by the Ninth Circuit. Plaintiff's argument that the Ordinance means that Food 4 Less "no longer has the ability to reject UFCW's premium pay proposal" is nonsensical, and does not establish preemption. *See* Westmoreland Decl. ¶ 8. According to Westmoreland, UFCW seeks a "retroactive premium of $2 per hours for all hours worked going back to May 28, 2020 and that Food 4 Less continue to pay this premium for all associates who continue to work during the pandemic." The Ordinance does not dictate the result of this negotiation any more than a minimum wage law "dictates" the result of collective bargaining

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over wages. Both unions *and* unionized employers negotiate against a "backdrop" of state employment laws. *Halifax* at 21. Unions must bargain against the backdrop of the at-will employment presumption under state law and must negotiate just-cause protections for their members to protect job security. Employers bargain against the backdrop of various minimum-wage and premium pay requirements. The Ordinance, like all labor laws and minimum wage standards, may *inform* negotiations, but it does not dictate a result and is not preempted.

Plaintiff argues that the Ordinance provides an "economic weapon" to the union, but the Supreme Court and lower courts have repeatedly rejected this characterization. *See National Broadcasting Co.*, 70 F.3d at 72; *Fort Halifax Packing*, 482 U.S. at 21. It is irrelevant to the NLRA preemption analysis that impacted grocers may be subject to indirect pressure or be "burdened" by the Ordinance because the law gives workers something that they might have to bargain for. *See National Broadcasting Co*., 70 F.3d at 72 (reasoning that "This is true [that an employer may have a weaker bargaining position as a result of a state law mandating overtime pay], but without consequence in federal law labor.") In passing a substantive labor standard, which constitutes a valid exercise of its police power, the City does not interject itself into the collective bargaining process in a way that is incompatible with the general goals of the NLRA. Like the state laws at issue in *Fort Halifax*, *National Broadcasting Co*., *Viceroy Gold*, and *American Hotel and Lodging Association*, the Ordinance is not preempted by the NLRA.

a. ***Bragdon* is Inapplicable and Largely abrogated**

Even though it has been abrogated and is factually off-point, Plaintiff relies heavily on *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) to support their preemption argument. 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. The Ninth Circuit subsequently recognized, however, that *Bragdon*'s holding only applied 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, 991, fn. 8 (9th Cir. 2004) ("*Bragdon* must be interpreted in the context of Supreme Court authority and our other, more recent, rulings on NLRA preemption.") The premium pay required by the Ordinance here is not tied in any way to any collective bargaining agreement.

Plaintiff's attempt to use *Bragdon* to invalidate the Ordinance is similar to the many previous failed efforts to do so in California and federal courts. *See, e.g., Southern California Edison Co. v. Public Utilities Com.* 140 Cal.App.4th 1085, 1103–1104 (2006) ("In our view, the conclusion by the Ninth Circuit in *Bragdon* . . . is inconsistent with the rule articulated by the Supreme Court . . . We therefore decline to follow *Bragdon*."); *California Grocers Assn. v. City of Los Angeles*, 52 Cal.4th 177, 200 (2011) ("The Ninth Circuit Court of Appeals has effectively repudiated *Bragdon*."); *Fortuna Enterprises, L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1011 (C.D. Cal. 2008) ("The Court finds that this is not such an "extreme situation," where the terms of the Ordinance virtually dictate the results of the collective bargaining process."); *Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 1011 n.62 (C.D. Cal. 2013). *Bragdon* stands for the limited principle that an ordinance dictating private employers' wage rates by tying them directly to collectively bargained rates is preempted. It has no application here.

C. <u>The Remaining Factors Weigh Heavily Against an Injunction</u>

To obtain a preliminary injunction, Plaintiff must show that it will suffer irreparable harm, that balance of equities tips in its favor, and that a preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("Where the government

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is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge."). Plaintiff does not do so.

1. Plaintiff Cannot and Does not Show Irreparable Injury

Plaintiff bears a heavy burden to show that "irreparable injury is likely in the absence of an injunction." *Winters*, 555 U.S. at 21–22. To establish a likelihood of irreparable harm, conclusory or speculative allegations are not enough. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir.1985) (finding irreparable harm not established by statements that "are conclusory and without sufficient support in facts")

Plaintiff has not shown that it will suffer *irreparable* harm. First, *it* has not and will not suffer any harm at all, instead alleging only that some of its members would have to spend money or would suffer vaguely defined "reputational harm."

Further, the majority of the harms that Plaintiff points to are *purely* economic, and not the type of *irreparable* harm that can justify injunctive relief. (*Compare L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("monetary injury is not normally considered irreparable" in the context of a preliminary injunction.") *and Sampson v. Murray*, 415 U.S. 61, 90, (1974) (The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough") *with* Westmoreland Decl., Dkt. 18-2 at ¶9 ("The Ordinance would significantly increase Food 4 Less's labor costs . . . The Ordinance would also immediately lead to increased administrative costs for Food 4 Less."))

Further, Plaintiff's own declarations demonstrate that the "non-economic" hardship they rely on in requesting a preliminary injunction—effects on their

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1 "reputation" —are either completely speculative or based only on conclusory
2 statements. Ronald Fong (an executive with Plaintiff, who does not own or operate
3 a grocery store), conjectures that mandating "hazard pay" – a term not used by the
4 Ordinance – would "suggest that our Member's stores are unsafe" and would
5 "damage our Member's goodwill and cause reputational harm." Dkt. 18-1, ¶ 16.
6 This statement is based on nothing beyond speculation – no documentary evidence,
7 expert analysis, reasoned argument, or even the experience of an actual owner or
8 operator of a grocery store. It is insufficient to show irreparably injury. *See* Dkt. 22
9 at p. 2 ("Plaintiff also offers only conclusory assertions that failure to enjoin the
10 Ordinance would result in reputational harm and damage to its members' goodwill
11 by branding those stores as hazardous workplaces.")

12 Moreover, and as determined by the City Council in an exercise of legislative
13 discretion, grocery workers are in *fact* at a higher risk of contraction of COVID-19
14 by the simple and undeniable fact that their work requires them to interface directly
15 with the general public. *See also* Supp. Bell Decl., ¶ 4; Dkt. 21; Ex. U (Association
16 between SARS-CoV-2 infection, exposure risk and mental health among a cohort
17 of essential retail workers in the USA doi:10.1136, Journal of Occupational and
18 Occupational Medicinal) ("In conclusion, in this cohort of grocery retail essential
19 workers, 20% had a positive SARS-CoV-2 RT-PCR assay result . . . Employees [of
20 grocery stores] with direct customer exposure were five times more likely to have a
21 positive SARS-CoV-2 assay result.") This is in contrast to other workers, such as
22 attorneys, business executives, and other white-collar workers who have the
23 privilege of employment that enables them to work remotely. There is no
24 "reputational harm" in recognizing the *fact* that grocery store workers face danger
25 in ensuring access to food and other essentials. *See* Dkt. 20-1 at ¶ 3.

26 Mr. Fong argues that it is "unreasonable" to comply with the ordinance, and
27 suggest that Plaintiff's members may face "extreme penalties" if they cannot
28

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comply. Dkt. 18-1 at ¶ 17. First, Mr. Fong tellingly does not allege that its members *cannot* increase pay by $4 per hour, only that it would be difficult. Mr. Fong could not so declare, because he is not an employee, manager, or executive with any grocery. Further, it strains credulity to suggest that sophisticated commercial entities lack the ability to implement a simple and specific pay increase.

This argument is further undercut by the fact that Plaintiff's members in fact used to pay COVID-19 related bonus pay, and at least one still does. Dkt. 9 at ¶¶ 3 ("Grocer have provided 'appreciation pay,' 'hero bonuses,' and 'thank you pay' to reward their associates."); 16 ("GCA Member Stater Brothers has one location in Long Beach, and agreed in December to pay $2 per hour as a hazard pay premium to certain employees.") Kroger, where Mr. Westmoreland is an executive, provided hazard pay for a short period of time, from approximately April 1, 2020 to mid-May, 2020. Dkt. 21; Ex. Q at section. 4 and Figure 7; *see also* Dkt. 20-1at ¶ 4. It is unreasonable to suggest that it cannot do so again.

Finally, Mr. Fong's dire suggestion of "extreme penalties" is not based in fact. The Ordinance provides for no such "extreme penalties," but rather primarily provides an employee whose earned wages have been illegally withheld a private right of action, in which they can recover *up to* a penalty of twice the premium pay withheld. (Ordinance at § 5.91.120.) This speculation is a far cry from the type of evidence needed to obtain an injunction.

2. The Balance of Equities Weigh in the City's Favor

When an injunction is sought against the government, the balance of equities and public interest in part merge. *Drakes Bay Oyster Co.,* 747 F.3d at 1092. The public interest and equities are undeniably served by allowing an ordinance enacted to protect the health safety and welfare and ensure fair payment to essential workers to go into effect.

IV. <u>CONCLUSION</u>

The preliminary injunction should be denied.

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