Appeal No. 21-55174

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA GROCERS ASSOCIATION, a California non-profit organization,

Plaintiff and Appellant,

v.

CITY OF LONG BEACH, a charter municipality,

Defendant and Appellee.

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

APPELLEE CITY OF LONG BEACH'S ANSWERING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee City of Long Beach is a political subdivision, for whom no corporate disclosure is required.

Dated: April 16, 2021

By: s/ Christopher M. Pisano
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I. STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying Plaintiff and Appellant California Grocers Association's request for a preliminary injunction, wherein the district court concluded that Plaintiff was not likely to prevail on the merits of its challenge to the City of Long Beach's "Premium Pay for Grocery Workers Ordinance" ("Ordinance"). This Ordinance provides for a $4 per hour premium pay requirement for frontline grocery store workers to account for the health and safety risks these workers face during the COVID-19 pandemic. In denying the request for a preliminary injunction, the district court concluded that the Ordinance: (1) is not preempted by the National Labor Relations Act under the *Machinist* preemption doctrine; and (2) does not burden fundamental right and is subject to and satisfies "rational basis" review under the Equal Protection clauses of the United States and California constitutions.

II. INTRODUCTION

The City of Long Beach ("City") is in the midst of a public health and economic emergency of almost unprecedented magnitude. COVID-19 is a virulent infectious disease that had already killed more than 500,000 Americans when Appellant California Grocer Association's ("Appellant" or "CGA") motion was heard, 3-ER-541. The pandemic has forced the closure of entire sectors of economic activity, which has brought about shockingly high unemployment rates

within the City. 3-ER-522–534; 3-ER-515–520; 3-ER-499.

At least as of the time being, the COVID-19 pandemic appears to be waning in parts of the nation. After a year of horrible pandemic news, with infection rates and accumulating death toll numbers, trends are starting to improve thanks to the roll out of new vaccines. But the pandemic is not over and COVID-19 remains as a deadly and dangerous disease, with asymptomatic spread making it difficult to contain.

The City Council enacted the City's "Premium Pay for Grocery Workers Ordinance" three months ago, on January 19, 2021 (the "Ordinance"). 4-ER-569; *see also* 4-ER-580–91. At the time of enactment, the State of California was in its "darkest hour" of the pandemic, with positive cases, hospitalizations and death rates spiking. *See S. Bay United Pentecostal Church v. Newsom*, 985 F.2d 1128, 1131 (9th Cir. 2021) ("The 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.")

The Ordinance requires that for a modest 120-day period, large grocery store employers within the City must pay a $4 per hour premium to their frontline workers on top of existing pay. 4-ER-586. At the time the Ordinance was enacted, the COVID-19 numbers were at all-time highs within the City and elsewhere in surrounding Los Angeles County. 3-ER-404–08, 3-ER-400–01; 3-ER-386–391; 2-

ER-114; *S. Bay United Pentecostal Church*, 985 F.2d at 1131.

For the entire pandemic, grocery stores, unlike most industries, were deemed essential and remained opened. 3-ER-462–62. Frontline workers, i.e. those who interact with shoppers on a daily basis, were forced to take on significant health risks, both to themselves and their families, in making sure that food supply chains remained open. 2-ER-231. Yet while these frontline grocery store workers were being asked to take on heightened health risks, particularly during the dark period in early 2021, they were not being compensated for doing so, even though the grocery stores that employ them were reaping record windfall profits. *See* 4-ER-582–83; 3-ER-490–95; 2-ER-241; 2-ER-263; 3-ER-298–325.

The City enacted the Ordinance in recognition that grocery store workers merited additional compensation because of the risks they face, to promote job retention for these workers, and other stated purposes. 4-ER-582–82. The Ordinance provides for a minimum labor standard to these workers that the grocery stores should have been doing themselves, but were not.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The COVID-19 Pandemic Arrives; Many Industries Close, But Grocery Stores Remain Open as Essential Businesses

COVID-19 first hit the news in late 2019, with reports of a new and deadly virus spreading uncontrollably in Asia and Europe. COVID-19 cases appeared in California in late February and early March, and on March 4, 2020, Governor

Newsom proclaimed a State of Emergency. 3-ER-484–488. On March 19, 2020, he issued Executive Order N-33-20, which directed all California residents to heed State public health directives from the State Public Health Officer. 3-ER-481–82. Following a federal designation of "critical infrastructure sectors" on March 22, 2020 (and in subsequent updates), the State Public Health Officer designated a list of "Essential Critical Infrastructure Workers." 3-ER-457–479. Included in that list are "workers supporting groceries . . . and other retail that sells good or beverage products." 3-ER-462

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, to protect the peace, safety, and welfare, and to alleviate damage, hardship, or suffering. 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. 3-ER-413–31.

Public health officials at both the state and local level were urging everyone to remain at home in the face of this new, and highly contagious and deadly virus. However, while many were able to head those warnings and figure out a way to work from home, many of the most economically disadvantaged were not,

including those "essential" business sector workers like grocery store workers who had to go to work at their place of employment in order to protect the health and well-being of everyone.

B. The City and its Residents Have Been Devastated by COVID-19 on Both the Public Health and Economic Fronts

The State of California in general, and the City in particular, experienced high COVID-19 positivity rates, hospitalizations and deaths during the pandemic. The City has a total population of about 470,000. As of late January 2021, there were 46,833 total positive COVID-19 cases within the City (about 10 percent of the population), and a total of 618 deaths. 2-ER-114. In late January, the County of Los Angeles, like most of the state, was in the "purple tier," the most restrictive tier in the California Department of Public Health ("CDPH") guidelines for reopening. 2-ER-113.

As for California in general, in the months leading up to the enactment of the Ordinance, the state saw sharp increases in positive cases, hospitalizations and deaths. In Southern California, hospitals throughout Los Angeles County, including the Long Beach area, were stressed to their breaking point in late January, with ICU hospital bed capacity in area hospitals "dangerously low" at 11 percent. 3-ER-404–08, 3-ER-400–01; 3-ER-386–391; 2-ER-114.

The COVID-19 pandemic caused not only a health crisis, but also an economic crisis, as many sectors of the economy were forced to close in order to

prevent even further transmission. Unemployment levels spiked all over the country, and millions of Americans face potential eviction. 3-ER-499; 3-ER-515–20. The City and its residents suffered tremendous economic hardships due to the pandemic. 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. 2-ER-119–20. The City's Convention Center, Port and Aquarium are major draws that usually bring people to the City and help support a large number of jobs in the hospitality, retail and food service industries. *Id.* 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. *Id.* 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. 2-ER-120. In late January, the unemployment rate for the City was 12.1 percent, which is an historically high level. 2-ER-119–20.

C. In Contrast, Large Grocery Store Chains have Done Well During the Pandemic; Reaping Record Windfall Profits

While much of nation suffered both physically and economically over this last year, grocery retailers like Kroger have not only survived, but have thrived during the pandemic. 2-ER-283–92. The top grocery retail companies earned on average an extra $16.9 billion in profit, which was a 39 percent increase from the prior year, and stock prices were up an average of 33 percent. 2-ER-284; *see also* 3-ER-298–327.

While the grocery store companies did well economically, the profits were not shared with the frontline workers. In late March and early April 2020, grocery stores in the City voluntarily adopted "appreciation pay" or "hero pay" programs, where they gave their frontline workers an additional $2 per hour to recognize the importance of their work and the newfound risks associated with their jobs. This pay increase lasted only until late May or early June 2020, at which point grocery stores stopped offering the "appreciation pay" to their employees. In December 2020, some stores provided various types of bonuses, e.g. reinstituting $2 per hour, or paying a one-time bonus. But these bonuses were inconsistent and did not cover all stores. 3-ER-309–14.

D. The City Council Enacted the Ordinance to Protect Grocery Store Workers and to Promote the General Public Health and Welfare

In-person service sectors, which are prevalent within the City, were hard hit by the pandemic. Throughout the pandemic, the City Council prioritized worker protection, particularly those workers in poorer and disadvantaged communities. City staff have provided regular briefings to the City Council on potential policy changes to provide greater economic relief to those most impacted by the crisis. 2-ER-120–21. The City Council enacted multiple ordinances designed to protect local workers. For example, in May 2020, the City Council adopted three ordinances designed to provide job protections and benefits to low income workers. 2-ER-120–21

On January 19, 2021, the City Council enacted the Ordinance, codified in Chapter 5.91 of the Long Beach Municipal Code ("LBMC"). 4-ER-580–592. The Ordinance provides for an increase of $4 per hour for essential grocery workers, and prohibits employers from circumventing this increase by reducing compensation or earning capacity "*as a result*" of the Ordinance. 4-ER-586–87, emphasis added. It does not prevent an employer from taking *any* action as long as it is not a response to the Ordinance. *Id.*

The Ordinance is a modest, temporary, emergency measure, that by its own term expires 120 days after its enactment, or May 19, 2021, unless the City Council takes further legislative action to extend the term. 4-ER-586. In enacting this Ordinance, the Long Beach City Council legislatively determined that:

> Grocery store workers are essential businesses operating in Long Beach during the COVID-19 emergency making grocery workers highly vulnerable to economic insecurity and health or safety risks.
>
> Grocery workers working for grocery stores are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. They work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease. . . .
>
> Grocery workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection. . . .
>
> [E]stablishing an immediate requirement for grocery stores to provide

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

4-ER-582–82.

E. Kroger Closed Two Stores in the City in Response to the Ordinance, But These Stores were Already Losing Money

In response to the Ordinance, Kroger, one of CGA's largest members, decided to close two of its stores in the City, a Ralphs store and a Food 4 Less. 2-ER-58.[1] As Kroger's Regional CFO testified, these stores had been underperforming and were subject to potential closure for some time. *Id.* After the City enacted the Ordinance, Kroger decided to close these two stores permanently as of April 17, 2021. *Id.*

F. CGA Filed Suit Shortly After the Ordinance was Enacted and Moved for Immediate Injunctive Relief, Which was Denied

On January 21, 2021, i.e., two days after the Ordinance took effect, CGA

[1] In attempting to demonstrate irreparable harm, CGA submitted evidence of these store closures and other evidence, including an expert witness report, with CGA's reply papers. *See* 2-ER-56–58; 2-ER-79–102. The City objected to this late submittal of evidence with CGA's reply papers. 1-SER-18–26. The lower court did not reach any factor besides likelihood of success on the merits, and did not rule on the City's objection. To the extent this Court considers any factor beyond likelihood of success on the merits, the City renews its objections to CGA's improper submittal of new evidence with its reply papers. The City also notes that CGA's referral to this evidence (e.g., AOB at p. 51) without reference to the fact that the admissibility of the evidence was in controversy, and failure to disclose the existence of the City's objections, violates Ninth Circuit Rule 28(e).

filed this lawsuit. 4-ER-567. That day CGA also filed an Application for a Temporary Restraining Order. 4-ER-597. The application was filed with two supporting declarations, as well as a declaration from CGA's legal counsel. *Id*. On January 22, 2021, the City filed an opposition, along with one declaration and a declaration from counsel. 4-ER-598. Later that day, the lower court denied the application. *Id*.

In denying the application for a temporary restraining order, the lower court set a briefing schedule on a motion for preliminary injunction, which provided for the City to file a supplemental opposition and for CGA to file a reply. *Id*. On January 29. 2021, the City filed its supplemental opposition, as well as three declarations in support of its opposition. *Id*. On February 5, 2021, CGA filed its reply, as well as six additional declarations and a declaration from counsel. 4-ER-598–99. On February 12, 2021, the City filed an objection to the declarations submitted on reply, and on February 16, 2021, CGA filed a response to the objections, as well as a declaration from counsel. 4-ER-599–600.

Meanwhile, on February 9, 2021, United Food & Commercial Workers Local 324 ("UFCW") filed an unopposed motion to intervene in the lawsuit. 4-ER-599. On February 16, 2021, the lower court granted UFCW's motion to intervene. 4-ER-599–600.

The motion for preliminary injunction was heard by the lower court on

February 23, 2021, and the court heard argument from counsel for CGA, the City and UFCW. 4-ER-600. The court took the matter under submission, *id*., and on February 25, 2021, the court issued an order denying the motion for preliminary injunction. 4-ER-600; *see also* 1-ER-2–18. This appeal followed.

IV. SUMMARY OF ARGUMENT

The Ordinance does not violate the Equal Protection Clause of the U.S. and California Constitutions, nor is it preempted by the National Labor Relations Act ("NLRA").CGA's challenges to the Ordinance fail for multiple reasons.

First, the Ordinance is not preempted by the NLRA. The Ordinance sets a substantive labor standard, i.e., the payment of an additional $4 per hour on top of existing wages for both union and non-union grocery store workers. The Supreme Court and this Court repeatedly have held that substantive state labor standards are not preempted by the NLRA. *See, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22 (1987) ("*Fort Halifax*"); *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 NLRA is concerned with establishing an equitable **process** for determining terms and conditions of employment. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753 (1985). Nothing in the Ordinance disrupts this process. The grocery stores can bargain over anything with their employees, including wages and earning capacity. The stores simply cannot reduce wages and earning capacity as a result of the

Ordinance and t is not preempted under the *Machinists* doctrine.

Second, the Ordinance does not violate the Equal Protection Clause of either the U.S. or California Constitutions. CGA takes an aggressive, but legally incorrect position that the Ordinance is subject to strict scrutiny review erroneously claiming the Ordinance impinges upon a fundamental right to contract. There is no such fundamental right. It has been settled law for decades that economic and employment-related regulations like the Ordinance involve no fundamental right or suspect class, and so they 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 Ordinance is subject to rational basis review, and it survives such review because providing fair minimum compensation standards is rationally related to a legitimate government interest, particularly during a pandemic when the employees in question risk serious illness and even death for merely showing up to work.

Third, CGA's challenge fails because it did not meet any of the other factors for a preliminary injunction under the test set forth in *Winter v. National Resource Defense Council, Inc.*, 555 U.S. 7, 21 (2008). The lower court did not address these other factors because it found that CGA was not likely to prevail on the merits. But even if the lower court had analyzed the other factors, the City would still have prevailed. There was no evidence presented below that CGA was likely to suffer

irreparable harm over this 120-day Ordinance. The only evidence presented is that two stores in the City, which were already losing money, closed following the enactment of the Ordinance. This is not evidence of "irreparable" harm, and the evidence presented to the contrary showed that grocery stores were recording record profits during the pandemic. Additionally, the evidence below showed that the balance of equities tips in favor of the City. An injunction was not, and is not, in the public interest and CGA does not address this prong in its opening brief.

Finally, CGA's challenge fails because, given the changing nature of the pandemic since the Ordinance was enacted, and the short 120-day window in which the Ordinance applies, the issue presented is now all but moot. In all likelihood by the time this Court decides this issue, the Ordinance will no longer be in effect. Any extension of the Ordinance would be subject to further legislative enactment by the City Council. And while nobody can predict what the City's elected representatives will do in carrying out their legislative function, if the pandemic continues to wane, and barring a drastic shift in the landscape of the pandemic, any legislative decision to continue the application of the Ordinance would be subject to a different review based on different facts than what existed in mid-January. In short, it appears as though this issue is now moot, and the Court ought not to issue advisory opinions.

V. STANDARD OF REVIEW ON APPEAL

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. *Winter*, 555 U.S. at 21 (the "*Winter* Factors").

On appeal, this Court reviews a district court's decision to grant or deny a preliminary injunction for an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). Although the district court's interpretation of "underlying legal principles" is reviewed *de novo*, this Court's review is overall "limited and deferential." *Id*. An appellate court does not review the underlying merits of the case, and the district court " 'will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion.' " *Gregorio T. By & Through Jose T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (quoting *Sports Form, Inc. v. United Press International*, 686 F.2d 750, 752 (9th Cir. 1982); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005) ("Mere disagreement with the district court's conclusions is not sufficient reason for us to reverse the district court's decision regarding a preliminary injunction.").

The City notes that CGA failed to comply with Ninth Circuit Rule 28-2.5, in that while CGA describes the standard of review; it fails to identify "where in the record on appeal [any] issue was raised." CGA could not do so, because it inexplicably failed to include in its excerpts of record both the memorandum of points and authorities in support of its *ex parte* application for a temporary restraining order (the same moving papers that the district court treated as CGA's moving papers in support of its motion for a preliminary injunction, *see* 3-ER-546) *and* CGA's reply in support of its motion for a preliminary injunction. While CGA's appeal fails on the merits, its failure to provide this Court with any legal argument or analysis it made to the district court is also a sufficient ground to affirm the ruling below.

The district court applied the correct legal principles, and CGA has not and cannot show that the district court abused its discretion in declining to issue a preliminary injunction.

VI. LEGAL ARGUMENT

A. CGA is not Likely to Prevail on its Claim that the Ordinance is Preempted by the NLRA

CGA asserts that it is likely to prevail on its claim that the Ordinance is preempted by the NLRA, 29 U.S.C. §§ 157–158. CGA is incorrect. The NLRA does not preempt state or local wages, or other labor regulations; it preempts only laws that interfere with "economic weapons of self-help, such as strikes and

lockouts." *Golden Estate Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614–15 (1986); *Fort Halifax*, 481 U.S. at 20–21. The Ordinance does not interfere with any such economic weapons.

1. *There is a Strong Presumption Against Preemption*

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

Fort Halifax, a *Machinists* preemption case, is clear: "pre-emption should not be lightly inferred... [because] the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax*, 482 U.S. at 21. It is well-established that NLRA preemption should not be presumed. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 888, 891 (9th Cir. 2018) *cert. denied*

139 S.Ct. 2744 (2019) (expressly applying presumption against preemption in context of *Machinist* preemption challenge, and holding that the presumption applies with "particular force" when challenged law does not interfere with process of bargaining or self-organization) (citing *Fort Halifax*, 482 U.S. at 21; *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)); *see also Rhode Island Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 667 F.3d 17, 29 (1st Cir. 2011) (acknowledging presumption against *Machinists* preemption); *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993) (In context of *Machinist* and *Garmon* preemption challenges, noting "We are reluctant to infer pre-emption. . . . Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 818 (3d Cir.), *cert. denied*, 140 S. Ct. 102 (2019) (citing *Fort Halixax* for proposition that there is a presumption against NLRA preemption of state labor law).

2. *The Ordinance is Not Preempted by the NLRA*

The Supreme Court and this Court have held that substantive state labor standards are not preempted by the NLRA. *See, e.g.*, *Fort Halifax*, 482 U.S. at 20–22; *National Broadcasting Co., Inc.*, 70 F.3d 69; *Viceroy Gold Corp.*, 75 F.3d 482; *Babler Brother v. Roberts*, 995 F.2d 911 (9th Cir. 1993) (state law mandating

premium overtime wages for non-union employees working on public construction projects was not preempted). The Ordinance is a substantive labor standard benefitting union and non-union grocery workers as individuals, and does not conflict with the NLRA, which regulates the *process* of collective bargaining. Courts in the Central District have rejected similar challenges to the City of Los Angeles' living wage ordinances. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles* 119 F.Supp.3d 1177, 1179 (C.D. Cal. 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016); *Fortuna Enters., L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000 (C.D. Cal. 2008).

The NLRA is "concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metro. Life Ins. Co.*, 471 U.S. at 753. Pursuant to this principle, the Supreme Court has established two narrow doctrines of preemption by federal labor law: *Garmon* and *Machinists*. In its opening brief, CGA acknowledges that *Machinists* preemption is the only relevant preemption question at issue. AOB, p. 18. As is discussed below, *Machinists* preemption does not apply, and there are numerous cases cited herein that show that the Ordinance is not preempted by the NLRA.

In *Fort Halifax*, 482 U.S. 1, the Supreme Court held that a Maine statute requiring employers, in the event of a plant closing, to provide a one-time severance payment in the absence of a collective bargaining agreement on the

subject, was not preempted by the NLRA. Just like CGA here, the company in *Fort Halifax* argued that the law was preempted under *Machinists* preemption because it intruded upon the parties' bargaining activities, i.e., it undercut the employer's ability to withstand a union's demand for severance pay. *Id*. at 20. The Supreme Court rejected this argument and found that Maine's law was a valid and unexceptional exercise of its police power. *Id*. at 22. The Court reasoned that such a substantive labor standard provides protections to union and nonunion workers alike, and thus neither encourages nor discourages bargaining processes. *Id*. at 21–22. The *Fort Halifax* Court held that the mere fact that a state statute regulates matters over which the parties may bargain cannot support a claim of preemption. *Id*. at 21–22.

In *Viceroy Gold Corp*, 75 F.3d 482, this Court held that a California labor standard was not subject to *Machinists* preemption. California Labor Code section 750 prohibited mine workers from working more than eight hours a day. *Id*. at 485. The statute was later amended to create an exception to the eight-hour shift limitation "when the employer and a labor organization representing employees of the employer have entered into a valid collective-bargaining agreement where the agreement expressly provides for the wages, hours of work, and working conditions of the employees." *Id*. at 485–86. Viceroy Gold, a non-union operator of a gold processing facility, 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. This Court rejected the company's claim that section 750 was preempted. *Id*. at 489–90. The Court reasoned that even though the eight-hour shift limitation may be burdensome to some employers and employees who preferred a 12-hour work schedule, it "undoubtedly" qualified as a minimum safety protection for non-union mine workers, while permitting a longer workday through the protections provided by the collective bargaining process. *Id*.

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

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

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

In its opening brief, CGA attempts to navigate around analogous case law against its position by arguing that the Ordinance mandates "bonus pay," rather than providing a floor from which employers and employees then bargain. AOB, p. 21. This is not so. The Ordinance may raise the bargaining floor, but it is still just a floor from which bargaining can occur. In any event, CGA makes a distinction without a difference. Both the Supreme Court and this Court have held that labor standards other than minimum wage laws, or laws that set benefit "floors", are not preempted. Indeed, the Supreme Court specifically found that non-minimum wage laws regulating employment are not subject to *Machinists* preemption. *Fort Halifax*, 482 U.S. at 21 (law mandating lump sum severance payments); *Metro Life Ins. Co.*, 471 U.S. at 758 (law mandating mental health).

For example, in *American Hotel and Lodging Association*, 834 F.3d 958, this Court considered an ordinance that, among other things, required employers to provide paid leave and required that service charges pass through to employees. *Id*. at 962. This Court held that no portion of the Ordinance was preempted. *Id*. at 964–65.

In *National Broadcasting Co.*, 70 F.3d 69, this Court considered a law that set an overtime premium of double an employees' regular wage rate unless there is a collective bargaining agreement that covered the topic. *Id*. at 70. However, the law required that the bargained for "premium wage rates for overtime work" must

be "not less than one dollar ($1.00) per hour more than the minimum wage." *Id*. This Court rejected a claim that the law was preempted, explaining that "such state minimum benefit protections have repeatedly survived *Machinists* preemption challenges." *Id*. at 71. Just like the Ordinance at issue here, the law in *National Broadcasting Co*. provided a fixed premium pay rate (at least one dollar more per hour than the minimum wage) that could not be modified in the bargaining process.

3. *The Ordinance Does not Prohibit All Negotiations to Mitigate Labor Costs*

CGA contends that the Ordinance is preempted because it categorically prohibits negotiations to mitigate increased labor costs. AOB, pp. 23-26. On its face, the Ordinance does not do this; it does not prohibit an employer from taking "any [action] to mitigate increase labor costs that result from the Ordinance." Rather, it prevents an employer from taking only two actions, and only if those actions are taken "as a result of [the] Ordinance going into effect." 4-ER-586.

First, the Ordinance prevents an employer from unilaterally "tak[ing] any action" to reduce a "grocery worker's compensation." *Id.* This provision means what is says: An employer may not, as a result of the $4 per hour wage increase, simply reduce all employees' base pay by $4 per hour or some other amount to nullify or weaken the effect of the Ordinance. To the extent an employer may otherwise do so consistent with collective bargaining agreements and applicable

law, the Ordinance does not prevent an employer from modifying any employment terms besides direct compensation; e.g., modifications to paid time off for vacation, free meals, employee discounts, or any other "perk" or employment term besides direct compensation.

Second, the Ordinance prevents an employer from unilaterally "tak[ing] any action" to "limit a grocery worker's earning capacity." 4-ER-586. This provision also means what it says: An employer may not, as a result of the Ordinance going into effect, take a direct action that limits an employee's ability to earn money. While slightly broader in scope than the prohibition on reduction in direct compensation, the prohibition is still cabined to direct actions that limit an employee's ability to earn their base salary, plus the $4 per hour premium. For example, an employer may not, as a result of the Ordinance going into effect, reduce employees' hours across the board to keep employees' total take home pay static. An employer may not, as a result of this Ordinance going into effect, refuse to schedule employees who otherwise would have been assigned shifts during the period the Ordinance is in effect. An employer *may* however, modify any terms besides direct earning capacity; whether it be vacation time, free meals, employee discounts, or any other "perk" or employment term.

In its opening brief, CGA cites to a definition of "earning capacity" stated in *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932) ("Earning

capacity means fitness and readiness and willingness to work, considered in connection with opportunity to work.") CGA then reasoned, based on this definition, that employers would be prohibited under the Ordinance from even offering paid time off in lieu of paying the premium in order to avoid increased labor costs brought on by the premium. AOB, p. 25. That is not so. If the definition of "earning capacity" includes a "willingness to work," then employers could offer paid time off in order to avoid paying the premium because any employee who would accept the paid time off would no longer have a "willingness to work," at least for the period of time when then were being paid for time off. In sum, CGA's broad interpretation of "compensation" and "earning capacity" is strained and somewhat defies common sense.

The City on the other hand provides common sense interpretations of the phrases "reduce a grocery worker's compensation" and "limits a grocery worker's earning capacity," and the City's interpretations are supported by definitions elsewhere in the Ordinance. As the lower court noted, if the City intended the employer conduct prohibited by Section 5.91.060 to be all encompassing, the drafters of the Ordinance "could have said so in the Ordinance. They did not." 1-ER-9. The drafters of the Ordinance did, however, include a definition of "adverse action" describing a broader range of conduct than simply reducing compensation or limiting earning capacity. Section 5.91.020 of the Ordinance, "Definitions,"

defines "Adverse action" to mean:

> [R]educing the compensation to a grocery worker, garnishing gratuities, *temporarily or permanently denying or limiting* access to work, *incentives, or bonuses,* offering less desirable work, demoting, terminating, deactivating, putting a grocery worker on hold status, failing to rehire after seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a covered grocery worker for any reason prohibited by Section 5.91.090.
>
> "Adverse action" also encompasses any action by the hiring entity or a person acting on the hiring entity's behalf that would dissuade a grocery worker from exercising any right afforded by this ordinance.

4-ER-584 (emphasis added).

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

If the City truly intended Section 5.91.060 to prohibit the broad range of conduct imagined by CGA, the City could have used language as or more expansive as the definition of "Adverse action" in section 5.91.060. It did not do so. Or, simpler still, "if the drafters of the Ordinance meant to prohibit employees from offsetting labor costs by lowering any form of compensation 'in any way,'" they could have drafted section 5.91.060 to state: "No hiring entity shall, as a result

of this Ordinance going into effect, take any 'adverse action' against any grocery worker." They did not do so.

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

4. *The Ordinance Does not Dictate a Bargaining Result*

CGA argues that the Ordinance is preempted because it virtually dictates the results of collective bargaining. AOB, pp. 20-21. This is not so. In the specific context of collective bargaining, the Ordinance facially does not prohibit any bargained for employment term, but merely provides a $4 increase to whatever terms are agreed upon. If, because of the backdrop of the Ordinance, CGA's members take a bargaining position that involved, for example, refusing to increase base pay above current rates or reducing the number of vacation days that the employer will allow, and a union agrees to these terms, then this would not run

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

Indeed, the Ordinance does not prevent bargaining on any topic besides the single topic of a $4 an hour wage supplement. Stated differently, it takes a single "chip" (or topic) off the table, and provides a new backdrop of bargaining with this "chip" removed – as *every other* state substantive labor law does. *See Northwest Grocery Association v. City of Seattle,* 2021 WL 1055994, at *4 (W.D. Wash. Mar. 18, 2021) ("But in *Bragdon,* the determinative issue was that the ordinance dictated the mix *entirely*, leaving *nothing* to bargain over (citation). The Ordinance here simply *affects* the mix . . . this is not sufficient to establish an NLRA preemption argument, as is true of *any* minimum labor standard.") (emphasis in original).

While employees and employers cannot bargain around state minimum wage laws, state laws prohibiting child employment, occupational safety laws, laws against workplace discrimination, or a host of other substantive state labor laws, this does not render these laws preempted – those laws simply provide a backdrop for bargaining, just as the Ordinance does here. *See, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981) (minimum wage laws not

preempted); *Associated Builders & Contractors of California Cooperation Comm., Inc. v. Becerra*, 231 F.Supp.3d 810, 820 (S.D. Cal. 2017), *aff'd sub nom. Interpipe Contracting*, 898 F.3d 879 (noting child labor laws not preempted); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863–64 (9th Cir. 1987) (California's Occupational Safety and Health Act requirements not preempted).

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

Finally, the precise contours of the meaning of "compensation" and "earning capacity" are not even ripe for adjudication, as the district court did not have before it any individual who has suffered a concrete and particularized injury that involves these definitions. *See generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540

(2016); *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 512 (1984) ("Finally, we also decline to reach the validity of § 93(b)'s second sanction—prohibition of a union's administration of its pension or welfare funds—despite the Court of Appeals' unanimous holding that the sanction is expressly pre-empted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). . . . Because the Commission never imposed this sanction on Local 54, we are presented with no concrete application of state law. The issue is hence not ripe for review, and the Court of Appeals' holding that the federal ERISA pre-empts this sanction must therefore be vacated.").

5. *The Ruling in Bragdon has no Applicability to this Case*

CGA relies heavily on *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) ("*Bragdon*") in arguing that the Ordinance is preempted. The reliance on *Bragdon* is misplaced. It is a factually distinct case, and more recent precedent abrogates its broader *dicta*.

In *Bragdon*, this Court held that a Contra Costa County ordinance that required construction employers to pay "prevailing wages" which were determined solely by reference to established collective-bargaining agreements, was preempted by the NLRA. *Bragdon*, 67 F.3d at 502. "This manner of setting wages, the court held, gave employers what amounted to a Hobson's choice—they had either to accept the results of third parties' collective bargaining processes or enter into a

collective bargaining agreement themselves." *Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 1011 (C.D. Cal. 2013), *aff'd in part, appeal dismissed in part*, 614 F. App'x 867 (9th Cir. 2015).

This Court subsequently cabined *Bragdon*'s holding to its particular set of facts—a municipal ordinance mandating wages based exclusively on third-party collectively bargained rates. *Associated Builders & Contrs. of S. Cal. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004) ("*Bragdon* must be interpreted in the context of Supreme Court authority and our other, more recent, rulings on NLRA preemption."); *id.* at 991, fn. 8 ("In invalidating Contra Costa County's prevailing wage ordinance, we carefully distinguished, for purposes of preemption, state-established minimum wage regulations, which we acknowledged to be lawful."); *Cal. Grocers Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 200 (2011) ("[T]he Ninth Circuit Court of Appeals has effectively repudiated *Bragdon*, and a majority of other circuits have limited *Bragdon* to its facts."); *Assoc. Builders & Contractors of Cal. Cooperation Comm., Inc.*, 231 F. Supp. 3d at 823–24 ("Plaintiffs ignore that the Ninth Circuit has retreated from its holding in *Bragdon*."). The premium pay required by the Ordinance here is not tied to any collective bargaining agreement, and is not preempted under *Bragdon*.

More fundamentally, the Ordinance here has none of the characteristics of the law that the *Bragdon* court held was preempted. As this Court explained, the

ordinance in *Bragdon* effectively wholesale imported compensation terms from negotiated collective bargaining agreements: "[T]he prevailing wage . . . is not a fixed statutory or regulatory minimum wage, but one derived from the combined collective bargaining of third parties in a particular locality. . . . The manner in which the Ordinance operates affects 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." *Bragdon*, 64 F.3d at 502.

The Ordinance here shares nothing with the law before the *Bragdon* Court. While the Ordinance provides for a fixed regulatory premium, it in no way derives its requirements from "the collective bargaining of third parties." The Ordinance does not regulate the "total of the wages and benefits paid," it simply requires that *whatever* wages and benefits are paid are supplemented by a $4 per hour premium. The Ordinance is entirely unconcerned with "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." *However* such benefits and compensation are allocated to an employee, the compensation must simply be supplemented by a $4 per hour premium.

Finally, even to the extent that dicta in *Bragdon* can be read to endorse an essentially new strand of NLRA preemption, through which sufficiently "onerous"

minimum labor standard can be preempted by the NLRA, a $4 per hour wage supplement is a far cry from the type of extreme regulation that could fall into such a novel type of preemption. In *Am. Hotel & Lodging Ass'n*, 119 F. Supp. 3d 1177, the court reasoned that a wage standard would have to be extreme beyond reason to even potentially face such preemption:

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

Id. at 1191–92. On appeal in the *American Hotel & Lodging Association* matter, this Court had no need to even address the alleged "onerousness" of the ordinance at issue. *Am. Hotel & Lodging Ass'n*, 834 F.3d 958. Instead, this Court correctly recognized that, based on its own and Supreme Court precedent, the relevant inquiry was whether the challenged Ordinance was a "minimum labor standard" or whether the challenged ordinance attempted to "regulate the mechanics of collective bargaining" – an inquiry that is agnostic as to the alleged onerousness of a labor standard. *Id.* at 963–65

6. *Even if the Challenged Provision is Preempted, It is Severable, And the Remainder of the Ordinance may Remain*

CGA's severability analysis ignores California law and the decisions of this Court. When faced with an issue of preemption, California courts and this Court have been clear that particular applications of a challenged law can be severed as preempted. To the extent this Court concludes any particular application of the Ordinance is unconstitutional or preempted, that *application* of the Ordinance can be severed leaving the core command of a $4 per hour premium intact.

The guiding principle of severability is legislative intent. In *Calfarm Insurance Co. v. Deukmejian*, 48 Cal.3d 805 (1989), the California Supreme Court explained that "[t]he test of severability is one based on reason, and it stands to reason that voters who favored a measure [for a particular purpose] would still favor that measure had they foreseen the invalidity of [one aspect of that purpose]." *Id.* at 821.

Contrary to CGA's argument, California law is not so rigid about "grammatical severability" that it confines a court to the options of striking out discrete words or invalidating the entire statute. To preserve legislative intent, California courts have a duty to reformulate statutes even when it requires the addition of words. California law "requires that a court enforce the legislative intent or statutory meaning where it is clearly manifested. The inclusion of words necessary to clear expression of the intent or meaning is in aid of legislative

authority." *Kopp v. Fair Political Practices Comm'n*, 11 Cal.4th 607, 658 (1995) (citation omitted). "T]he denial of the power to insert words when the intent or meaning is clear is more of a usurpation of the legislative power because the result can be the destruction of the legislative purpose." *Id.* (citation omitted). And "when legislative (or the electorate's) intent regarding policy choice is clear, a revision that effectuates that choice is not impermissible merely because it requires insertion of more words than it removes." *Id.* at 661.

In *Am. Bankers Ass'n v. Lockyer*, 541 F.3d 1214 (9th Cir. 2008), the district court had held that the federal Fair Credit Reporting Act preempted applications of a provision of the California Financial Information Privacy Act and enjoined enforcement of the statute in its entirety. *Id.* at 1215-16. This Court reversed and remanded, holding that "section 4053(b)(1) has non-preempted *applications* and that California law requires that we reform section 4053(b)(1) to sever its preempted *applications*." *Id.* at 1216 (emphasis added). Quoting the California Supreme Court, this Court reaffirmed that "[w]e must revise the statute 'if we conclude that the Legislature's intent clearly would be furthered by application of the revised version rather than by the alternative of invalidation.' " *Id.* at 1217 (citation omitted). "The California Supreme Court has recognized that the practical effect of severing actual language from a statute is to rewrite the statute, and has therefore "eschewed, as a matter of semantics, the distinction between severing a

phrase from a statute and severing an *application*." *Id.* at 1218 (emphasis in original). This Court concluded that excluding the preempted application would effectuate the Legislature's intent, and therefore held that all non-offending applications of the statute would be preserved. *Id.* at 1217–18.

Applying those principles, it is not at all difficult to "reform" the Ordinance in a manner that eliminates any possible preempted applications[2] while continuing to achieve the core policy objective of requiring premium pay for as many front-line grocery workers as possible. The Ordinance has a broad saving clause which clearly evidences an intent to sever any invalid *application* of the law:

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

4-ER-590 (emphasis added); *see also* 1-ER-9–10. Whether narrowing the scope of the terms "compensation" and "earning capacity" and enjoining application of the Ordinance outside that narrow scope or enjoining some other application, any *possible* preempted application of the Ordinance can be severed from the core substantive mandate of a $4 per hour premium.

[2] To be clear, the district court correctly concluded that there are no preempted applications of the Ordinance.

B. CGA is not Likely to Prevail on its Claim that the Ordinance Violates the Equal Protection Clause of the U.S. and California Constitutions

1. *The City's Police Powers Include the Power to Regulate Wages*

Local governments have the power to regulate wages and conditions of employment within their jurisdiction. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93, 400 (1937). As this Court held in 2004, "[t]he 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.*, 471 U.S. at 756 ("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 an ongoing public health emergency. More than a century ago, in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the United States 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 In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (upholding state limitations on access to abortion during the COVID-19 pandemic under the "settled rule" announced in *Jacobson*); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020).

2. *The Ordinance is Rationally Related to a Legitimate Governmental Purpose*

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

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

Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 331-332 (1981) (internal citations omitted).

This test is the "most relaxed and tolerant form of judicial scrutiny," *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), reflecting a strong preference for resolution of policy differences at "the polls not [in] the courts." *Williamson v. Lee Optical of*

Oklahoma, Inc., 348 U.S. 483, 488 (1955). In conducting a rational basis review, a court will uphold a challenged law "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Any plausible basis suffices, even if it did not underlie the action, *id.*, and even if no party raised that basis in argument. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988). Because it is "entirely irrelevant for constitutional purpose" whether the rational basis was the actual motivation for a law, "the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (internal citations, quotation marks omitted.) Put another way, legislative decisions may be based on rational speculation. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979).

In *RUI One Corp.*, 371 F.3d 1137, this Court 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. This Court considered the plaintiff's argument that the purported reasons for the law were not the real reasons motivating the enactment of the Berkeley ordinance, but rather it was a ploy to help unionize hotels in the

Marina. *Id*. at 1155. This Court 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*. This Court 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, this Court concluded that it was "certainly rational ... for the City to treat Marina businesses differently from their competitors outside the Marina." *Id*. at 1156. In light of *RUI One*, there is a rational basis for the Ordinance.

Indeed, 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 . . . during the COVID-19 emergency.

4-ER-582–83. It was rational for the City to conclude that heightened pay would promote job retention among essential grocery workers. It was rational for the City to conclude that a premium pay requirement was appropriate to recognize and remunerate essential grocery workers for the hazardous conditions they have been working in for many months, an undeniably public purpose. *Id*. It would have been rational for the City to have simply concluded that grocery workers are underpaid even absent the COVID-19 pandemic. CGA's argument that the Ordinance lacks a rational basis is wrong.

3. *Strict Scrutiny Does Not Apply*

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

For equal protection purposes, fundamental rights include such rights as the right to vote and the right to procreate. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n. 3 (1976) (*per curiam*) (citing *Roe v. Wade*, 410 U.S. 113 (1973) (right of uniquely private nature); *Bullock v. Carter*, 405 U.S. 134

(1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *William v. Rhodes*, 393 U.S. 23 (1968) (First Amendment Rights); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate)). *See also Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (fundamental rights include "those ties that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs")(internal quotes and citations omitted); *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir.1996) (fundamental rights protect "against a State's interference with personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, as well as with an individual's bodily integrity.").

No court for decades has held that this narrow field of "fundamental rights" extends to the right to enter or enforce contracts, much less the right to purchase labor at a particular price.

In contrast, "freedom of contract is a qualified, and not an absolute, right[;]" "there is no absolute freedom to do as one wills or to contract as one chooses." *Parrish*, 300 U.S. at 392 (1937); *accord Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934) ("prohibition [on impairment of contracts] is not an absolute one and is not to be read with literal exactness . . . ."); *Nebbia v. People of State of New York*, 291 U.S. 502, 523 (1934) ("[N]either property nor contract

rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows").

For nearly a century, courts across the United States have uniformly rejected the *Lochner* era notion that the "freedom to contract" or to be free from "governmental interference with their contracts" is a fundamental right triggering any form of heightened scrutiny. *See, e.g.*, *Parrish*, 300 U.S. at 392 ("Liberty [of contract] implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."); *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) ("Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. *Morey* . . . so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled."); *Allstate Ins. Co. v. Dorr*, 411 F.2d 198, 200 (9th Cir. 1969) ("The Supreme Court has not for several decades, invalidated any state economic regulations on the liberty of contract ground.") (emphasis added); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 424–25 (1952) ("The only semblance of substance in the constitutional objection to Missouri's law is that the employer must pay wages for a period in which the employee performs no services . . . . But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social

affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.").

Indeed, courts have repeatedly held that laws which "interfere with" or burden contractual rights are subject only to the deferential rational basis test. *See, e.g.*, *International Franchise Ass'n, Inc.*, 803 F.3d at 407 (9th Cir. 2015) ("The district court properly cited the rational-basis standard. . . . It is legitimate and rational for the City to set a minimum wage based on economic factors, such as the ability of employers to pay those wages."); *RUI One Corp.*, 371 F.3d at 1154 (analyzing living wage standard under rational basis test); *Associated Builders and Contractors of California Cooperation Committee, Inc.*, 231 F.Supp.3d at 827 (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).")

CGA asks this Court to disregard decades of authority that economic regulations are not subject to strict scrutiny. CGA bore, and failed to carry, the burden of justifying this extraordinarily request. As the Supreme Court has noted, it exercises "the utmost care whenever [it is] asked to break new ground" in the field of fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

This is precisely what CGA asks this Court to do: recognize a "fundamental" contractual right that no other court has recognized. Making CGA's request more extraordinary and far-reaching is the fact that the "fundamental right" CGA seeks recognition of is a simple linguistic repackaging of a right courts have expressly held is *not* fundamental or subject to heighted scrutiny: the right to "freedom of contract." *Isaacs v. United States*, 865 F.2d 264 (9th Cir. 1988) ("[Plaintiff] alleges that Congress had no compelling justification for the passage of this legislation, and furthermore that they impair his fundamental right of freedom to contract. We disagree. The test for determining whether economic and social regulation meet the requirements of substantive due process is one of a reasonable relationship."); *Parrish*, 300 U.S. at 391 ("The Constitution does not speak of freedom of contract.").

Plaintiffs' arguments mirror those in *Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525, 557 (1923) a decision which was overruled by *Parrish*, 261 U.S. 525:

> The women with whom appellee *had so contracted* were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its [wage regulating] order . . .
>
> The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to

> sustain the burden, . . . Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. . . . To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person . . . .

Adkins, 261 U.S. at 542 (emphasis added). Despite this "interference" with existing contractual relationships between employers and "women with whom [the employer] had so contracted", the Supreme Court overruled *Adkins* and upheld a minimum wage law which necessarily "interfered" with existing employment contracts:

> We think that the views thus expressed are sound and that the decision in the A*dkins* Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. . . . Our conclusion is that the case of *Adkins v. Children's Hospital, supra*, should be, and it is, overruled.

Parrish, 300 U.S. at 397. CGA's challenge may have fared better a century ago, but under modern constitutional jurisprudence, local regulation of wages does not trigger strict scrutiny. *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 745 (7th Cir. 1987) (Affirming landlord-tenant ordinance against claim that it destroyed pre-existing contracts, and noting: "The plaintiffs have brought their case in the wrong era.")

The consequences of recognizing the right pressed by CGA as fundamental would be extraordinary, upsetting foundational principles of separation of powers

and all but destroying the local police power, underscoring the heavy burden CGA chose to assume when making this argument. Under CGA's articulation of the "fundamental" right at issue, all or nearly all state and local wage and economic regulations would be reviewed under the strict scrutiny standard. Increased minimum wage legislation "interferes with existing contracts" that provide for payment of the current minimum wage. Increased or modified overtime legislation "interferes with existing contract[s]" that do not provide for modified overtime payments. Legislative classification of certain workers as "employees" rather than "independent contractors" "interferes with existing" independent contractor contracts. CGA asks this Court to go beyond even the heyday of the *Lochner* era, and require that any labor or employment statute or regulation that "interferes with" some subset of existing employment contracts satisfy strict scrutiny. This is simply not the law. *Lincoln Fed. Lab. Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949) ("That wages and hours can be fixed by law is no longer doubted. . . .")

Most recently, the United States District Court for the Western District of Washington recently rejected precisely the "strict scrutiny" argument pressed by CGA here, explaining that "courts have routinely applied rational basis review to regulations implicating economic relationships and, by extension, contracts. . . . The Ordinance is subject to rational basis review. *Northwest Grocery Association*,

2021 WL 1055994 *6 (citing *Beach Commc'ns, Inc.*, 508 U.S. at 313; *RUI One Corp.*, 371 F.3d at 1154; *Jackson Water Works, Inc. v. Pub. Utilities Comm'n of State of Cal.*, 793 F.2d 1090, 1093–94 (9th Cir. 1986); *Int'l Franchise Ass'n, Inc.*, 803 F.3d at 407.)

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

C. CGA Failed to Demonstrate that it Would Prevail on the Other *Winter* Factors for a Preliminary Injunction

To obtain a preliminary injunction, a 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 is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge."). CGA failed to do so below and fails to do so here.

1. *CGA Failed to Show Irreparable Injury*

CGA bore a heavy burden to show that "irreparable injury [was] likely in the absence of an injunction." *Winter*, 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")

CGA failed to show that it will suffer *irreparable* harm. CGA failed to show that *it* would 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 CGA pointed to were *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) ("[M]onetary 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* 3-ER-560 ("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, CGA's own declarations demonstrate that the "non-economic" hardships they relied on in requesting a preliminary injunction—effects on CGA's members' "reputation" —were either completely speculative or based only on conclusory statements. Ronald Fong (an executive with CGA, who does not own or operate a grocery store), conjectured that mandating "hazard pay" – a term not used by the Ordinance – would "suggest that our Member's stores are unsafe" and would "damage our Member's goodwill and cause reputational harm." 3-ER-564–65. This statement is based on nothing beyond speculation – no documentary evidence, expert analysis, reasoned argument, or even the experience of an actual owner or operator of a grocery store. It was insufficient to show irreparably injury.

Moreover, grocery workers are in fact at a higher risk of contraction of COVID-19 by the simple and undeniable fact that their work requires them to interface directly with the general public. 1-SER-28; 1-SER-64; 2-ER-231–236; 2-ER-236 ("In conclusion, in this cohort of grocery retail essential workers, 20% had a positive SARS-CoV-2 RT-PCR assay result . . . Employees [of grocery stores] with direct customer exposure were five times more likely to have a positive SARS-CoV-2 assay result.") This is in contrast to other workers, such as attorneys,

business executives, and other white-collar workers who have jobs that enable them to work remotely. There is no "reputational harm" in recognizing the fact that grocery store workers face danger in ensuring access to food during a pandemic. 1-SER-28; 1-SER-64.

Mr. Fong argued that it is "unreasonable" to comply with the ordinance, and suggest that Plaintiff's members may face "extreme penalties" if they cannot comply. 4-ER-565. First, Mr. Fong tellingly did not state that CGA's members *could not* 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 store. Further, it strains credulity to suggest that sophisticated commercial entities lack the ability to implement a simple and specific pay increase. CGA has no evidence that any of its members have been unable to comply with the Ordinance.

This argument is further undercut by the fact that CGA members in fact previously paid COVID-19-related bonus pay, and at least one still did at the time CGA sought a preliminary injunction . Dkt. 9 at ¶¶ 3 4-ER-568 ("Grocers have provided 'appreciation pay,' 'hero bonuses,' and 'thank you pay' to reward their associates."); 4-ER-571–72 ("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. 3-ER-309–314; *see also* 1-SER-64. It is unreasonable to suggest that it cannot do so again.

Mr. Fong's dire suggestion of "extreme penalties" was 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. 4-ER-589. This speculation is a far cry from the type of evidence needed to obtain an injunction.

Finally, none of the harms alleged by CGA can support issuance of a preliminary injunction, because none of the harms would be remedied by the injunction CGA sought.

CGA sought an injunction preventing the City from enforcing the Ordinance. 1-SER-67; *see also* 1-SER-16–17, 4-ER-578–79. However, the Ordinance is not enforced by the City. Rather, it provides a private right of action to covered grocery workers who suffer financial injury as a result of a violation of the Ordinance. 4-ER-589. CGA did not seek an (improper) mandatory injunction compelling the City to rescind the Ordinance, and did not join and seek injunctive relief against any of the individual workers who have rights under the Ordinance.

Because the injunctive relief sought by CGA would not remedy any alleged

harm, these harms are not the sort of "irreparable harms" that are considered by a court in determining whether a preliminary injunction should issue. *Eilenberg v. City of Colton*, 2020 WL 6555042, at *4 (C.D. Cal. May 14, 2020) (" 'A plaintiff may be irreparably harmed by all sorts of things, but the irreparable harm considered by the court must be caused by the conduct in dispute and remedied by the relief sought.' ") (quoting *Sierra Club v. U.S. Dep't of Energy*, 825 F.Supp.2d 142, 153 (D.D.C. 2011)).

2. *CGA Failed to Show that the Equities and Public Interest Tilted Towards Injunctive Relief*

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 remain in effect for its full term.

D. CGA's Claims are Effectively Now Moot

The Ordinance was enacted on January 19, 2021, and by its terms expires 120 days from its enactment. 4-ER-569; 4-ER-586. 120 day from January 19, 2021 is May 19, 2021.

This brief is being filed on April 16, 2021. Per this Court's March 1, 2021 Order, Appellant may file its reply brief as late as May 7, 2021. Because this appeal may not be fully briefed until as late as May 7, 2021, in *all* likelihood by the

time this appeal is concluded the Ordinance will expire by its own terms.

The Ordinance will expire by its terms on May 19, 2021, in all likelihood before this appeal is concluded and before any remand and further action on the part of the district court can take place. Generally, the expiration or repeal of a challenged legislative act is sufficient to render a case moot and subject to dismissal. *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (citing *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 478 (1990); *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Kremens v. Bartley*, 431 U.S. 119, 127–28 (1977).

This is not a situation in which a legislative body voluntarily and temporarily rescinded an Ordinance because of a legal challenge or interim adverse ruling. *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir.2006) (holding that a city's enactment of an interim ordinance rescinding the challenged ban on commercial signage following an adverse district court ruling did not moot plaintiff's constitutional challenge where the city indicated that it would reenact the old ordinance if it succeeded on appeal). Nor is this a situation in which the legislative body has announced an intention to reenact the ordinance, or enact a new but legally similar ordinance. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (appeal not moot because City had announced intention to reenact challenged portion of ordinance); *Northeastern Florida*

Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 662–63 (1993) (appeal not moot because City had repealed and replaced ordinance with new ordinance that disadvantaged plaintiffs only "to a lesser degree" than the original one). Rather, the challenge will become moot because of the natural expiration of the Ordinance.

Further, as this Court confirmed in 2019, the expiration or rescission of an ordinance or law should "not be treated the same as voluntary cessation of challenged acts by a private party." *Bd. of Trustees of Glazing Health & Welfare Tr.*, 941 F.3d at 1199. Rather, a court should "assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire." *Id.* Therefore, in determining whether a case is moot," a court should "*presume* that the repeal, amendment, *or expiration* of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Id.* (emphasis added). Notably, any reasonable expectation of reenactment cannot be based on "speculation alone," but must be "founded in the record." *Id.* at 1119.

Here, CGA failed to cite evidence in the record (or outside the record, or even any plausible basis for) suggesting that the City Council will reenact the Ordinance or something similar to it. As noted, the world of today is different than

it was three months ago concerning COVID-19, and with the expanded role-out of vaccines and increased availability for "front-line" grocery workers and the population at large to be vaccinated against COVID-19, there appears to be less motivation for a premium pay ordinance today than there was in January. That is not to say that the pandemic is over, or that circumstances will not change. But as of the date of submission of this brief at least, the pandemic appears to be waning.

And, if the City were to reenact the Ordinance or something similar to in on May 19, 2021 or thereafter, the facts and legislative findings supporting the Ordinance would necessarily be different, and any challenge to the rational basis supporting the Ordinance would turn on the facts as they appeared to the City Council as of any new enactment, rather than those that existed in January 2021.

In short, the Ordinance, by design and by its plain language, is temporary, and it is on the verge of naturally expiring. When it does, there will be nothing left to enjoin and this appeal (and lawsuit) will be moot. CGA can point to nothing to support a reasonable expectation of reenactment, and this Court should dismiss this appeal as moot.

VII. CONCLUSION

For all of the foregoing reasons, the district court's order should be affirmed.

Dated: April 16, 2021

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CERTIFICATE OF COMPLIANCE

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Dated: April 16, 2021

BEST BEST & KRIEGER LLP

By: _____
CHRISTOPHER M. PISANO

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that this Certificate of Service is true and correct and that this declaration was executed on April 16, 2021.

Dated: April 16, 2021

BEST BEST & KRIEGER LLP

By: s/ Christopher M. Pisano
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