No: 21-55174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA GROCERS ASSOCIATION, a California non-profit organization,

Plaintiff/Appellant,

v.

CITY OF LONG BEACH, a charter municipality,

Defendant/Appellee,

UNITED FOOD & COMMERCIAL WORKERS LOCAL 324,
Intervenor – Defendant-Appellee.

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

INTERVENOR-APPELLEE UNITED FOOD & COMMERCIAL WORKERS LOCAL 324's ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Intervenor – Defendant-Appellee United Food & Commercial Workers Local 324 certifies that it has no parent corporations nor any publicly held corporations owning 10% or more of its stock.

Dated: April 16, 2021

Respectfully submitted,

By: */s/Paul L. More*

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STATEMENT OF RELATED CASES

Plaintiffs Northwest Grocery Association and Washington Food Industry Association filed a notice of appeal in *Northwest Grocery Association v. City of Seattle*, No. 21-cv-00142 (W.D. Wash.) on March 19, 2021. That appeal was docketed in this Court on March 19, 2021 as *Northwest Grocery Association v. City of Seattle*, Case No. 21-35205. Intervenor-Appellee United Food & Commercial Workers Local 324 is not aware of any other related cases pending in this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: April 16, 2021

Respectfully submitted,

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JURISDICTIONAL STATEMENT

Intervenor-Appellee United Food & Commercial Workers Local 324 (the "Union") concurs that 28 U.S.C. §1292(a) applies to this interlocutory appeal. However, the Union does not concur that Plaintiff-Appellant California Grocers Association ("CGA") has standing to pursue the preliminary injunction it seeks. C*f.* Appellant's Opening Brief ("AOB"), at 1. The Union also asserts that this interlocutory appeal will become moot on May 19, 2021.

STATEMENT OF THE ISSUE

Did the district court correctly deny CGA's request for a preliminary injunction barring the City of Long Beach from enforcing an ordinance that requires large grocery stores to temporarily provide their employees with an additional $4 per hour in premium pay, where (1) CGA showed no likelihood of success on the merits of its claim that this minimum labor standard is preempted by the National Labor Relations Act; (2) CGA showed no likelihood of success on the merits of its claim that the City's economic regulation is subject to heightened constitutional scrutiny or that it fails to pass rational-basis review under the Equal Protection Clause; and (3) any harm to CGA's members was monetary and an injunction directed against City enforcement would not have prevented private enforcement of the ordinance?

INTRODUCTION

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

The California Grocers Association ("CGA") sued and asked the district court to preliminarily enjoin the City from enforcing the Ordinance. The district court correctly denied that request, holding that CGA had demonstrated no likelihood of success on its claims that the Ordinance is preempted by the National

Labor Relations Act ("NLRA") or that it is subject to, and fails, strict scrutiny under the federal and state Equal Protection Clauses. ER 2-18.

The district court did not abuse its discretion. CGA's preliminary-injunction request faces insurmountable legal barriers. First, CGA lacks Article III standing to seek the preliminary injunction that it requests. CGA seeks an injunction only against the City's enforcement of the Ordinance. Supplemental Excerpts of Record ("SER") 66-67; ER 578-79. But the Ordinance does not give the City an enforcement role; it creates a private right of action that may be exercised only by "covered grocery workers." Appendix ("A"), at 13 (Long Beach Mun. Code §5.91.120). Accordingly, the relief that CGA seeks is not directed at the causes of its alleged injury and would not redress that injury. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Even if the City had some enforcement role not set forth in the Ordinance, CGA presented no evidence that there was any imminent threat of prosecution by the City. *See Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*).

Moreover, the Ordinance is scheduled to expire by its terms on May 19, 2021, at which point this interlocutory appeal will become moot. *See Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016); *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (*en banc*).

Even if CGA's preliminary-injunction request were justiciable, the district court did not abuse its discretion in concluding that CGA has no likelihood of success on the merits. CGA claims that the Ordinance is preempted under the *Machinists* doctrine of federal labor preemption because it purportedly interferes with grocery companies' collective bargaining. But federal labor law does not preempt state substantive employment standards, because those standards do not regulate the *process* of collective bargaining, which is the NLRA's subject. *Metro. Life Ins. Co. v. Mass*, 471 U.S. 724, 753 (1985); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19–20 (1987); *Am. Hotel & Lodging Ass'n v. City of L.A.*, 834 F.3d 958, 963–65 (9th Cir. 2016). CGA's claim that the Ordinance should be struck down under *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 2005) is based on a misunderstanding of that case and a premature (and mistaken) interpretation of the Ordinance.

The district court also properly rejected CGA's novel claim that the Ordinance's workplace protections are subject to strict scrutiny under the Equal Protection Clause because they "implicate[] the rights secured by the federal and state Contract Clauses." *See* AOB, at 32. The Supreme Court long ago rejected the notion that the Constitution contains the "fundamental right to be free of legislative interference in . . . existing contracts" that CGA claims. *Cf.* AOB, at 31; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–99 (1937). The Court has not

subjected economic regulation that impairs contractual rights to strict scrutiny under the Equal Protection Clause. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983). Courts in this Circuit have consistently applied rational-basis scrutiny to claims that state and municipal minimum-wage laws violate the Equal Protection Clause. *See, e.g.*, *Int'l Franch. Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 407 (9th Cir. 2015); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004).

Nor did CGA demonstrate irreparable harm that would be forestalled by the injunction it requested. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). None of the injuries that CGA alleges would be addressed by an injunction prohibiting the City from exercising its (non-existent) enforcement role under the Ordinance, since covered grocery employees could still exercise their right to private enforcement. And even if this were not so, the irreparable harms that CGA alleges are speculative and not supported by record evidence.

CGA's opposition to the Ordinance is political, not legal. Its arguments are better addressed to voters and politicians, not the federal courts.

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STATEMENT OF THE CASE

Factual Background

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

[1] *See* https://covid19.ca.gov/essential-workforce/ (last visited April 15, 2021).

[2] ER 230-39 (Lan F-Y, Suharlim C, Kales SN, *et al*. "Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA," OCCUP. ENVIRON. MED. (Oct. 30, 2020).

[3] ER 310-11 (Molly Kinder, Laura Stateler, and Julia Du, "Windfall profits and deadly risks: How the biggest retail companies are compensating essential workers during the COVID-19 pandemic," BROOKINGS INSTITUTE (November 2020)).

significant increases in profits, as restaurants and other retail food venues shut down.[4]

Municipal governments in California have stepped in to require large grocery companies to compensate their employees for the risks that they are taking. On January 19, 2021, the City passed the Ordinance, the first of many in California. The Ordinance requires covered grocery stores to provide their non-supervisory workers an hourly wage premium of four dollars. A9-10 (§5.91.050). It covers grocery employers with 300 or more employees nationwide and an average of fifteen employees in stores in the City. A9 (§5.91.040).

The Ordinance's purpose is to "compensate[] grocery store workers for the risks of working during a pandemic[,]" as such workers face "magnified risks of catching or spreading the COVID-19 disease because the nature of their work involves close contact with the public[.]" A6 (§5.91.005). Mandating higher pay also "ensures the retention of these essential workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency." *Ibid*.

The City Council passed the Ordinance as an emergency measure so that it would take effect immediately, and the Ordinance expires after 120 days. A10

[4] ER 317 (finding that Krogers experienced a 90% increase in profits during 2020 and that Albertson's saw a 153% increase, far higher than the average increase for all retailers analyzed by the Brookings Institute researchers).

(§5.91.050(C)). In order to protect against employers responding to the premium pay by simply cutting other wages, the Ordinance prohibits grocery stores from reducing a covered worker's "compensation" or "earning capacity" "as a result of this Ordinance going into effect," and establishes a burden-shifting procedure for assessing whether an employer has done so. A10 (§5.91.060).

Since the City passed the Ordinance, other cities have followed suit, including Los Angeles, Oakland, San José, and Seattle, Washington.[5] CGA responded to the Ordinance's passage by filing the instant lawsuit, and it has filed identical lawsuits against hazard-pay ordinances adopted in other cities.[6] The Western District of Washington recently dismissed an identical challenge to a Seattle hazard-pay ordinance, a decision that is on appeal. *Nw. Grocery Ass'n v. City of Seattle*, No. 21-cv-0142-JCC, 2021 WL 1055994 (W.D. Wash. Mar. 18, 2021), on appeal, Docket No. 21-35205.

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[5] City of Los Angeles, Ordinance No. 186940 (March 3, 2021) ("Premium Hazard Pay for On-Site Grocery and Drug Retail Workers Ordinance"); Oakland Mun. Code Ch. 5.96; City of San José, Ordinance No. 30534 (Feb. 9, 2021); City of Seattle, Wash., Council Bill 119990 (Feb. 3, 2021) ("Hazard Pay for Grocery Employees Ordinance").

[6] *See California Grocers Association v. City of Oakland*, Case No. 21-cv-00863-DMR (N.D. Cal.); *California Grocers Association v. City of San Leandro*, No. 21-cv-01175-AGT (N.D. Cal.); *California Grocers Association v. City of Daly City*, 21-cv-01773-TSH; *California Grocers Association v. City of Montebello*, Case No. 21-cv-01011-FLA-AGR (C.D. Cal.); *California Grocers Association v. City of West Hollywood*, No. 21-cv-01448-CBM (C.D. Cal.).

Procedural History

CGA filed its complaint on January 20, 2019. ER 567. The complaint alleges that the Ordinance is preempted by the NLRA, violates the California and federal Contract Clauses, and violates the California and federal Equal Protection Clauses. ER 573-78. The complaint seeks injunctive relief only against the City's enforcement of the Ordinance, asking that the Court "enter[] a preliminary and permanent injunction enjoining the City from enforcing or taking any action under the Ordinance." ER 578-79.

After being denied a temporary restraining order, *see* ER 3, CGA sought a preliminary injunction enjoining the "City of Long Beach" from "[e]nforcing any provision of the Premium Pay for Grocery Works [*sic*] Ordinance[.]" SER 66-67; *see also* ER 5.

On February 25, 2021, the district court denied CGA's motion, holding that CGA had "fail[ed] to establish a likelihood of success on the merits." ER 5. Because CGA failed to do so, the district court did not evaluate the other requirements for preliminary injunctive relief. ER 5-18.

STANDARD OF REVIEW

The Union agrees with the City of Long Beach's description of the standard of review that applies to this interlocutory appeal.

ARGUMENT

I. CGA Lacks Standing to Pursue the Preliminary Injunction Sought.

Under Article III of the Constitution, the federal courts have jurisdiction over a claim between a plaintiff and a defendant only if it presents a "case or controversy." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The power granted to federal courts under Article III 'is not an unconditioned authority to determine the constitutionality of legislative or executive acts.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 471 (1982) (citation omitted). "'[A] plaintiff must demonstrate standing separately for each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth*, *supra*, 528 U.S. at 185). This includes requests for preliminary injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

Plaintiffs must satisfy three criteria to establish a case or controversy sufficient to give a federal court jurisdiction over their claims and requests for relief. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). First, they must have suffered, or be about to suffer, an "injury in fact." Second, "there must be a causal connection between the injury and the conduct complained of." Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* All three requirements of injury, causation,

and redressability must be present for plaintiffs to have standing. *Friends of the Earth*, 528 U.S. at 185.

In its complaint and preliminary-injunction motion, CGA seeks an order restraining only the "City of Long Beach" from "[e]nforcing any provision of the Premium Pay for Grocery Works [*sic*] Ordinance." SER 66-67; ER 578-79. But the City has no enforcement responsibility under the Ordinance, which is enforced through a private right of action. *See* A13 (§5.91.120). Whether a government entity is a proper defendant for injunctive relief is based on "whether there is the requisite causal connection between their responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004).

It is a "long-standing rule that a plaintiff may not sue a[n] . . . official who is without any power to enforce the complained-of statute." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (citing *Gritts v. Fisher*, 224 U.S. 640 (1912); *Muskrat v. United States*, 219 U.S. 346 (1911)). Specifically, "when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957–58 (8th Cir. 2015) (quoting

Bronson v. Swensen, 500 F.3d 1099, 1110 (10th Cir. 2007)). Moreover, as the Fifth and Seventh Circuits have held, public officials named as defendants cannot cause or redress a plaintiff's injury arising from a statute's private-action provision, and a court may not enjoin non-parties who are entitled to invoke a private-action provision without violating due process. *Hope Clinic v. Ryan*, 249 F.3d 603, 606 (7th Cir. 2001); *Okpalobi*, 244 F.3d at 428.

CGA does not have standing under *Lujan*'s causation and redressability prongs to seek an injunction against the City enforcing the Ordinance, because the City lacks enforcement responsibility over the law. CGA did not seek a preliminary injunction restraining covered grocery store employees from bringing private actions under the Ordinance. SER 66-67; ER 578-79. But it would not have been able to in any case, because those employees were not party to the case.[7] As stated by the Seventh Circuit, "[a]n injunction prohibiting [*government*] *defendants* from enforcing the private-suit rules would be pointless; an injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements)." *Hope Clinic,*

[7] Nor does the Ordinance authorize the Union to bring suit. The Ordinance only authorizes a "covered grocery worker" to bring a private action. A13 (§5.91.120).

249 F.3d at 605 (emphasis in original); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

Even if the City had some theoretical means of enforcement not stated in the Ordinance, "[i]n evaluating the genuineness of a claimed threat of prosecution, [the court] look[s] to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n, supra*, 220 F.3d at 1139; *see also Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979) (a plaintiff challenging the constitutionality of a statute need not "first expose himself to actual arrest or prosecution" but must establish Article III standing by "alleg[ing] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and demonstrating that "there exists a credible threat of prosecution thereunder."). "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas,* 220 F.3d at 1139. Additionally, "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Id.*; *Stoianoff v. State of Montana,* 695 F.2d 1214, 1223 (9th Cir. 1983) ("The mere

existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.").

"When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt*, 442 U.S. at 298–99 (quoting *Younger v. Harris,* 401 U.S. 37, 42, (1971)); *Thomas*, 220 F.3d at 1141. CGA's complaint makes no factual allegation that it faces any risk that the City will enforce the Ordinance against its members, or that its members have any concrete plan to violate the Ordinance. ER 567-579; SER 5-17 (amended complaint, filed two months after the Ordinance went into effect, containing no factual allegation of City enforcement threat). Nor did CGA produce any evidence that the City threatened to prosecute its members in its preliminary-injunction motion. The City does not have enforcement responsibility over the Ordinance, so it is difficult to see how such evidence could exist.

The Court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas*, 220 F.3d at 1138. CGA does not have standing to seek a preliminary injunction barring the City from enforcing the Ordinance, because such an injunction would not redress the injuries that CGA claims.

II. CGA's Interlocutory Appeal Will Become Moot On May 19, 2021.

"An interlocutory appeal of the denial of a preliminary injunction is moot when a court can no longer grant any effective relief sought in the injunction request. The interlocutory appeal may be moot even though the underlying case still presents a live controversy." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016); *Pub. Util. Comm'n of the State of Cal. v. FERC,* 100 F.3d 1451, 1458 (9th Cir.1996) ("The court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal."). Courts "determine questions of mootness in light of the present circumstances where injunctions are involved." *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996); *Weinstein v. Bradford,* 423 U.S. 147, 148 (1975).

The Ordinance, by its terms, will expire on May 19, 2021. A10 (§5.91.050(C)); ER 2-3. On that date there will no longer be any Ordinance to preliminarily enjoin the City from enforcing (even if the City had responsibility for enforcing it), and this appeal will be moot.

The Ninth Circuit "treat[s] the voluntary cessation of challenged conduct by government officials 'with more solicitude . . . than similar action by private parties'" and "[f]or this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Glazing Health & Welfare Tr.*, *supra*, 941 F.3d at 1198; *Am. Tunaboat Ass'n v. Brown,* 67 F.3d 1404, 1407 (9th Cir. 1995) (plaintiff's "appeal of the

district court's denial of its application for a preliminary injunction is moot" because the regulation sought to be enjoined was no longer in effect); *Arc of California v. Douglas*, 757 F.3d 975, 982 (9th Cir. 2014) ("Because the percentage payment reduction has expired, there is nothing left to enjoin."); *see also Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 377, 377 (2017) (dismissing as moot a challenge to an executive order's provisions that had "expired by [their] own terms"); *Burke v. Barnes*, 479 U.S. 361, 363–64 (1987) (holding "that any issues concerning whether [a bill] became a law were mooted when [it] expired by its own terms").

In *Glazing Health & Welfare Trust*, this Court joined "nearly 'all [other] circuits to address the issue'" and held that "'that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar.'" *Glazing Health & Welfare Tr.*, 941 F.3d at 1198 (quoting *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004)). Thus, "in determining whether a case is moot, [the 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." *Glazing Health & Welfare Tr.*, 941 F.3d at 1199.

A party challenging this presumption of mootness does not have to show that reenactment of the law is a "virtual certainty" but it must demonstrate that

there is a reasonable expectation of reenactment "founded in the record . . . rather than on speculation alone." *Ibid*. Here, there is no evidence in the record that the City plans to reenact the Ordinance after it expires. CGA points out that the Ordinance *allows* for extension of the Ordinance. AOB, at 7. But the City always retains authority to enact or reenact a law, and CGA can only speculate that the City will actually exercise this authority to reenact the Ordinance, or to reenact it with the provisions that CGA believes are unlawful. Accordingly, as of May 19, 2021, the parties will "'no longer have a legally cognizable interest in the determination of whether the preliminary injunction was properly denied.'" *In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (internal citation omitted).[8]

III. CGA Does Not Meet The Requirements for a Preliminary Injunction.

"[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). The plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

[8] The City's and the Union's motions to dismiss CGA's amended complaint are scheduled for hearing on April 26, 2021. *See California Grocers Association v. City of Long Beach*, No. 21-cv-00524, PACER Doc. 51. If the district court dismisses CGA's complaint, this interlocutory appeal will become moot under the doctrine of merger. *See Sec. & Exch. Comm'n v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361–62 (9th Cir. 1982); *Env't Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001).

absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citations omitted). CGA meets none of these requirements.

A. CGA Has No Likelihood of Success on the Merits.

1. The Ordinance is not preempted under the *Machinists* doctrine.

CGA misunderstands the *Machinists* doctrine of federal labor preemption, which preserves certain aspects of the collective bargaining *process* from state regulation, but does not displace state and local substantive workplace standards. *See Int' Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). CGA argues that two aspects of the Ordinance are preempted under the *Machinists* doctrine: (1) the mandated $4 per hour in premium pay; and (2) the prohibition against grocery stores reducing other compensation to fund that premium pay. Neither argument has any basis.

a. *Machinists* preserves the collective bargaining process, not the substantive outcomes of bargaining.

Under the *Machinists* doctrine, "[s]tates are . . . prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes and lockouts, unless such restrictions presumably were contemplated by Congress." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614–615 (1986). State activity is preempted under this doctrine "on the theory that preemption is

necessary to further Congress['s] intent that 'the conduct involved be unregulated because [it should be] controlled by the free play of economic forces.'" *Fort Halifax*, *supra*, 482 U.S. at 19–20 (quoting *Machinists*, 427 U.S. at 140) (second edit in original). Thus, *Machinists* preemption—like the NLRA itself—is "concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain[.]" *Metro. Life*, 471 U.S. at 753 (emphasis added); *see Burnside v. Kiewit Pac. Corp*., 491 F.3d 1053, 1068–69 (9th Cir. 2007); *cf*. *Machinists*, 427 U.S. at 135-36 (state law punishing peaceful union strike as unfair labor practice preempted).

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

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining

> processes that are the subject of the NLRA. . . . Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."

Id. at 755 (internal quotation and citation omitted). When adopting the Wagner Act, Congress legislated against a backdrop of substantial state employment protections, yet "there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Id*. at 756.

In *Fort Halifax Packing Company v. Coyne*, the Court held that a Maine law requiring companies to pay their workers a substantial severance when they closed large manufacturing plants was not preempted. Like CGA does here, the employer argued "that the Maine law intrudes on the bargaining activities of the parties because the prospect of a statutory obligation undercuts the employer's ability to withstand a union's demand for severance pay." *Fort Halifax*, 482 U.S. at 20; *cf*. AOB, at 21. The Court rejected this argument: "This argument—that a State's establishment of minimum labor standards undercuts collective bargaining—was considered in and rejected in *Metropolitan Life Ins. Co. v. Massachusetts*[.]" *Id*. The Court continued:

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any

> state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations.

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

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

Courts in this Circuit have repeatedly applied *Metropolitan Life* and *Fort Halifax* to uphold substantive labor standards over *Machinists* challenges, including laws that targeted particular industries and occupations. In each case, the Court stressed the fundamental difference between state substantive employment protections and state laws that regulate the collective-bargaining process. *See, e.g.*,

Am. Hotel & Lodg. Ass'n, 834 F.3d at 963–65 (city ordinance requiring higher minimum wages and compensated time off for employees of large hotels not preempted); *Assoc. Builders & Contractors of So. Calif. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004) (minimum wages and benefits for state-registered apprentices on private construction projects not preempted); *Viceroy Gold Corp. v Aubry*, 75 F.3d 482, 489–90 (9th Cir. 1996) (overtime regulation that applied only to miners not preempted); *Nat. Broad. Co. v. Bradshaw*, 70 F.3d 69, 71–73 (9th Cir. 1995) (state overtime law covering the broadcast industry not preempted); *see also, e.g.*, *Kyne v. Ritz-Carlton Hotel Co*., 835 F.Supp.2d 914, 929 (D. Haw. 2011) (hotel service-charge ordinance not preempted); *Fortuna Enter. L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1006–12 (C.D. Cal. 2008) (minimum-wage ordinance that applied to hotels in area adjacent to airport not preempted); *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. 06-cv-1254-SBA, 2006 WL 2739309 at *12–13 (N.D. Cal. Aug. 23, 2006) (local minimum-wage ordinance not preempted); *Columbia Sussex Mgmt., LLC v. City of Santa Monica*, No. 19-cv-09991-ODW, 2020 WL 5358505, at *7 (C.D. Cal. Aug. 28, 2020) ("The Workload Limitation Provision and its corresponding Waiver 'do not regulate the mechanics of labor dispute resolution,' but instead 'provide the "backdrop" for negotiations,' similar to other state minimum labor standards."); *California Grocers Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 200-208 (2011) (ordinance requiring large grocery

stores to hire predecessor's workforce after asset sale not preempted under *Machinists*).

CGA's statement that "[t]o be sure, *not all* state and local laws that affect the substance of collective bargaining agreements are *categorically* preempted," is thus comically backwards. *See* AOB, at 18 (emphasis added). In fact, "[t]he Supreme Court has *never* applied *Machinists* preemption to a state law that does not regulate the mechanics of labor dispute resolution." *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015) (emphasis added).

b. The Ordinance's premium-pay requirement is not preempted.

CGA argues that the Ordinance's $4 per hour premium-pay requirement is preempted because one of its members, Food 4 Less, "is currently engaged in negotiations for a new collective bargaining agreement, in which UCFW [*sic*] Local 324 has made an express demand for hourly premium pay during the pandemic" and "[b]y enacting the Ordinance, the City ended any negotiation on that term, effectively rewriting the contract as it saw fit." AOB, at 21; *ibid*. (complaining that other stores in Long Beach are "covered by collective bargaining agreements that set wage scales . . . that the Ordinance has effectively displaced"). This is precisely the argument that the Supreme Court rejected in *Metropolitan Life* and *Fort Halifax*. *See Fort Halifax*, 482 U.S. at 20 (rejecting employer's argument

that Maine law was preempted because it "undercut[] an employer's ability to withstand a union's demand for severance pay").

CGA argues that the Ordinance is "not a 'minimum labor standard' at all" because "[r]ather than provide a floor from which employers and workers bargain, it mandates bonus pay on top of negotiated wages[.]" AOB, at 21. It is unclear what CGA means by this. If CGA's argument is that only minimum-wage laws are exempt from *Machinists* preemption and not laws that mandate bonuses or premium-pay on top of a regular wage rate, the argument is baseless. *See, e.g.*, *Fort Halifax*, 482 U.S. at 20-22 (upholding statute requiring a week's pay for each year of employment as severance); *Bradshaw*, 70 F.3d at 72 (law requiring double-rate overtime in broadcast industry not preempted).

CGA also suggests that the Ordinance is preempted because it targets large grocery stores in the City. AOB, at 21. But it is "clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *Nunn*, 356 F.3d at 990; *Am. Hotel & Lodg. Ass'n*, 834 F.3d at 963–65; *NBC v. Bradshaw,* 70 F.3d at 71-73; *Viceroy Gold,* 75 F.3d at 489-90.

c. The Ordinance's protection against employers funding premium pay through reductions in other compensation is not preempted.

The Ordinance prohibits covered employers from funding the mandated premium pay by reducing an employee's other "compensation" or "earning capacity." A10 (§5.91.060). The Ordinance does not ban all reductions in compensation during its four-month term, only those that are "a result of [the] Ordinance going into effect," and the Ordinance sets forth a burden-shifting procedure to determine whether the pay reduction would have occurred independent of the Ordinance's premium-pay mandate. A10 (§5.91.060).

This provision solves an obvious problem with employment regulations that mandate supplemental pay: money is fungible, and an employer facing such a regulation can simply reduce some other form of pay (or basis for pay) in order to lessen the regulation's effect. For this reason, California prohibits employers from "manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the . . . overtime rate that will have to be paid." *Huntington Memorial Hosp. v. Superior Court*, 131 Cal.App.4th 893, 905 (2005). State law also "prohibits borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the minimum wage for a second set of hours or tasks[.]" *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762, 781 (2020). Employers are prohibited from "mak[ing] or tak[ing] any deduction from the earnings of any

employee, either directly or indirectly, to cover the whole or any part of the cost of compensation" under the State's workers' compensation statute. Cal. Lab. Code §3751. The Ordinance's prohibition against employers funding the $4 per hour hazard pay by reducing other compensation is no different from these policy solutions.

CGA, however, asks the Court to read this prohibition to the furthest extent that its language can possibly bear (and in a way that the City itself rejects) and then hold that the resulting limitation on its members' operational discretion is preempted under *Chamber of Commerce v. Bragdon*, *supra*, 64 F.3d 497. Incredibly, CGA then asks the Court to hold the *entire Ordinance* preempted, arguing that its extreme interpretation of this subsidiary protection cannot be severed from the Ordinance's primary, wage-premium mandate. AOB, at 20-30. There are many problems with this argument.

First, both the City and the district court read the Ordinance to prohibit only two mechanisms for funding the premium pay: reducing the employee's base wages and reducing the employee's work hours. ER 9 ("The Ordinance prohibits (1) reducing a worker's wages to offset that worker's premium pay, and (2) reducing a worker's hours to offset the increase in that worker's effective hourly pay."). CGA does not dispute that if Section 5.91.060 were limited to these things, the Ordinance would not be preempted under its theory. *See* AOB, at 23-24.

Nothing about Section 5.91.060 under this interpretation (or, indeed, under CGA's expansive reading of the provision) interferes with "the mechanics of collective bargaining" under *Machinists*. *Am. Hotel & Lodging Ass'n*, 834 F.3d at 963.

There is nothing unreasonable about this interpretation. Although CGA has chosen one particularly broad dictionary definition of "compensation" (AOB, at 24), in American usage, the term usually refers to wages or salary. *See* Bryan A. Garner, GARNER'S DICTIONARY OF LEGAL USAGE 185 (3d ed. 2011) ("compensation = . . . (2) (in AmE) salary or wages"); *see also* BLACK'S LAW DICTIONARY 322 (9th ed. 2009) ("compensation: (1) remuneration and other benefits received in return for services rendered; *esp., salary or wages*").

CGA also argues that the Ordinance's reference to "earnings capacity" means anything imaginable that could reduce the amount of money a worker earns, including being passed over for a promotion, "miss[ing] out on any additional wage opportunities," or, apparently, an employee's "readiness and willingness to work." *See* AOB, at 25. But there is no standard definition of the term "earning capacity," and equating the somewhat ambiguous term with a reduction in work hours for the sole purpose of avoiding the wage premium is certainly plausible. Given that this is what the City *says the Ordinance was intended to mean*, there is no reason for federal courts to second guess that interpretation. *Harrington v. City of Davis*, 16 Cal. App. 5th 420, 43 (2017) ("[A] city's interpretation of its own

ordinance is 'entitled to deference' in our independent review of the meaning or application of the law.") (internal quotation omitted); *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990).

Second, even if there were some legitimate theoretical dispute over Section 5.91.060's meaning, there would be no reason for the Court to weigh in on it in order to manufacture a constitutional issue. "[A]s the Supreme Court has stated, '[w]e will not strain to reach a constitutional question' through mere speculation." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1153 (9th Cir. 2004) (quoting *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. at 188). Although the Ordinance has been in effect for nearly three months, there is no evidence (or allegation) that any grocery store has been accused of violating the Ordinance by reducing any worker's compensation or earnings capacity. Nor is there any reason to believe that any court would adopt CGA's expansive reading of the Ordinance. CGA is asking the Court to enjoin enforcement of the provision (and, in fact, of the entire Ordinance) based on speculation about how broadly some future court hearing a hypothetical action against a grocery employer might interpret Section 5.91.060.

This issue is not ripe for adjudication. The prudential aspect of ripeness is considered in a two prong test: "(1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration." *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 670 (9th Cir. 2004). CGA has alleged no

hardship that its members face from delaying adjudication until it becomes clear whether this provision will be invoked at all. Those of CGA's members that are party to collective bargaining agreements are already contractually precluded from reducing employees' compensation and most imaginable forms of "earning capacity." The one CGA member that is currently engaged in collective bargaining admits that federal labor law already bars it from "adjust[ing] costs elsewhere in [its] operation that affect its unionized employees." ER 559; *see* 29 U.S.C. §158(a)(5); *NLRB v. Katz*, 369 U.S. 736 (1962). State courts addressing concrete facts will be better situated to interpret Section 5.91.060 (if it is ever invoked). *See Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1033 (9th Cir. 2005) ("The interpretation of the statute is an issue of state law and no California court has interpreted that statute as applied in these circumstances. The fitness of these issues for judicial decision is poor, and the hardship to the parties is minor.").

Third, CGA relies exclusively on *Chamber of Commerce v. Bragdon*, *supra*, 64 F.3d 497, to support its argument. *See* AOB, at 18-21. But *Bragdon* is factually distinct and more recent precedent abrogates the case's broader *dicta* as incompatible with Supreme Court and subsequent Ninth Circuit precedent.

Bragdon involved an ordinance that required contractors on private construction projects to provide a wage-and-benefit package that was determined

exclusively by reference to unionized contractors' collective-bargaining agreements. *Bragdon*, 64 F.3d at 502. As this Court explained in clarifying the case's scope, the problem with the prevailing-wage ordinance in *Bragdon* was that it required private, non-union employers to comply with the *collectively bargained* wages and benefits in the unionized sector. *Nunn*, 356 F.3d at 991. "This manner of setting wages, the court held, gave employers what amounted to a Hobson's choice—they had either to accept the results of third parties' collective bargaining processes or enter into a collective bargaining agreement themselves." *Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 1011 (C.D. Cal. 2013), *aff'd in part, appeal dismissed in part*, 614 F. App'x 867 (9th Cir. 2015).

For that reason, "[i]n invalidating Contra Costa County's *prevailing* wage ordinance, we carefully distinguished, for purposes of preemption, state-established *minimum* wage regulations, which we acknowledged to be lawful." *Nunn*, 356 F.3d at 991 n.8 (citing *Bragdon*, 64 F.3d at 502); *see also Am. Hotel & Lodging Ass'n*, 834 F.3d at 965 n.5 (ordinance in *Bragdon* was preempted because "prevailing wages were defined as the per diem wages set by the state for public works projects, which in turn were based on the wages in local collective bargaining agreements, effectively forcing nonunion employers to pay what amounted to a union wage."). *Bragdon* held that the prevailing-wage ordinance before it was preempted because the ordinance made non-union contractors' wages

and benefits entirely dependent on their unionized competitors' collectively bargained rates, and thus "affect[ed] the bargaining process" in a way that typical wage mandates do not. *Bragdon*, 64 F.3d at 502; *Nunn*, 356 F.3d at 991. The Ordinance does nothing like this.

Finally, even if CGA's interpretation of Section 5.91.060 were required, and extreme applications of the Ordinance's prohibition were actually at hand, those applications could be severed from the remainder of the Ordinance. *See* A15 (§5.91.150) ("If any clause, sentence, paragraph, subdivision, section, subsection, or portion . . . , or the *application thereof* . . . 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*."); ER 9-10. The extreme applications of Section 5.91.060 that CGA fears would clearly be grammatically severable from the remainder of the Ordinance. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014). Indeed, no grammatical work would need to be done at all, since only an "application" of the Ordinance to a particular "circumstance" would be involved.

Applications of Section 5.91.060 that prevented CGA members from, for example, reducing "work opportunities" or denying promotions (were a court ever to interpret Section 5.91.060 to preclude these things) would also be functionally severable, as the remainder of the Ordinance (and non-preempted applications of

Section 5.91.060) would not be "rendered vague by their absence" and are not "inextricably connected to them by policy considerations." *Id*. at 576. Such applications would also be volitionally severable, since in the absence of these extreme applications, "'the remainder [of the statute] is complete in itself and would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute.'" *Ibid*. (internal citation omitted). This is clear both because the Ordinance contains a severability clause and because the City represents that it would have done so.

d. CGA's remaining *Machinists* arguments are baseless.

CGA's opening brief suggests that it will revisit two other meritless arguments for *Machinists* preemption that it made below.

CGA suggests that the Ordinance is *Machinists* preempted because it does not contain "opt-out provisions for [stores] covered by collective bargaining agreements[.]" AOB, at 19. Some employers have argued unsuccessfully that cities' *inclusion* of a collective-bargaining opt-out supported a *Machinists*-preemption claim. *See Am. Hotel & Lodging Ass'n*, 834 F.3d at 965 ("The Supreme Court has made clear, however, that the NLRA 'cast[s] no shadow on the validity of these familiar and narrowly drawn opt-out provisions.'") (quoting *Livadas v. Bradshaw,* 512 U.S. 107, 132 (1994)); *NBC v. Bradshaw,* 70 F.3d at 72. But employment laws are not *required* to include collective-bargaining opt-outs

that allow unionized employers and unions to waive workers' protections under otherwise applicable employment standards. *See Burnside*, 491 F.3d at 1068 ("In the *Machinists* line of cases, the Court has repeatedly repudiated the idea that the mere ability of unionized workers to bargain collectively somehow makes it permissible to give unionized employees fewer minimum labor-standards protections under state law than other employees."); *Metro. Life Ins.,* 471 U.S. at 755–56 (interpreting *Machinists* preemption to prevent unionized workers from benefitting from state substantive employment standards "would turn the policy that animated the Wagner Act on its head").

CGA has also suggested that the Ordinance should be held preempted because the Union supported its passage and the Ordinance was purportedly "designed" to benefit the Union's members. *See* ER 571-72, ¶¶16, 17. But "Congress did not intend for the NLRA's . . . preemptive scope to turn on state officials' subjective reasons for adopting a regulation or agreement." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1026 (9th Cir. 2010) (refusing to consider plaintiffs' argument that the community-college district had "ulterior motives" to "reward the unions"); *N. Ill. Chapter of Assoc. Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.").

CGA's *Machinists* arguments are unsustainable under Supreme Court and Ninth Circuit precedent.

2. The Ordinance does not violate State or Federal Equal Protection.

The district court also correctly decided that CGA had no likelihood of success on its argument that the Ordinance burdened CGA members' "fundamental right to be free of legislative interference in their existing contracts" and so was subject to strict scrutiny under the California and federal Equal Protection Clauses. *See* AOB, at 31. In fact, this argument is baseless and ignores decades of settled precedent. Social and economic legislation, including employment standards like the Ordinance, is subject to rational-basis review under the Equal Protection Clause. The Supreme Court long ago rejected the notion that employers have a fundamental right to be free of regulation that interferes with their employment contracts. *See West Coast Hotel Co. v. Parrish*, *supra*, 300 U.S. at 391–99 ("The Constitution does not speak of freedom of contract."); *see also Nebbia v. N.Y.*, 291 U.S. 502, 523 (1934) ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.").

Because the Ordinance's classifications are not subject to heightened scrutiny and CGA eschews any claim that the Ordinance does not pass rational-basis review, CGA's equal-protection claims fail.

a. CGA's proposed "fundamental right to contract freely" under the Equal Protection Clause ignores many decades of precedent.

Under the Contract Clause itself, a plaintiff who challenges the economic regulation of a private contract must demonstrate that the regulation lacks a reasonable basis, with "'courts properly defer[ing] to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves Grp., Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 412–13 (1983) (quoting *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977)); *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1099 (9th Cir. 2003) (noting "the substantial deference given to legislative judgment as to the necessity and reasonableness of economic statutes" regulating private contracts); *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991) ("[L]egislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test[.]").

The absurdity of CGA's constitutional theory is demonstrated by the fact that under it, the same economic regulation is subject to *strict scrutiny* under the Equal Protection Clause when a plaintiff asserts that the regulation merely "implicates the rights secured by the federal and state Contract Clauses." *See* AOB, at 32. In CGA's view, no litigant need ever again bother with the difficult task of meeting the Contract Clause's requirements of "substantial" contractual

impairment and the lack of a "legitimate public purpose" under a deferential standard of review. *Cf. Energy Reserves*, 459 U.S. at 411-12. They may simply reframe their complaint as an equal-protection challenge.

Indeed, although CGA's complaint contains causes of action under the federal and state Contract Clauses, ER 577-78, CGA made no effort to litigate these claims in its preliminary-injunction motion. Instead, it tried to alter the standard of review under the Contract Clause through the backdoor of the Equal Protection Clause, an approach the district court properly rejected. *See* ER 17 ("CGA does not assert a likelihood of success on its Contract Clause claims. Instead, CGA tries to shoehorn a Contract Clause analysis into its Equal Protection Clause analysis. By mashing the two analyses together, CGA distorts the Equal Protection Clause framework in an attempt to impose strict scrutiny on the Ordinance in the Contract Clause context.").

If CGA were correct, all federal and state legislation that mandated employment standards, and thus "implicated" regulated businesses' employment contracts, would face strict scrutiny. Businesses could avoid minimum-wage, overtime, and other workplace laws by contracting around them. *Cf. U.S. Trust Co.,* 431 U.S. at 22 ("If the law were otherwise, 'one would be able to obtain immunity from state regulation by making private contractual arrangements.'"). Indeed, any government regulation that implicated a company's existing contracts

would be subject to strict scrutiny. As an incredulous district-court judge hearing an identical challenge to a Seattle hazard-pay ordinance remarked: "Given the difficulty of surviving strict scrutiny review, elevating the Contracts Clause to a 'fundamental right' and subjecting any impingement thereupon to strict scrutiny would likely obliterate the ability of government to regulate *any* economic activity at all." *Nw. Grocery Ass'n*, *supra*, 2021 WL 1055994, at *6.

Fortunately, CGA's blunderbuss approach is not the law. CGA relies on a statement from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973), which it seems to believe held that any right "explicitly or implicitly guaranteed by the Constitution" is a "fundamental right" demanding strict scrutiny under the Equal Protection Clause. In fact, what the Court held in that case was that the right to education was *not* a fundamental right because there is no "right to education explicitly or implicitly guaranteed by the Constitution." *Id*.

The Court has never uncritically incorporated other constitutional guarantees into the Equal Protection Clause. In fact, the list of recognized "fundamental rights" under the Equal Protection Clause is quite short. *Cf. Roe v. Wade*, 410 U.S. 113 (1973) (strict scrutiny review accorded to right of a uniquely private nature); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment); *Skinner v. Oklahoma ex rel.*

Williamson, 316 U.S. 535 (1942) (right to procreate). The Court has declined to extend strict-scrutiny review expansively, recognizing that "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices[.]" *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

Specifically, the Court has never extended equal protection's fundamental-rights doctrine to economic interests protected in the Takings and Contract Clauses. Doing so would upend the carefully balanced economic, separation of powers, and regulatory considerations at stake under those Clauses.

In *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. 176, for example, Alabama increased a severance tax on oil extracted from state oil wells, but exempted one class of owners ("royalty owners") from the tax increase. It also prohibited covered well owners from passing the costs on to purchasers. The well owners claimed that this pass-through prohibition violated the Contract Clause because it impaired their existing purchase contracts. The Court rejected this claim, holding that Alabama was entitled to adopt a law "designed to advance 'a broad societal interest,' protecting consumers from excessive prices." *Id*. at 191 (internal citation omitted).

The Court then addressed the well owners' equal-protection claim, which alleged that the pass-through requirement and associated exemption of royalty

owners unconstitutionally discriminated against them. These laws unquestionably "implicated the Contract Clause." The Court recognized that the "pass-through prohibition . . . affects contractual obligations of which appellants were the beneficiaries," and the merits of the owners' Contract Clause challenge had proceeded all the way to the Supreme Court. But the Court did not recognize the well owners' rights as "fundamental": "Because neither of the challenged provisions adversely affects a fundamental interest or contains a classification based upon a suspect criterion, they need only be tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to regulation of economic and commercial matters." *Id*. at 195-96.

This Court has also rejected an attempt to avoid Contract Clause analysis by reframing the challenge as arising under the Fourteenth Amendment. *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1151 (9th Cir. 2004) (rejecting reliance on substantive due process arguments in Contract Clause challenge to municipal wage ordinance, noting that the Supreme Court's *Lochner*-era approach to contractual freedom "has been long superseded by its approach to the Contract Clause developed over the past three decades"); *see also Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 745 (7th Cir. 1987) (rejecting attempt to reformulate unmeritorious Contract Clause claim as Fourteenth Amendment

substantive due process violation, stating that "[t]he plaintiffs have brought their case in the wrong era"); *Gosnell v. City of Troy, Ill.*, 59 F.3d 654, 657 (7th Cir. 1995) (businesses alleging a deprivation of property due to municipal regulation "must make their arguments under the takings clause and the rational-basis component of equal protection analysis").

Rather, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993). Courts in this Circuit review minimum-wage regulations—including laws that target particular businesses, industries, and occupations—under the rational-basis test, because such laws do not implicate fundamental rights. *See, e.g.*, *Int'l Franch. Ass'n*, 803 F.3d at 407 (district court correctly applied rational-basis review to law requiring franchised employers to pay higher municipal minimum wage); *RUI One Corp.*, 371 F.3d at 1154 (applying rational-basis review to law requiring employers in city marina district to pay minimum wage); *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1061 (9th Cir. 2018) (rejecting equal-protection challenge to requirement that ready-mix companies pay prevailing wages under rational-basis review).

CGA also asks that the federal courts foist its novel interpretation of equal protection onto the California Constitution. AOB, at 41. But there is no California precedent endorsing CGA's view, and plenty of reason to doubt that California courts would ever adopt it. *See Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1124 (9th Cir. 2021) ("When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises.") (internal citation and quotation omitted).

For example, the California Supreme Court applied rational-basis review to a municipal law that required large grocery stores in the City of Los Angeles to rehire their predecessors' employees after an asset sale. *California Grocers Ass'n*, *supra*, 52 Cal. 4th at 187. The law mandated that such "hired employees may be discharged only for cause" during a transition period with the new employer, regardless of whether the employment contract was on an at-will basis. *Ibid*. Notwithstanding the fact that the ordinance "implicated" Contract Clause interests to the same extent as the Ordinance here, the California Supreme Court held that "because the Ordinance involves neither suspect classifications nor fundamental rights or interests it is subject only to 'rational basis' or 'rational relationship' review." *Id*. at 209. California courts review municipal employment legislation

that applies to particular industries under a rational-basis standard, just as Ninth Circuit courts do. *See, e.g., Garcia v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364, 383 (2010) (reviewing municipal service-charge protection measure that applied to large hotels under rational-basis standard).

Normally when a sophisticated litigant like CGA proposes to upend existing constitutional law, it makes some effort to wrestle with precedent and propose limiting principles. But CGA does not do so. Its equal-protection argument is not a serious one.

b. The Ordinance passes rational-basis review.

CGA argues exclusively that the Ordinance must meet heightened scrutiny and offers no argument that the Ordinance does not meet the rational-basis test. AOB, at 43-46. It has therefore waived any argument that the Ordinance is not rationally based. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.").

Even if it had not waived the issue, the Ordinance clearly meets that test. Under rational-basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Under rational-basis review, a statute bears "a strong presumption of validity," and plaintiffs bear the

burden "to negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 314–15 (citations omitted). "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313. Rather, this standard of review is a "paradigm of judicial restraint." *Id.* at 314.

The City determined that "[r]equiring grocery stores to provide premium pay to grocery workers compensates grocery workers for the risks of working during a pandemic." A6 (§5.91.005). It found that "[g]rocery store workers face magnified risks of catching or spreading the COVID-19 disease because the nature of their work involves close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease." *Ibid*. The City's conclusion that grocery workers face a particular risk of contracting COVID-19 is clearly rational. It is borne out by occupational epidemiologists and is Cal/OSHA's risk assessment. *See* ER 230-39.[9] Requiring employers to pay additional compensation for work that is particularly risky or arduous is both commonplace and legitimate. It is the basis, for example, of the statutory overtime

[9] *See* California Dept. of Industrial Relations, "Cal/OSHA Issues Citations to Grocery Stores for COVID-19 Violations," Release No. 2020-83 (Sept. 30, 2020) ("Grocery retail workers are on the front lines and face a higher risk of exposure to COVID-19," said Cal/OSHA Chief Doug Parker. "Employers in this industry must investigate possible causes of employee illness and put in place the necessary measures to protect their staff."), available at: https://www.dir.ca.gov/DIRNews/2020/2020-83.html.

wage premium. *See* Cal. Labor Code §510; *Industrial Welfare Comm. v. Superior Court*, 27 Cal.3d 690, 713 (1980) (overtime laws "impos[e] . . . a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered"); *see also* Cal. Labor Code §§858, 860 (finding that "[a]gricultural employees engage in back-breaking work every day" and mandating overtime premium pay for them).

The Ordinance also explains that the additional hazard pay will "better ensure the retention of these essential workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency." *Id.* The link between higher wages and employee retention is both rational and well-established,[10] and the City has a legitimate interest in reducing turnover in grocery stores patronized by the public, so that employees experienced in COVID-19 safety protocols remain on the job.[11]

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[10] *See, e.g.*, "Why Do Employees Stay? A Clear Career Path and Good Pay, for Starters," HARVARD BUSINESS REVIEW (March 6, 2017), available at: https://hbr.org/2017/03/why-do-employees-stay-a-clear-career-path-and-good-pay-for-starters; "How Higher Wages Can Increase Profits," WALL STREET JOURNAL (January 21, 2021), available at: http://www.wsj.com/articles/the-case-for-higher-wages-in-hard-times-11611241084.

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

CGA's primary arguments against the City's policy judgment are attempts at misdirection. For example, it argues that "[p]aying these workers an extra $4 an hour . . . will not protect anyone from the pandemic" because "[a]n employee making $26 an hour instead of $22 is just as likely to be infected[.]" AOB, at 43. But the Ordinance is not intended to prevent grocery workers from contracting COVID-19; it is intended *compensate* them for the risk of contracting it that comes from serving the public. *See* ER 18.

CGA also disputes the City's policy judgments, arguing that mandating additional pay does not promote employee retention but "will do just the opposite—raising costs to the extent that at least some stores are forced to raise prices or shut down, threatening to leave many workers without employment entirely." AOB, at 44. But even if CGA's view of labor economics were correct, "a state action need not *actually* further a legitimate interest; it is enough that the governing body '*could have rationally decided* that' the action would further that interest." *Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d at 1031 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)); *Beach Commc'ns.*, 508 U.S. at 313-14 ("Where there are plausible reasons for [legislative] action, our inquiry is at an end."); *cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) ("Whether the City of Goleta's economic theory for rent control is

sound or not . . . is not for us to decide. We are a court, not a tenure committee[.]").

CGA complains that the Ordinance violates Equal Protection because other large retailers and "other similarly-situated employees" are not also subject to it. AOB, at 45. But legislative line-drawing of this kind is "'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'" *RUI One Corp.*, 371 F.3d at 1155 (quoting *Beach Commc'ns*, 508 U.S. at 316). The City was not required to address every category of essential worker or none at all: "'[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *Beach Commn'ns*, 508 U.S. at 326 (quoting *Williamson v. Lee Optical of Ok., Inc.*, 348 U.S. 483, 489 (1955)). The City's focus on large grocery employers was rational, as these employers are more likely to be able to afford the mandated wage premium. *See Int'l Franchise Ass'n*, 803 F.3d at 407 ("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.").

Finally, CGA has argued that the Ordinance's "stated objectives are merely an attempt to impose a public policy rationale on interest-group driven legislation for labor unions and, in particular, for UFCW [Local] 324." ER 576, at ¶35. But

the Union has a First Amendment right to lobby for legislation that protects its members, just as the Association does. It is constitutionally objectionable to argue that the Union's involvement in the Ordinance's passage makes the law suspect under the Equal Protection Clause. In any case, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315; *RUI One Corp.*, 371 F.3d at 1155 (employer's argument that minimum-wage law's stated reasons "were not the real reasons" and that City "was instead motivated by a desire to help in [a] unionization campaign" was irrelevant).

B. CGA Has Not Demonstrated Any Irreparable Harm That Its Requested Injunction Would Remedy.

1. CGA's requested injunction would not forestall any alleged harm.

The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original); *ibid*. ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Furthermore, "[t]here must be a 'sufficient causal connection' between the alleged irreparable harm and the

activity to be enjoined" such as a "showing that 'the requested injunction would forestall' the irreparable harm[.]" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). Irreparable harm analysis is thus based on both the nature of the injury claimed and the scope of the relief sought.

The only "activity to be enjoined" in CGA's preliminary-injunction request is the City's enforcement of the Ordinance. SER 66-67; ER 578-79. CGA did not (and could not) seek injunctive relief against private parties enforcing the Ordinance. *See supra*, Part I.

CGA identifies four harms that it claims are irreparable: (1) "being subject to the application of an unconstitutional law" (AOB, at 46); (2) threats to the "short-term and long-term viability [of] many of the stores to which it applies" (AOB, at 48); (3) "irreparable harm associated with the Ordinance's interference with the labor negotiations conducted by some of CGA's members" (AOB, at 49); and (4) the risk of damages in private actions (AOB, at 49-50).

Even if these alleged harms qualified as irreparable, they would not be addressed at all, much less "forstall[ed]," by a preliminary injunction precluding the City from exercising its (non-existent) enforcement power. CGA's members would still be "subject to the application" of an ordinance that they claim is unconstitutional, and covered grocery employers could continue to enforce the Ordinance against them. Similarly, CGA's members would still face the same

alleged threats to the "short-term and long-term viability" of their stores as they would face without an injunction, only without the (non-existent) risk of City prosecution. The CGA member that is engaged in collective bargaining negotiations—Food 4 Less (ER 557)—would still experience the "interference" of its employees enjoying the Ordinance's premium pay while bargaining proceeded. And CGA members would not be free from the risk of damages in private actions because there would be no injunction against those actions being filed. A preliminary injunction motion is not a request for declaratory relief, and the injunction that CGA seeks would do nothing to address the "irreparable harms" that it claims. *See Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) ("While being forced into bankruptcy qualifies as a form of irreparable harm, Perfect 10 has not established that the requested injunction would forestall that fate.").

2. CGA did not demonstrate that its members face irreparable harm.

While this is enough to demonstrate that CGA has not met its burden under *Winter*'s irreparable-harm prong, CGA did not demonstrate a likelihood that its members, in fact, face irreparable harm from the Ordinance.

CGA first argues that its preemption and equal-protection claims are enough to satisfy the irreparable-harm prong. AOB, at 46-47. CGA's argument fails at the outset because CGA does not have a likelihood of success on the merits of these

claims. *See DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). But in any case, irreparable injury is not automatically presumed merely because a constitutional violation is alleged. *Ibid.* ("While a First Amendment claim 'certainly raises the specter' of irreparable harm and public interest considerations, proving the likelihood of such a claim is not enough to satisfy *Winter*."); *Klein v. City of San Clemente,* 584 F.3d 1196, 1207 (9th Cir. 2009) (even where the plaintiff was likely to succeed on the merits of his First Amendment claim, he "must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor"). Instead, a plaintiff must still establish the likelihood of irreparable harm absent a preliminary injunction, as well as the other *Winter* factors. *DISH Network*, 653 F.3d at 776.

It is true that for some forms of constitutional injury—such as First Amendment speech and religious freedoms, the right against discrimination based on protected categories, and unconstitutional detention in violation of due process—irreparable harm exists because the constitutional injury to personhood and dignity cannot be remedied through monetary damages. *See, e.g.*, *Nelson v. NASA,* 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."), *reversed on other grounds,* —— U.S. ——, 131 S.Ct.

746 (2011); *Elrod v. Burns*, 427 U.S. 347 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (irreparable harm established by the constitutional injury where plaintiffs were likely to prevail on their claim that police department had practice of discriminatorily stopping Latino motorists); *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (presuming irreparable harm where plaintiffs showed likelihood of success on claim of unconstitutional detention without bail hearings). But economic injuries that *are* compensable with monetary damages, such as the temporary $4 per hour in premium pay that the Ordinance imposes, are not transmuted into irreparable harm simply because they flow from a law that is alleged to be unconstitutional.

CGA relies largely on *American Trucking Association, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). AOB, at 46-47. But there, the plaintiff established a likelihood of success in showing that a municipal policy requiring drayage trucking companies to enter into concessions agreements with the Port of Los Angeles as a condition of continued Port operation was preempted. *Id*. at 1053. The Court found irreparable harm because the municipal policy required drayage companies to either enter into an unconstitutional agreement that severely limited their ability to operate, including by precluding them from hiring drivers as independent contractors, or refusing to do so and being barred from using the Port,

threatening the "carrier's whole drayage business." *Id*. at 1058. CGA does not allege any analogous harm.

CGA also claims that a temporary $4-per-hour wage premium "makes many of its [members'] locations unsustainable," that "following passage of the Ordinance, two grocery stores in Long Beach elected to close," and that "[i]f the Ordinance remains in place, other stores . . . may soon follow." AOB, at 48. While it is true that the forced closure of a business can constitute irreparable harm, CGA did not come close to demonstrating a likelihood that the Ordinance threatens CGA members with this fate.

CGA suggests that two stores in Long Beach closed as a result of the Ordinance's premium-wage mandate. AOB, at 48. In fact, a Regional CFO from Krogers declared that the two Ralphs stores that closed were already "underperforming stores" that "[had] been continuously operating at a loss." ER 57-58. Despite these "continuous losses," the CFO stated, Krogers had elected to keep the stores open, and extend their leases to April 2022, so that they "would continue to remain open for the public during the pandemic." ER. 58. After the Ordinance's passage, however, Krogers elected to close its two stores that had already been experiencing "continuous losses." ER 58. According to the CFO, Krogers did so for a number of reasons, including that the Ordinance "would have

pushed the two stores that were already underperforming further into the red." ER 58.

This is not evidence of irreparable harm. *Perfect 10, Inc.*, 653 F.3d at 981 (no irreparable harm from the threat of bankruptcy where plaintiff "has not alleged that it was ever in sound financial shape" and "acknowledges that the company 'los[t] money at the beginning' and has never made up that ground").

Nor is there any evidence that any other store faces an imminent threat of closure caused by the Ordinance's temporary $4 per hour wage premium. The only evidence that CGA submitted to support this claim was the declaration of the CFO of Northgate Gonzalez Markets. ER 74-75. That CFO presented evidence on three stores. In each case, the CFO made financial projections based on an assumption that "the Ordinance continues for all of 2021," despite the fact that the Ordinance, by its terms, is only in effect for four months. *See* ER 74, 75; *see also* ER 76 (stating that "we could not continue to operate stores with projected losses at the levels described above"). Two of the stores were already experiencing substantial net losses during 2020, long before the Ordinance passed, and so this evidence suffers from the same causation problem as the Kroger closures. ER 75 (stores experiencing annual net losses of $521,000 and $551,000 before the Ordinance). And even if the CFO's declaration could establish irreparable harm for the small, regional chain for which he works, it could not justify a blanket

injunction covering major national chains for which there is no evidence in the record of an Ordinance-related closure threat (and for which there *is* record evidence of substantial operating profits at the national level during the pandemic). *See* ER 240-261, ER 262-281, ER 297-327; *see also* ER 560 (noting that Krogers might respond to the Ordinance by "pass[ing] on the labor costs to its consumers through price increases"); *see also* SER 5-17 (amended complaint, filed nearly two months after the Ordinance's adoption, alleging no further store closures or threats of closure).

Next, CGA argues that the Ordinance "interfere[s] with labor negotiations conducted by some of CGA's members." AOB, at 49. In fact, CGA only submitted evidence that one of its members—Food 4 Less—is currently engaged in collective bargaining. AOB, at 49; ER 557. The "interference" that Krogers' labor relations official described was that Food 4 Less "no longer has the ability to reject UFCW's premium pay proposal." ER 559. But this is not a cognizable harm, for the same reason that a minimum labor standard's "undercut[ting] the employer's ability to withstand a union's demand" does not establish federal labor preemption: Krogers has no right to be free from state and local employment mandates. *Fort Halifax*, 482 U.S. at 20. In any case, the harm that the Krogers official alleges is monetary, and so is not irreparable.

The Krogers labor relations official concedes that as a unionized employer, "Food 4 Less does not have the unilateral right to adjust costs elsewhere in their operation that affect its unionized employees." ER 559. Federal labor law prohibits a unionized employer from making unilateral changes to terms and conditions of employment during post-expiration negotiations over a new collective bargaining agreement. 29 U.S.C. §158(a)(5); *NLRB v. Katz*, *supra*, 369 U.S. 736. So Krogers is already precluded, by operation of federal law, from "adjusting costs" elsewhere in its operations, regardless of the Ordinance's operation. The Ordinance does not require "fundamental business changes" (*i.e.*, not reducing other forms of compensation to fund the Ordinance's premium pay) that are not already dictated by federal labor law. *Cf.* AOB, at 49.

The labor relations official states that Food 4 Less is "precluded from bargain[ing] a reduction in costs elsewhere in their CBA" (ER 559), but even if this were an accurate description of the Ordinance's effect, which it is not, the declaration provides no detail on what proposals Food 4 Less was prepared to make to do so, at what stage the parties are in bargaining (for example, whether they are currently bargaining over economic proposals at all), or why, if it were concerned about its unreasonable interpretation of the Ordinance's effect, Food 4 Less could not simply wait until the Ordinance expires before concluding bargaining over the issue. There is no support in the sole declaration CGA

submitted that Food 4 Less and the Union are close to adopting a new collective bargaining agreement such that "[o]nce those agreements are reached, they cannot be undone." AOB, at 49. A single, conclusory line in a declaration expressing concern over allegedly not being able to "bargain a reduction in costs" does not establish irreparable harm, even if the theoretical underpinnings of CGA's theory were correct. *Am. Passage Media Corp. v. Cass Commc'ns, Inc.,* 750 F.2d 1470, 1473 (9th Cir.1985) (irreparable harm is not established by statements that "are conclusory and without sufficient support in facts").

Finally, CGA claims, without any citation to the record, that the City "suggested" that CGA members "ignore the Ordinance" and then argues that they cannot do so because of the Ordinance's private right of action. AOB, at 49. The City never made such a "suggestion" and the existence of a private right of action in an Ordinance is not evidence of irreparable harm. In any case, as explained above, CGA's requested injunction would not restrain covered grocery workers from exercising their right to bring private actions under the Ordinance.

C. The Remaining Factors Weigh Against an Injunction.

CGA's arguments on the balance of equities and public-interest prongs of the *Winter* test rely on its assertion that the Ordinance is preempted and unconstitutional. AOB, at 50-51. Because CGA has shown no likelihood of success on the merits, however, these arguments do not support injunctive relief.

CGA spins out speculative theories on public harms that are not supported by the record. It states that "grocery stores" cannot both comply with the Ordinance and "maintain[] the same level of investment in public health without either reducing operations or raising prices." AOB, at 51. But the "evidence" that CGA cites for this attempt to pit additional pay for its employees against public health—a consultant's report paid for by CGA—is not specific to any identifiable stores and says nothing about hazard-pay mandates leading to a reduction in public-safety measures by any Long Beach (or other) grocery store. *See* ER 94-102. CGA's consultant's report simply presents the standard policy argument that regulated businesses regularly make when opposing increased minimum wages: that they will lead either to increased prices or reduced employment, but never to lower profit margins, lower executive pay, or reduced return to shareholders. Indeed, the consultant's report does not consider that the Ordinance's temporary, additional cost may be absorbed by grocery-store owners or shareholders, or paid for out of reserves. *See* ER 97-98.

CGA makes other speculative claims about the Ordinance's impact, including that it will lead to the "potential creation of food deserts where [closed] stores used to serve local communities" and that it will result in "costs of hundreds of dollars a year for families least able to afford such additional expenses." (AOB, at 51). These claims are not supported by anything more than speculation.

In any case, the City of Long Beach already rejected these arguments in deciding to adopt the Ordinance's temporary premium-pay requirement. In assessing the public interest, the Court is constrained by that policy decision. *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126–27 (9th Cir. 2008) ("[O]ur consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal."); *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943) ("[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.").

On the other side of the equation, there is a strong public interest in avoiding democratically adopted laws being enjoined based on facial challenges at the pre-enforcement stage. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008) ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.").

Of course, the frontline grocery workers who have been on the job through the pandemic have a strong interest in seeing that their risks are compensated during the remaining month that the Ordinance is in effect. The public also has a

significant interest in those workers staying on the job, something that the mandated premium pay supports. But even if the injunction that CGA requests were granted—and the City were enjoined from enforcing the Ordinance during its last month—CGA members would still be obligated to follow the Ordinance's requirements, and individual grocery workers could file private actions in state court against CGA members that did not.

CGA's lawsuit and preliminary injunction request are, in the end, an attempt to litigate policy arguments that it has been losing in cities across California. The Court should uphold the district court's order.

CONCLUSION

For the foregoing reasons, the district court did not abuse its discretion in rejecting CGA's request for a preliminary injunction, and the Court should affirm that decision.

Dated: April 16, 2021

Respectfully submitted,

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