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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

**PLAINTIFF CALIFORNIA GROCERS ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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

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## INTRODUCTION

Nothing in the City's opposition changes the facts before the Court. The City has enacted a first-of-its-kind ordinance that mandates a wage increase for only the union-eligible employees of specific types of grocery retailers. It is not a minimum wage law, nor is it a minimum labor standard of any kind. It does not provide any additional compensation for employees of mass market grocery retailers, which make up a significant portion of the Long Beach grocery market, or any other essential employees. And there is no basis to provide wage increases only to employees who are union eligible. Despite the City's attempt to cast the Ordinance as a public health measure, the Ordinance does not advance public health or safety. If anything, it runs counter to each of the goals articulated by the Council: the Ordinance is more likely to impede grocers' efforts to develop a safe shopping environment. It is likely to lead to an increase in grocery prices, and it will reduce the number of jobs and grocery stores in Long Beach at a time when the City's unemployment is at a historic high.

Contrary to the City's claims, CGA's members have stepped up to protect the health and safety of their employees, and many have instituted various forms of hero and hazard pay throughout the past year in the forms of monthly bonuses, grocery discounts, hourly wage supplements, and more. But CGA's members stores operate on very thin margins (1-2%, on average, in ordinary years), especially with increasing costs for sanitation and health protections and a parallel increased demand for distanced services. The Ordinance's 20-30% increase in labor costs – paired with a prohibition on any reduction of hours or "earning capacity" for any employee – is significant. It will render stores in Long Beach unprofitable and unable to sustain ongoing operations. Since the Ordinance came into effect, one Food 4 Less store and one Ralph's store in Long Beach have given required notices of permanent closure, citing increased labor costs as a result of the

Ordinance. Other stores that were previously profitable are now facing losses because of the Ordinance. Four days after this court's order denying temporary relief, UFCW representatives solicited non-union employees in two separate Long Beach grocers to urge workers to verify their paychecks were correct, suggesting the threat of employee claims against grocers is real.

Legally, the Ordinance cannot stand. Courts applying NLRA preemption principles have held that the issues addressed by the Ordinance should be free from local government interference and reserved to the "free play" of economic forces. CGA's equal protection challenge also has a substantial probability of prevailing. The City has been unable to articulate any reasonable connection to the stated government purpose. The Council's decision to legislate in favor of this specific class of employers (businesses with 300 employees and stores that sell 70% grocery items), while excluding similarly situated large retailers and other essential employees, who are at indisputably higher risk, cannot withstand scrutiny. The Ordinance will result in adverse community impacts in the form of increased prices and decreased grocery options. The balance of the hardships and the public interest weigh strongly in favor of a preliminary injunction.

## ARGUMENT

### I. LEGAL STANDARD

The Ninth Circuit has effectively two sets of criteria for evaluating a request for a preliminary injunction. *Earth Island Inst. v. U. S. Forest Serv Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the "traditional" criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable

injury, or that "serious questions are raised" and the balance of hardships tips sharply in plaintiff's favor. *Id*.

CGA has met its burden under either set of criteria.

## II. CGA IS LIKELY TO PREVAIL ON ITS PREEMPTION CLAIM

As CGA explained in its memorandum in support of a TRO, the ordinance is preempted as an impermissible attempt to dictate the outcome of labor negotiations. The City's opposition rests on its presumption that any "substantive labor standard" is immune from preemption. Opposition 24. Yet that view is mistaken. While minimum labor standards that provide a mere backdrop for collective bargaining are consistent with the NLRA, state and local laws that effectively dictate the outcome of the collective bargaining process are preempted. The Ordinance here imposes unusually strict terms on a narrow band of businesses without any allowance for further bargaining. By design, it is limited to employees that would be within UFCW's bargaining unit.[1] It is exactly this type of local labor measures that the NLRA prohibits.

In *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Supreme Court recognized that the NLRA requires certain conduct to remain "unregulated because [it must be] left to be controlled by the free play of economic forces." *Id*. at 140. The Court held that state and local laws are therefore preempted where they "attempt[] to influence the substantive terms of collective-bargaining agreements." *Id*. at 153. *Machinists* thus stands for the proposition that a "State's attempt to influence the substantive terms of collective-bargaining agreements [is] inconsistent with the federal regulatory scheme" of the NLRA.

[1] There is no legitimate public health reason to deny premium pay to a "confidential employee," as the Ordinance does. A confidential employee is one who access to confidential information concerning labor-related information, and is thus excluded from a collective bargaining unit. *NLRB v. Hendricks County Rural Elec. Mbrshp. Corp*., 454 U.S. 170, 189 (1981). This exclusion makes it clear that premium pay in Long Beach is for union-eligible employees only.

*Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 500 (9th Cir. 1995). Of course, not all state and local laws that affect the substance of collective bargaining agreements fall in that category. Courts have upheld generally applicable laws, including minimum wage ordinances, that "merely provide the 'backdrop' for negotiations." *Am. Hotel & Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 963 (9th Cir. 2016).*

But no court has held that *all* "substantive state labor standards" are categorically immune from preemption challenge. *Contra* Opposition 24. To the contrary, the NLRA preempts narrowly targeted substantive laws that "affect[] the bargaining process in a[n] … invasive and detailed fashion." *Bragdon*, 64 F.3d at 502. That is because "substantive requirements could be so restrictive as to virtually dictate the results of the [collective bargaining and self-organizing process]." *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 119 F. Supp. 3d 1177, 1187 (C.D. Cal. 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016) (alterations in original) (internal citation omitted). Such requirements are preempted. *Id.*

The Ninth Circuit's decision in *Bragdon* illustrates this principle. There, a prevailing wage ordinance was narrowly targeted at particular workers in a particular industry: "certain types of private industrial construction projects" in Contra Costa County "costing over $500,000." 64 F.3d at 498. Unlike a general, across-the-board minimum wage, the ordinance prescribed a rate "derived from the combined collective bargaining of third parties in a particular locality." *Id*. at 502. And the ordinance's strict terms were particularly intrusive because they "affect[ed] not only the total of the wages and benefits to be paid, but also the division of the total package that is paid in hourly wages directly to the worker and the amount paid by the employer in health, pension, and welfare benefits for the worker," thus "plac[ing] considerable pressure on the contractor and its employees to revise the labor agreement." *Id*. Those features distinguished the ordinance from "the isolated statutory provisions of general application approved in" other NLRA

preemption cases. *Id*. at 502-503 (internal citation omitted). Because the ordinance "virtually dictate[d] the results of" collective bargaining, the Court held it preempted. *Id*. at 501.

The City's Ordinance suffers from these very same defects. It is extremely narrowly targeted, applying only to stores "that devote[] seventy percent (70%) or more of [their] business to retailing a general range of food products," and "employ[] over three hundred (300) grocery workers nationally and employ[] more than fifteen (15) employees per grocery store in the City of Long Beach." Ordinance §§ 5.91.020; 5.91.040. Those precise criteria fit only 29 stores operated by 14 chains, and cover mostly workplaces with members of a single union: UFCW 324.[2] The Ordinance's terms are intrusive on collective bargaining as well – they effectively prevent it. The Ordinance mandates a $4 per hour premium, regardless of whether employees make $15/hour as a clerk or $65/hour as a pharmacist, requiring a 27% raise on the low range of the compensation spectrum. Ordinance § 5.91.050. That mandated premium cannot be used as a bargaining chip to exchange for any other type of benefit—the ordinance categorically prohibits targeted employers from "[r]educ[ing] a grocery worker's compensation" or "[l]imit[ing] a grocery worker's earning capacity" in any way "as a result of this Ordinance going into effect." Ordinance § 5.91.060. These restrictions "virtually dictate the results of the contract" between stores and UFCW 324, which is in the process of negotiating premium pay for hours worked during the pandemic. *Bragdon*, 64 F.3d at 501. By enacting this Ordinance, the City has ended any negotiation by rewriting the contract. (*See* ECF No. 18-2, Westmoreland Decl.) The Ordinance is thus preempted.

In opposition, the City points to supposedly "similar challenges to the City of

[2] Notably absent are mass-market retailers that sell a substantial portion of Long Beach's groceries, but do not employ workers in UFCW 324.

Los Angeles' living wage ordinances" that courts have rejected. Opposition 23-24. But all of these ordinances had key differences from the one here. At issue in *Am. Hotel & Lodging Ass'n* were a series of hotel wage laws, including a preliminary wage ordinance that established a "minimum wage of a total cash minimum wage of $12.28 per hour as of 2014," and an expanded $15.37 minimum wage for hotels with 150 or more rooms. 834 F.3d at 961. Both minimum wage ordinances included opt-out provisions for hotels covered by collective bargaining agreements and hardship waivers for employers to avoid layoffs or closures. *Id*. at 961-62. Because the ordinances were not "so restrictive as to virtually dictate the results of the contract" and merely provided a "backdrop" for the parties' negotiations, the Ninth Circuit held they were not preempted. *Id*. at 964-65 & n.5.

The Ordinance here is very different. It imposes far more severe restrictions on a much more narrow range of businesses. It was effective immediately. It has no hardship waiver, and it provides no way for parties to bargain around its terms. Indeed, the Ordinance has already forced two stores to close, will render at least three substantially unprofitable, and has dictated a key term of three stores' pending collective bargaining agreement. (Smith Decl. ¶ 5; ECF No. 18-2, Westmoreland Decl. ¶¶ 2-4, 8; Franklin Decl. ¶¶ 4-8.) More fundamentally, unlike the minimum wage ordinances at issue in *Am. Hotel & Lodging Ass'n*, the Ordinance is not a "minimum labor standard" at all. Rather than provide a floor from which employers and workers bargain, it mandates a surcharge on top of whatever wage the parties have negotiated, outlawing any compromise wage or alternative benefits. In fact, the Ordinance prohibits *any* reductions in compensation or earning capacity that could accommodate bargaining. Such a law can hardly provide a "backdrop for negotiations" because it prohibits any negotiations on the subject at all. *Am. Hotel & Lodging Ass'n*, 834 F.3d at 963. Whatever similarity Long Beach sees between "[t]he declarations submitted by Plaintiff" and "evidence of preemption rejected by the Ninth Circuit" in other cases is thus beside the point. Opposition 27. The law

itself is fundamentally different from those considered in *Am. Hotel & Lodging Ass'n*.

The other cases the City cites are likewise inapposite. See Opposition 24-25. In *Fort Halifax Packing Co. v. Coyne*, the Supreme Court rejected a NLRA preemption challenge to a Maine severance payment scheme because "it establishe[d] a minimum labor standard that does not intrude upon the collective-bargaining process." 482 U.S. 1, 7 (1987). The severance law was unlike the premium pay ordinance here in myriad ways, chief among them that it was far less harsh—requiring only a week's pay rather than an ongoing commitment—and was entirely "optional, since it applie[d] only in the absence of an agreement between employer and employees." *Id*. at 22.

Likewise, in *National Broadcasting Co. v. Bradshaw*, the challenged law covered only "hours worked over twelve hours in a day" in the broadcasting industry, 70 F.3d 69, 69 (9th Cir. 1995), as opposed to "each hour worked" in a narrow subset of stores. Ordinance § 5.91.050. And the law in *National Broadcasting* allowed for bargaining, providing an express carve-out for workplaces "covered by the terms of a collective bargaining agreement providing specified minimum overtime benefits." 70 F.3d at 69. Once again, the Ordinance's terms here are simultaneously far more severe than those at issue in *National Broadcasting* and expressly beyond the reach of collective bargaining.

*Viceroy Gold Corp. v. Aubry* follows the same pattern. 75 F.3d 482 (1996). The challenged law there applied broadly to all mines, underground sites, smelters, and ore refining plants in California, and merely restricted hours worked to 8 in every 24. *Id*. at 485. Like the laws in *Am. Hotel & Lodging Ass'n*, *Fort Halifax Packing*, and *National Broadcasting*, the law in *Viceroy* contained an exception to facilitate collective bargaining. *Id*. 486. It bears little resemblance to the Ordinance here.

Unable to identify an analogous case compelling the conclusion it wants, the

City resorts to attacking the most analogous case—the Ninth Circuit's decision in *Bragdon*. Opposition 28-29. But the City points to no decision undermining that binding precedent. The Ninth Circuit's passing remark that "*Bragdon* must be interpreted in the context of Supreme Court authority and our other, more recent, rulings on NLRA preemption" is nothing more than a truism. Opposition 29 (quoting *Associated Builders & Contrs. of S. Cal. v. Nunn*, 356 F.3d 979, 990, 991, fn. 8 (9th Cir. 2004)). *Every* decision should be interpreted in light of recent binding authority. Contrary to the City's suggestion, *Nunn* could have not somehow overturned *Bradgon*, as the three-judge panel in *Nunn* was bound by the prior panel decision in *Bragdon*. *See Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). While California appellate courts are not so bound, they likewise lack any authority to disturb a Ninth Circuit decision applying federal law, which governs here. *Contra* Opposition 28.

The City's attempt to limit *Bragdon* to the precise facts of that case also fails. The very cases the City claims "largely abrogate" *Bragdon* restate its central legal holding, recognizing preemption where "the terms of [an] Ordinance virtually dictate the results of the collective bargaining process." *Id*. at 29. (quoting *Fortuna Enterprises, L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1011 (C.D. Cal. 2008)). Indeed, as courts outside the Ninth Circuit have recognized, *Bragdon* flows from the common sense proposition that "[t]he more stringent a state labor substantive standard, the more likely it is that the state law interferes with the bargaining process." *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1136 (7th Cir. 2008). The City's Ordinance does precisely that. CGA is likely to prevail on its claim that the Ordinance is preempted.

## III. CGA IS LIKELY TO PREVAIL ON THE CLAIM THAT THE ORDINANCE VIOLATES EQUAL PROTECTION

CGA is also likely to demonstrate the Ordinance is unconstitutional. The City's opposition devotes most of its attention to the contention that the Ordinance

need only satisfy rational basis review. For the reasons detailed below, the City is wrong. But even if the City were right, its opposition reveals a still more fundamental flaw: the lack of any rationale that might support the Ordinance. While the City repeats the health and economic purposes asserted in the Ordinance itself, the City's opposition does not (and could not) make any effort to explain how the Ordinance advances those goals. The Ordinance thus cannot survive any level of constitutional scrutiny.

**A. The Ordinance is subject to strict scrutiny**

As CGA has explained (see TRO at 8-10), the City's Ordinance is subject to heightened scrutiny under both the federal and California Equal Protection Clauses because it "impinge[s] on fundamental rights." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010); *see Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal. 3d 937, 948 (1986) (adopting parallel approach for California constitution). The "fundamental right" at issue here is straightforward: it is the right, secured by the Contract Clauses of both the federal and California constitutions, to be free of legislative impairment of existing contractual agreements. (See U.S. Const. art. I, § 10; Cal. Const. art. I, § 9.) The City's Ordinance alters the terms of the contracts CGA's members have with the union representing their workers. Whereas those contracts set specific hourly wages that CGA's members will pay and enables them to alter their employees' hours, the Ordinance compels CGA's members to increase the hourly wages paid and precludes them from reducing hours in response. (Compare ECF No. 18-1, Fong Decl. ¶ 14 and Franklin Decl. ¶ 8 with Ordinance). The City did not impose such contractual impairments on an even-handed basis. Instead, it singled out a specified subclass of employers of frontline workers—not even just grocers, but only those grocers who derive a sufficient percentage of their revenue from selling groceries. (Ordinance §§ 5.91.020; ECF No. 18-1, Fong Decl. ¶ 9.) Because the ordinance interferes with only the contracts of these apparently disfavored grocers and thereby

burdens their fundamental rights, it must satisfy heightened scrutiny. *Plyler v. Doe* 457 U.S. 202, 216 (1982); *Long Beach City Employees Ass'n*, 41 Cal. 3d at 948.

In its opposition, the City does not dispute the basic framework for adjudicating an Equal Protection challenge such as CGA's here. In particular, it acknowledges that economic legislation that "impinges on fundamental rights" must receive heightened scrutiny. Opposition 17 (internal quotation marks omitted). Nor, even, does the City appear to deny that the rights secured by the federal and California Contract Clauses are "fundamental" within the meaning of the state and federal equal protection principles. Tellingly, the City does not directly address the California constitution—and its broader equal protection doctrine—at all. *See Serrano v. Priest*, 18 Cal. 3d 728, 764, 766 (1976) (holding that California's equal protection provisions require special protections for "fundamental interests" not recognized under federal law).

Instead, the City offers a number of misguided arguments in the hopes of nevertheless securing deference for the City's decision to unilaterally alter the contracts of certain specified grocers. The City's contentions betray its confusion about the constitutional requirements to which it must adhere.

*First*, the City broadly contends that the "regulation of wages" is "within [its] police power." Opposition 16. While that is true enough, it is also beside the point. The City may well have the general authority to regulate wages, but that does not mean that it can wield that authority in an arbitrary manner that burdens fundamental rights. The City could not, for example, mandate a higher minimum wage for men than women, or for only those who belong to a certain church. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (striking down works' compensation law that differentiated by gender); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) ("[T]he Contract Clause . . . must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police

power.") (emphasis omitted). Likewise, the City cannot materially alter the existing contracts of an arbitrary subset of employers who sell groceries—or at least, not without demonstrating some compelling justification to which the ordinance is narrowly tailored. *Plyler*, 457 U.S. at 216.

*Second*, the City wrongly accuses CGA of invoking a fundamental right to "freedom of contract" and seeking a "return to the *Lochner* era." Opposition 15, 16. CGA does nothing of the sort. CGA does not claim that it has some nebulous substantive due process right to make any and all contracts it sees fit. *See Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that law prohibiting bakers from working more than 60 hours a week conflicted with a baker's "general right to make a contract in relation to his business"). Rather, CGA contends that it has fundamental right, protected by the state and federal Contract Clauses, not to have the City alter the terms of its *existing* contracts. Long after the close of the *Lochner* era, the Supreme Court has continued to recognize that state interference with existing contracts implicate very different concerns than state regulation of the purported freedom to make contracts. *E.g.*, *Spanaus*, 438 U.S. at 245 ("Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.") Even the central authority on which the City relies—*RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004)—makes the very same point, observing that after the "heyday of economic due process," courts now generally "subject[] only state statutes that impair a specific (explicit or implicit) contractual provision to constitutional scrutiny." *Id.* at 1151. That is exactly what the City's Ordinance does here: the relevant contracts contain express terms governing wages and hours, terms the Ordinance has rewritten. (ECF No. 18-1, Fong Decl. ¶ 14; see also ECF No. 18-2, Westmoreland Decl. ¶¶ 3-4, 8)

*Third*, the City devotes a substantial portion of its opposition to arguing that the Ordinance does not "violate" the state or federal Contract Clauses. Opposition 16-19. But as CGA explained previously—and the City never addresses—the

Ordinance need not *violate* the Contract Clause to trigger heightened scrutiny under the Equal Protection Clause. TRO 10 n.1. There would be no reason to apply heightened scrutiny in assessing the constitutionality of regulations already held to be unconstitutional. Rather, the critical question for Equal Protection purposes is whether the ordinance "implicates" or "impinges" on some other protected "fundamental" right or interest by causing the sort of harm that would require the government to justify the burden it has imposed. *Angelotti Chiropractic, Inc.v. Baker*, 791 F. 3d 1075, 1085 (9th Cir. 2015); *Long Beach City Employees Ass'n*, 41 Cal.3d at 948. For the fundamental rights protected by the state and federal Contract Clauses, the question is thus whether the Ordinance has "operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983) (quotation marks omitted).[3]

Here, the answer to that question is yes: the City has unilaterally modified contractual terms governing the wages and hours of the targeted grocers' employees, matters that lie at "the very heart" of their bargained-for agreements. *Sonoma Cty. Org. of Pub. Employees v. Cty. of Sonoma*, 23 Cal.3d 296, 308-09 (1979); *see Spannaus*, 438 U.S. at 242 (similar). Indeed, the City does not directly contest the centrality of such contractual terms or the significance of its alteration of those terms. Instead, it contends that a law cannot constitute a "substantial impairment of contracts" when the law is an "exercise of the police powers." Opposition 18. But the Supreme Court has flatly rejected that circular proposition, holding that the police power "has limits when its exercise effects substantial modifications of private contracts." *Spannaus*, 438 U.S. at 244.

[3] Because the City cannot justify its ordinance with any legitimate purpose (*see infra* pp. 15 - 17), it also violates the Contract Clauses. But CGA need not first show that the Ordinance serves no purpose in order to require the City to provide a justification that would satisfy heightened scrutiny.

Equally unavailing is the City's contention that CGA's members are operating in a "heavily regulated industry." Opposition 17. CGA's grocers are not operating under the same sort of government-imposed price controls as were natural gas utilities in the 1970s. *Energy Reserves Group*, 459 U.S. at 411. If grocery stores are a "heavily regulated industry," that term no longer has any meaning. While CGA's members (like any other business) are subject to minimum wage laws and other similar requirements, that does not mean the City could make any and all alterations to their existing contracts without substantially impairing them. *See Sonoma Cty. Org. of Pub. Employees*, 23 Cal.3d at 308; *cf. General Offshore Corp. v. Farrelly*, 743 F. Supp. 1177, 1198 (D.V.I. 1990) (holding that Virgin Island's modification of law governing termination of employees did not "significantly impair" employment contracts because "employer's ability to discharge an employee is not severely limited by the statute," and the law did not go significantly beyond preexisting limits on employee discharge).

*Fourth*, the City claims that courts have "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." Opposition 21. Yet the City cites no decision involving a regulation remotely like the Ordinance here—which not only alters the terms of certain employers' existing contracts, but does so without altering the contracts of other, similarly situated employers.

*RUI One Corp.*—the principal decision on which the City relies—is perhaps the most factually similar case. It demonstrates where the City's contentions go astray. There, Berkeley had passed a minimum-wage ordinance that affected a restaurant with whom the city had a lease. 371 F.3d at 1145-46. The restaurant sued, invoking both the Contracts Clause and the Equal Protection Clause and claiming that the ordinance impaired its lease agreement. *Id.* at 1146. A divided Ninth Circuit panel rejected these contentions, with the key point of disagreement

being whether the ordinance in fact impaired the cited lease. The majority concluded that the ordinance did not impair the lease agreement, explaining that "no specific provision of the lease agreement addresses payment to or employment benefits for RUI's employees." *Id.* at 1147. Only after having made that determination did the majority conclude that the ordinance was subject to rational basis review under the Equal Protection Clause because it "neither targets a suspect class nor impinges upon a fundamental right." *Id.* at 1154.

Here, by contrast, the relevant contracts do, in fact "address[] payment" for the targeted grocers' employees, and the City's Ordinance directly modifies those express contractual terms. *Id.* at 1147. Because the ordinance therefore "impinges upon a fundamental right," it is subject to heightened scrutiny. *Id.* at 1154.

The other decisions the City cites are further afield, and they do not support its contention. Most involve Equal Protection challenges to wage laws that were not alleged to have altered the terms of any existing contract. *See Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 398 (9th Cir. 2015); *Associated Builders and Contractors of Cal. Cooperation Comm., Inc. v. Becerra*, 231 F.Supp.3d 810, 827 (S.D. Cal. 2017); *Etere v. City of New York*, No. 08 CV 2827 (LAP), 2009 WL 498890, at *1 (S.D.N.Y. Feb. 24, 2009). Another involved a substantive due process challenge to a federal law governing pension benefits, with the court emphasizing that the Contract Clause does not apply to the federal government. *Peick v. Pension Benenfit Guar. Corp.*, 724 F.2d 1247, 1263 (7th Cir. 1983). The remainder simply address run-of-the-mill Contract Clause challenges, and not any Equal Protection claim. *See Heights Apartments, LLC v. Walz*, No. 20-CV-2051 (NED/BRT), 2020 WL 7828818, at *12 (D. Minn., Dec. 31, 2020); *Baptiste v. Kennealy*, No. 1:20-cv-11335-MLW, 2020 WL 5751572, at *4 (D. Mass., Sept. 25, 2020). While the City criticizes CGA for being unable to locate any decision analyzing an "analogous wage-regulating ordinance" (Opposition 22), the City is likewise unable to find any case in which a court was called on to confront a law

that directed a subset of employers in a particular industry to pay their employees a specified wage bump, in defiance of their existing contractual arrangements. The apparent novelty of the City's Ordinance is by no means a reason to presume its constitutionality. *Cf. Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2201 (2020) (A "lack of historical precedent" is "perhaps the most telling indication of a severe constitutional problem") (internal alterations and quotation marks omitted).

**B. The Ordinance cannot withstand any level of scrutiny**

Regardless, the Ordinance cannot satisfy even rational basis scrutiny, let alone the heightened scrutiny to which it should be held. The Ordinance itself cites three purported purposes: to "protect[] public health," address "economic insecurity," and "promote[] job retention." (Ordinance at 3-4.) While all of these may be legitimate governmental objectives in the abstract, none has any relationship to the mandate the City actually enacted, let alone to the City's apparently arbitrary decision to limit that mandate only to a certain subset of businesses that sell (70%) groceries. As CGA has explained (TRO 10-13), paying these workers an extra $4 an hour, and forbidding CGA's members from reducing hours in response, will not protect anyone from coronavirus infection. An employee making $24 an hour instead of $20 is just as likely to be infected (and perhaps more so, if the Ordinance forces grocers to divert funds used to support its existing voluntary health measures). Likewise, requiring grocers whose employees are currently employed to pay those employees *more* does not address the economic insecurity caused by the pandemic or promote job retention. Instead, as recent events have revealed, it 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. (*See generally* Smith Decl.; Williams Decl., Ex. C; Franklin Decl. ¶ 8-9.)

The City's opposition makes all the more plain the absence of any rationale

for the Ordinance. The opposition quotes the three general purposes the City invoked in the Ordinance itself. Opposition 21. But nowhere does the City even attempt to address *how* the Ordinance might actually advance these purposes. It cannot do so.

The declarations from City employees with actual knowledge of the relevant health and economic concerns are equally telling. Dr. Anissa Davis, the City Health Officer, outlines the health threat posed by COVID-19 and the difficulties the City has faced in combatting the virus. Yet she does not say anything even remotely suggesting that requiring certain grocers to pay their union-eligible employees an extra $4 an hour might somehow support the City's efforts. Similarly, John Keisler, the City's Director of Economic Development, explains that the economic effects of the "shut-downs" necessitated by the pandemic have been hard on Long Beach's residents, particularly among certain racial and socio-economic groups. ECF No. 24-4. Davis Decl. ¶3-6. He describes measures that City has taken to confront their rising unemployment, such as "prohibiting employers from using the pandemic and resulting shut-down orders as an excuse to exchange existing workers with new and perhaps lower-wage workers." *Id.* ¶7. Never does he suggest that an ordinance imposing a mandatory wage surchage on certain employers *not* subject to shut-down orders might somehow address the economic hardships caused by the shut-downs.

Nor could any additional purposes that the City cites supply the Ordinance's missing logic. The City asserts that "provision of grocery services is critical to addressing the raging pandemic," and that "[p]reserving this function is a significant and legitimate public purpose." Opposition 19. Stipulated. But how does an ordinance that requires grocers to pay employees an additional $4 an hour—thereby forcing some of them to shut down—help preserve the provision of grocery services? The City cannot say.

Finally, and somewhat confusingly, the City invokes *RUI*, saying that the

Ninth Circuit's conclusion that it was rational "'to treat Marina businesses'"—to which the challenged Berkeley living wage ordinance applied—"'differently from their competitors outside the Marina'" makes it "clear that there is a rational basis for the Ordinance at issue here." Opposition 24 (quoting *RUI One Corp.*, 371 F.3d at 1155). But the "rational basis" on which the *RUI* Court relied was (as one might expect) specific to that case: Berkeley explained that these Marina business received certain particular "benefits from the City in the form of improvements and lack of competition due to the development moratorium," that the "rent" City received did not cover these benefits, and that "members of the public might [otherwise] be deterred from patronizing the Berkeley Marina." *RUI*, 371 F.3d at 1156. None of these justifications have any application here.

The failure of these various rationales leaves nothing that could support the Ordinance. Because it burdens some employers without burdening other employers in similar circumstances (including other grocery retailers), without any rational justification, it fails any degree of constitutional scrutiny.

## IV. CGA IS LIKELY TO SUFFER IRREPARABLE HARM

The City does not dispute that a constitutional violation alone, like the one here, is sufficient to establish likelihood of irreparable harm. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding irreparable harm because constitutional violations cannot be adequately remedied through damages). Accordingly, the unconstitutionality of the Ordinance in itself should be sufficient reason to grant this injunction. But even absent any constitutional issue, grocers are likely to suffer irreparable harm. The City attacks this harm as purely economic, or speculative. Opposition 30-32. Not so.

First, in the few days following passage of the Ordinance, two grocery stores in Long Beach have elected to close. (Smith Decl. ¶ 5.) The sharp and sudden increase in labor costs wrought by the Ordinance made operating these locations unsustainable. (*Id.*) Over 150 employees will be displaced as a result. (*Id.*) There

is more than mere loss of revenue at issue. Stores in Long Beach are already struggling with the significant increased expenses associated with health and safety regulations required by the Covid pandemic. (Williams Decl., Ex. C at p. 7; see generally Franklin Decl. ¶¶ 4-8.) Now, the Ordinance threatens the short-term and long-term viability of numerous grocery stores in Long Beach, which readily meets the Ninth Circuit standard for the "possibility of irreparable injury." *See Am. Trucking Ass'ns,* 559 F.3d at 1052 (reversing district court and finding that irreparable harm was likely because compliance with locally mandated concession agreements would lead to evaporation of business for plaintiff member businesses and could be potentially fatal for smaller companies).

The cases cited by the City are wholly inapposite. In *Los Angeles Memorial Coliseum Commission v. National Football League*, the only injury the district court identified for the plaintiff in the absence of an injunction was "lost revenues due to [plaintiff's] failure to acquire an NFL team." 634 F.2d 1197, 1202 (9th Cir. 1980). There were no constitutional equal protection rights at issue, no discussion of permanent business loss, and no concrete discussion of reputational or other intangible harm. *Id.* at 1201-03. Similarly, in *Sampson v. Murray*, a single-plaintiff employment case, in which the plaintiff sought an injunction prohibiting termination of her employment, the injury was limited to "temporary loss of income, ultimately to be recovered." 415 U.S. 61, 90 (1974). Unlike these cases, the store impacts in Long Beach are enduring. The loss cannot be recouped through an action for damages.

Second, the City's claim that the grocers' reputational harm and loss of goodwill is "speculative" is belied by their own venomous briefing. The City itself attacks grocers as lacking both "decency" and "compassion" for not supporting the Ordinance, despite its potential to put an end to their operations in in Long Beach. The City argues that grocers have failed to "take care of their own[]" despite indisputable facts that grocers have offered their employees increased compensation

since the pandemic. Opposition 7, 8 ("[F]ront line workers . . . have continued to suffer economically."). By designating grocery stores as workplaces that warrant $4/hour of hazard pay, the City has branded grocers' stores as unreasonably hazardous environments. They further bolster their attack by referencing a May 2020 cohort study of 104 workers from one Boston grocery store. (ECF No. 18-1, Fong Decl. ¶¶ 16-17; ECF No. 18-2, Westmoreland Decl. ¶ 8; Bell Dec. Dkt. 21, Exh. U].) Therein lies the problem. The City sees no possibility of reputational harm because it is the City, through the Ordinance and otherwise, telling workers and the public that CGA's stores present a "danger," (Opposition 30:24-25), worthy of mandatory government compensation, while similar employers are presumably safe.[4] At this stage, CGA need not present absolute proof that it has suffered reputational harm, only that such harm is probable. Based on the record before the court, the existing harms weigh in favor of granting the requested injunction. *See Am. Trucking Ass'ns, 559 F.3d at 1057* ("a loss of goodwill and reputation" supports request for injunctive relief).

To minimize the harm to CGA's Members, the City further denies the common sense difficulties of complying with the Ordinance. Opposition 30-31. The City acknowledges that grocers have previously provided additional bonuses to its workers during the pandemic and that therefore, should be able to do so again. *Id.* at 32. Comparing pre-planned, bonuses that took into account revenue and expenses, are a far fetch from the mandatory, immediate across the board bonuses

[4] The most recently released occupational epidemiology from UCSF biostatisticians suggests that California retail workers have only a mildly elevated mortality risk relative to the general population. See *Excess mortality associated with the COVID-19 pandemic among Californians 18–65 years of age, by occupational sector and occupation: March through October 2020.* (See Decl. of Wm. Tarantino in support of Preliminary Injunction, Exhs. A and B.) While this recent data does not present a complete picture of the relative risk to essential workers, it highlights the fact that understanding the risk and hazard to specific workers associated with locations and occupations cannot be reduced to or explained a single number of cases, as the City tried to do.

required by this Ordinance. Additionally, the Ordinance may subject grocers to significant penalties. (See ECF No. 18-1, Fong Decl. ¶ 17.) The City attempts to refute this point by arguing that the Ordinance in itself does not provide for "extreme penalties." Opposition at 32. This argument disregards how the mandated premium pay implicates the complicated tangle of federal and California wage and hour law, the violation of which may result in significant penalties. In fact, CGA's concern regarding litigation is not speculative. Four days after this Court denied CGA's request for a TRO, several UFCW workers approach workers at two CGA members stores. (See Leslie Decl. ¶ 3; Anaya Decl. ¶ 3; Martinez Decl. ¶ 3.) The UCFW representatives advised the non-union workers that UCFW had "won" hazard pay for them, and that they should contact UFCW to assert their rights if the hazard pay was not include on their next paycheck. (Leslie Decl. ¶ 6; Anaya Decl. ¶ 6; Martinez Decl. ¶ 5.)

Lastly, the City conveniently ignores the irreparable harm by directly interfering with ongoing collective bargaining negotiations. As CGA previously discussed, one grocer that operates three stores in Long Beach are currently in the process of negotiating collective bargaining agreements. (ECF No. 18-2, Westmoreland Decl. ¶ 3.) The Ordinance, however, effectively dictates the parties' bargaining positions with respect to premium pay. And once those agreements are reached, they cannot be undone. Grocers' threatened injuries are not merely economic. They face real reputational harm and loss of goodwill, on top of the significant financial and legal threats to their businesses.[5] These factors are sufficient to establish likelihood of irreparable harm.

## V. AN INJUNCTION IS IN THE PUBLIC INTEREST

The balance of equities and public interest factors merge when the

[5] UFCW 324 has been handing out flyers to various stores in Long Beach urging the workers to contact the union should any grocer fail to comply with the ordinance. (Leslie Decl. ¶ 4; Anaya Decl. ¶ 4; Martinez Decl. ¶ 4.)

government is the opposing actor. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "In assessing whether the plaintiffs have met this burden, the district court has a duty to balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotation marks and alteration omitted). Here, the City has no legitimate interests in the Ordinance because the Ordinance conflicts with federal law and is unconstitutional.

The Ninth Circuit has observed:

> It would not be equitable or in the public's interest to allow the state to continue to violate . . . federal law, especially when there are no adequate remedies available to compensate [plaintiff] for the irreparable harm that would be caused by the continuing violation. In such circumstances, the interest of preserving the Supremacy Clause is paramount.

*California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012). As discussed above, the NLRA preempts the City's Ordinance. The public interest favors "applying federal law correctly." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011). The Ordinance's incompatibility with the NLRA means that the public interest weighs in favor of an injunction. Similarly, the City simply has "no legitimate interest in enforcing an unconstitutional law." *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 854 (E.D. Cal. 2018). While the City claims that the public interest weighs in their favor because the Ordinance "protects the public safety and welfare," they have yet to identify how the Ordinance is connected to any legitimate public purpose.

Setting aside the merits of CGA's claims, the adverse impacts of the Ordinance extend far beyond the parties to the litigation. Grocery stores cannot absorb mandatory increases in labor costs, while maintaining the same level of investment in public health, without either reducing operations or raising prices. (*See generally* Williams Decl., Ex. C; ECF No. 18-2, Westmoreland Decl. ¶ 9;

Franklin Decl. ¶ 8.) Both of those options have significant and substantial public impacts. At a minimum, the grocers and the public should be able to avoid these impacts pending resolution of the legality of the City's actions. *See, e.g.*, *April in Paris v. Becerra*, No. 2:19-cv-02471, 2020 WL 6043948 at *11 (E.D. Cal. Oct. 13, 2020) (noting that "the public interest favors applying federal law correctly" and that the reach of a government in protecting something ends where the preemptive effect of federal law begins).

## CONCLUSION

The City of Long Beach has enacted an Ordinance that serves the discrete interests of a small group at the expense of other grocers, other essential workers, and the other residents of Long Beach. The Ordinance conflicts with the requirements of federal labor law, and the guarantees of the California and federal constitutions. It will do nothing to end the pandemic, and will destabilize the local food supply, and harm local businesses. The grocers that are impacted by this Ordinance will suffer imminent and irreparable harm as a result, and the balanced of the hardships weigh in favor of a preliminary injunction pending a resolution of this matter.

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