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CALIFORNIA GROCERS ASSOCIATION

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ORANGE

14 CALIFORNIA GROCERS ASSOCIATION,
15 a California non-profit organization,
16 Plaintiff,
17 v.
18 CITY OF IRVINE, a charter municipality
19 Defendant.

Case No.
**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

21 Plaintiff California Grocers Association (“Plaintiff” or “CGA”) brings this
22 action against Defendant City of Irvine (“Defendant” of “City”) and alleges as
23 follows in this Complaint for declaratory and injunctive relief:

24 **INTRODUCTION**

25 1. At the onset of the COVID-19 pandemic, the State of California
26 and various counties, cities, and other regulatory bodies throughout the state issued
27 a series of emergency orders and regulations in an effort to stem the spread of the
28

1 virus and protect the public health and welfare. These early efforts—aimed at
2 balancing the public’s basic economic and social needs with a desire to minimize
3 COVID morbidity and mortality—came at a steep price, especially for essential
4 businesses, and the millions of employees and members of the public who rely on
5 them.

6 2. California grocers have stayed open to serve their communities
7 since day one. They understand that defeating this pandemic requires extraordinary
8 measures and have eagerly committed themselves to the task. Since March of 2020,
9 California grocers of all sizes have established rigorous and science-driven safety
10 measures, often at great expense, to adapt to this new environment and ensure that
11 they operate in a safe and hygienic manner in order to help slow the spread of the
12 virus, and protect their workers and the public.

13 3. Grocers have implemented comprehensive safety measures for
14 customers and employees and compensated frontline grocery employees for their
15 extra efforts in a difficult environment. Grocers have provided “appreciation pay,”
16 “hero bonuses,” and “thank you pay” to reward their associates. Additionally, in
17 terms of employee support, grocers have offered COVID-19 testing to employees
18 and provided emergency leave and paid time off to those affected by the virus or
19 experiencing symptoms.

20 4. For worker safety, grocers have provided supplies to employees
21 including face masks and protective gear in addition to encouraging employees to
22 stay home if feeling ill and implementing paid leave policies. Plexiglas shields,
23 physical distancing measures, and contactless payment and delivery services have
24 been implemented to protect employees. Some of California’s largest grocers such
25 as Kroger and Albertsons joined the United Food and Commercial Workers
26 International union just last year to urge federal and state governments to designate
27 grocery store employees as emergency first responders.

1 **PARTIES**

2 10. Plaintiff California Grocers Association has served as the voice of
3 the state’s grocery community for over 120 years. As a nonprofit, statewide trade
4 association, CGA’s membership is comprised of over 300 retailers and
5 approximately 150 grocery supply companies. As part of its mission, CGA has
6 advocated on behalf of its member retailers on important policy issues.
7 Headquartered in Sacramento, California, CGA brings this action on behalf of its
8 members operating stores in the City of Irvine.

9 11. Defendant, City of Irvine, is and at all relevant times has been a
10 public entity duly organized and existing under and by virtue of the laws of the
11 State of California as a charter municipality.

12 **FACTUAL BACKGROUND**

13 12. California Grocers Association pursues this action on behalf of its
14 members who are grocery store employers (“Members”) because the employers
15 who operate grocery stores in Irvine will suffer a direct and adverse impact from
16 the application of the Ordinance, and thus would have standing to pursue these
17 claims in their own right. The policy and legal interest CGA seeks to protect is at
18 the core of Plaintiff’s mission, and the injunctive and declaratory relief sought does
19 not require the participation of individual members.

20 13. Several Members operate grocery stores in the City that employ
21 members of a specific labor union, United Commercial Food Workers International,
22 Local 324 (“UFCW 324”), and those employees are parties to collective bargaining
23 agreements that govern the terms of their employment, including wage scales.
24 Other Members operate grocery stores that do not employ unionized workers, but
25 those employees are free to organize and select a collective bargaining unit, should
26 they choose to do so.

27 14. Members have suffered or will continue to suffer economic and
28 non-economic harm as a result of the enactment of the Ordinance, and its

1 of economic forces. Laws subject to NLRA preemption include laws that interfere
2 with or attempt to regulate the economic tools available to labor or management
3 during the course of collective bargaining or that otherwise interfere with the
4 collective bargaining process, such as those that alter the parties' rights and
5 economic alternatives during collective bargaining, or the processes and procedures
6 utilized for union organizing.

7 24. Application of the Ordinance to the activities of the Irvine
8 Members unequivocally intrudes upon zones of activity in the areas of labor
9 relations, union organizing, and collective bargaining that is reserved under federal
10 labor law and policy to the free play of economic forces. The Ordinance establishes
11 premium pay standards that, by design or consequence, empower the UFCW or
12 other collective bargaining units to secure a wage rate they could not otherwise
13 have obtained from the employer at a unionized or non-union grocery store. This
14 undermines the collective bargaining process and disrupts the process of union
15 organizing.

16 25. While the City has the ability to enact ordinances to further the
17 health and safety of its citizens, the Ordinance here bears no relation to those goals.
18 Local minimum wage laws, for example, seek to lessen the burden on public
19 welfare services. This ordinance is not a minimum labor standard. It is a mandatory
20 hourly bonus for a specific group of workers, regardless of the wage negotiated in
21 the current collective bargaining agreements or other employment agreements.

22 26. The Ordinance is preempted by the NLRA as it regulates zones of
23 activity that Congress intentionally left to be controlled by the free play of
24 economic forces.

25 27. The City's application and enforcement of the Ordinance will cause
26 CGA's Members to suffer irreparable harm for which they have no adequate
27 remedy at law, even if the Ordinance is later declared by this Court to be void and
28

1 unenforceable. This claim is also brought pursuant to 42 U.S.C. §1983 and
2 §1988(b).

3 28. CGA is entitled to judgment declaring the Ordinance to be void and
4 unenforceable under the Supremacy Clause of the U.S. Constitution and equitable
5 and injunctive relief to prevent the City of Irvine or any other private enforcer from
6 attempting to enforce or give effect to the Ordinance.

7 **SECOND CAUSE OF ACTION**

8 **Declaratory and Injunctive Relief**

9 **(Equal Protection Clause of the United States Constitution)**

10 29. CGA incorporates herein by this reference the allegations contained
11 in Paragraphs 1 through 28, inclusive.

12 30. CGA hereby seeks declaratory, equitable and injunctive relief to
13 prevent the City from depriving Plaintiff's members of the protections afforded to
14 them under the Equal Protection Clause of the U.S. Constitution, which guarantee
15 each and all of them equal protection of the laws. (U.S. Const., Amend. XIV, § 1).
16 This claim is also brought pursuant to 42 U.S.C. §1983 and §1988(b).

17 31. The Equal Protection Clause requires that persons who are similarly
18 situated receive like treatment under the law, and that statutes may single out a class
19 for distinction only if that classification bears a rational relationship to the purpose
20 of the statute. As such, the City may not irrationally single out one class of
21 individuals for discriminatory treatment.

22 32. The Ordinance improperly singles out certain grocery store
23 businesses in Irvine for disparate treatment while not requiring the same treatment
24 of similarly situated businesses. More importantly, the ordinance implicates the
25 Members' fundamental right to be free from unreasonable governmental
26 interference with their contracts, specifically their collective bargaining agreements
27 and other employment agreements.
28

1 members existing contractual relationships that will cause them to suffer irreparable
2 harm for which they have no adequate remedy at law.

3 **FIFTH CAUSE OF ACTION**

4 **Declaratory and Injunctive Relief**

5 **(Contracts Clause of the California Constitution)**

6 44. CGA incorporate herein by this reference the allegations contained
7 in Paragraphs 1 through 43, inclusive. Plaintiffs hereby seek declaratory and
8 injunctive relief to prevent the City from violating, and continuing to violate, the
9 Contract Clause of the California Constitution, which provides in pertinent part
10 that: “A ... law impairing the obligation of contracts may not be passed.” (Cal.
11 Const., Art. I, § 9.)

12 45. Like the Federal Contracts Clause, the California Contracts Clause
13 also imposes limits upon the State of California, and its municipalities, to abridge
14 existing contractual relationships, even in the exercise of its otherwise legitimate
15 police power. For the same reasons set forth in Paragraphs 41 through 43 above,
16 application of the Ordinance to CGA’s members within the City constitutes a
17 substantial and unconstitutional impairment of those members existing contractual
18 relationship in violation of the California Contract Clause. Such application will
19 cause those members to suffer irreparable harm for which they have no adequate
20 remedy at law.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff prays for the following relief:

23 1. On the first cause of action, a judgment declaring that the
24 Ordinance, as well as any act taken in furtherance of the Ordinance by any person,
25 is preempted by the National Labor Relations Act, and its implementing regulations
26 and guidance, and are therefore void and unenforceable, and entering a preliminary
27 and permanent injunction enjoining the City from enforcing or taking any action
28 under the Ordinance;

1 2. On the second and third causes of action, enter a judgment declaring
2 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
3 person, violate state and federal equal protection guarantees, and are therefore void
4 and invalid, and entering a preliminary and permanent injunction enjoining the City
5 from enforcing or taking any action under the Ordinance;

6 3. On the fourth and fifth causes of action, enter a judgment declaring
7 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
8 person, violate the contracts clauses of the state and federal constitution, and are
9 therefore void and invalid, and entering a preliminary and permanent injunction
10 enjoining the City from enforcing or taking any action under the Ordinance;

11 4. For an award of attorneys' fees and costs of suit herein pursuant to
12 California Code of Civil Procedure § 1021.5, 42 U.S.C. §1988, or any other
13 applicable law; and

14 5. For such other and further relief as the Court may deem just and
15 proper.

16 Dated: March 16, 2021

MORRISON & FOERSTER LLP



18 By: _____
19 William F. Tarantino

20 Attorneys for Plaintiff
21 CALIFORNIA GROCERS
22 ASSOCIATION

Exhibit A

CITY COUNCIL ORDINANCE NO. 21-XX

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF IRVINE, CALIFORNIA, ESTABLISHING
PREMIUM PAY FOR GROCERY WORKERS

WHEREAS, the City of Irvine is a charter city organized pursuant to Article XI of the California Constitution and pursuant to the authority so granted, the City has the power to make and enforce within its limits all ordinances and regulations with respect to municipal affairs not in conflict with its own charter. Such powers include, without limitation, the ability to adopt regulations pertaining generally to the protection and promotion of the public health, safety, and welfare; and

WHEREAS, on March 17, 2020, the City Manager, acting as the Director of Emergency Services, issued a Proclamation of the Existence of a Local Emergency that was ratified by the City Council on March 24, 2020; and

WHEREAS, on March 19, 2020, California Governor Gavin Newsom issued a “Stay Home - Stay Healthy” proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes. In addition to healthcare, public health and emergency services, the “Stay Home - Stay Healthy” proclamation identified grocery stores as essential business sectors critical to protecting the health and well-being of all Californians and designated their workers as essential critical infrastructure workers; and

WHEREAS, as of February 1, 2021, there have been over 435,000 deaths due to COVID-19 across the country, including 50 in Irvine; and

WHEREAS, the COVID-19 virus has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, grocery and drug retail workers face increased exposure risk due to inability to consistently practice physical distancing in the workplace, with researchers in Massachusetts reporting that employees with direct customer exposure were five times more likely to test positive for the COVID-19 virus than those employees without such exposure; and

WHEREAS, frontline grocery and drug retail workers have been unable to work from home, including those with children engaged in distance learning, and have therefore likely incurred additional childcare expenses; and

WHEREAS, according to United Food and Commercial Workers Local 324, as of February 2, 2021, 83 Irvine retail (drug and grocery) workers are confirmed to have COVID-19, and one retail (drug and grocery) worker has died; which numbers do not account for non-union grocery and drug retail workers; and

WHEREAS, Orange County is currently vaccinating people in Tier 1A, frontline grocery and drug retail workers are listed in Tier 2 for Orange County's COVID-19 vaccination plan, and distribution to people in Tier 2 is not anticipated to be completed in Orange County until Spring 2021; and

WHEREAS, during the early stages of the COVID-19 pandemic, many grocery companies provided "Hero Pay," which was generally implemented as either a temporary hourly wage increase or a one-time bonus for certain essential workers; and

WHEREAS, Hero Pay has generally phased out or terminated; however, according to the Brookings Institute, the top retail companies earned on average an extra \$16.7 billion in profit in 2020 compared to 2019; and

WHEREAS, premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress; and

WHEREAS, grocery and drug retail workers working during the COVID-19 pandemic merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to the COVID-19 virus. Grocery and drug retail 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; and

WHEREAS, the availability of grocery and drug retail stores is fundamental to the health of the community and is made possible during the COVID-19 emergency because grocery and drug retail workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by working in hazardous situations; and

WHEREAS, establishing an immediate requirement for grocery and drug retail stores to provide premium pay to grocery and drug retail workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery and drug retail 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 pandemic; and

WHEREAS, the City Council has carefully reviewed and considered all of the evidence, including the staff report and public comments presented; and

WHEREAS, this Ordinance is exempt from the requirements of the California Environmental Quality Act (“CEQA”) pursuant to State CEQA Guidelines, as it is not a “project” and has no potential to result in a direct or reasonably foreseeable indirect physical change to the environment because it is merely the formation of an organization. (14 Cal. Code Regs. § 15378(a).) Further, this Ordinance is exempt from CEQA because there is no possibility that this Ordinance or its implementation would have a significant negative effect on the environment. (14 Cal. Code Regs. § 15061(b)(3).) The City Clerk shall cause a Notice of Exemption to be filed as authorized by CEQA and the State CEQA Guidelines.

NOW, THEREFORE, the City Council of the City of Irvine DOES HEREBY ORDAIN as follows:

SECTION 1. FINDINGS. That the findings and determinations reflected in the Recitals above are true and correct, and are incorporated herein by this reference.

SECTION 2. ADOPTION OF PREMIUM PAY FOR GROCERY WORKERS.

A. DEFINITIONS.

For purposes of this Ordinance, the following definitions apply.

1. “Adverse action” means reducing compensation, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, placing on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a grocery worker. “Adverse action” may involve any aspect of employment, including pay, work hours, responsibilities, or other material change in the terms and condition of employment.
2. “Aggrieved party” means a grocery worker or other person who suffers tangible or intangible harm due to a covered employer or other person's violation of this Ordinance.
3. “Base wage rate” means the regular hourly wage rate paid to a grocery worker.
4. “City” means the City of Irvine.
5. “Grocery worker” means an individual who performs at least two (2) hours of work in a calendar week for a covered employer within the City of Irvine, but does not include managerial, supervisory, or confidential employees of a covered employer.

6. “Covered employer” means any retail establishment, as defined herein, that is located in the City of Irvine, employs at least 15 employees at the retail establishment, and whose owner, parent company, franchisor or network of franchises employs three hundred (300) or more employees nationally. For purposes of this definition, all employees who worked for compensation shall be counted, including but not limited to (a) employees who are not covered by this Ordinance; and (b) employees who worked in full-time employment, part-time employment, joint employment, temporary employment, or through the services of a temporary services or staffing agency.

7. “Hour worked” means the time during which a grocery worker is subject to the control of a covered employer, including any time that the employee is suffered or permitted to work or on-call.

8. “Person” means any individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

9. “Premium pay” means an additional \$4.00 per hour wage premium for each hour worked that is in addition to a grocery worker’s base pay rate and any commissions, gratuities, bonuses or any other form of regular or premium pay that is owed to the grocery worker, including but not limited to any holiday, overtime, or vacation pay.

10. “Retail establishment” means a retail establishment located in the City of Irvine that:

a. (i) devotes seventy percent (70%) or more of its sales floor area to retailing a general range of food products, which may be fresh or packaged, or (ii) receives seventy percent (70%) or more revenue from retailing a general range of food products;

b. is more than 85,000 square feet and devotes 10% or more of its sales floor area to the sale of merchandise that is non-taxable pursuant to Section 6359 of the Revenue and Taxation Code, including retail establishments with multiple tenants, so long as consumer goods and nontaxable items are sold under the same roof with shared checkout stands, entrances, and exits; or

c. is retail pharmacy that sells a variety of prescription and nonprescription medicines, as well as any combination of miscellaneous items, including but not limited to sundries, dry foods, packaged foods, beverages, fresh produce, meats, deli products, dairy products, canned foods, or prepared foods.

B. PREMIUM PAY REQUIREMENT.

1. Each covered employer shall pay each grocery worker premium pay consisting of an additional four dollars (\$4.00) per hour for each hour worked.
2. Covered employers shall provide the pay required for a minimum of one hundred twenty (120) days from the effective date of this Ordinance.

C. GROCERY WORKER PROTECTIONS.

1. It shall be unlawful for a covered employer to fund the premium pay required under this Ordinance by reducing the base wage rate, overtime, holiday or other premium pay rate, hours of work, vacation, pension contributions, or other non-wage benefits of any grocery worker, or by increasing charges to any grocery worker for parking, uniforms, meals, or other work-related materials or equipment.
2. A covered employer violates the prohibition if a motivating factor in the covered employer's decision to take any adverse actions, unless the covered employer proves that it would have taken the same action at the time that it did irrespective of the Ordinance's operation.

D. NOTICE OF RIGHTS.

1. Each covered employer shall provide grocery workers with a written notice of rights established by this Ordinance in a form published by City. The notice of rights shall be in a form and manner sufficient to inform grocery workers of their rights under this Ordinance. The notice of rights shall provide information on:
 - a. The right to premium pay guaranteed by this Ordinance;
 - b. The right to be protected from retaliation for exercising in good faith the rights protected by this Ordinance; and
 - c. The right to bring a civil action for a violation of the requirements of this Ordinance, including a covered employer's denial of premium pay as required by this Ordinance and a covered employer's or other person's retaliation against a grocery worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this Ordinance.

2. Covered employers shall post the notice of rights required in a conspicuous location, and in an electronic format that is readily accessible to the grocery workers, including smartphone application or online web portal. The notice shall be in English, Spanish, and any other primary language spoken by at least 10% of the covered employer's retail establishment.

E. RECORD KEEPING.

1. Covered employers shall retain records that document compliance with this Ordinance, including payroll records listing the premium pay required by this Ordinance as a separate item, for a period of two years.

2. If a covered employer fails to retain adequate records required, there shall be a presumption, rebuttable by clear and convincing evidence, that the covered employer violated this Ordinance for each grocery worker for whom records were not retained.

F. RETALIATION PROHIBITED.

No covered employer shall discharge, reduce in compensation, or take any other adverse action against a grocery worker for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to exercise their rights under this Ordinance, or for otherwise asserting rights under this Ordinance. The protections of this Ordinance shall apply to any grocery worker who mistakenly, but in good faith, alleges non-compliance with this Ordinance.

G. VIOLATION.

The failure of any person to comply with any requirement imposed on it under this Ordinance is a violation.

H. CIVIL ENFORCEMENT AND REMEDIES.

1. The remedies provided for in this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, damages, penalties, fines, or relief.

2. Any grocery worker aggrieved by a violation of this Ordinance may bring a civil action in a court of competent jurisdiction against the covered employer or other person violating this Ordinance and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any unpaid compensation due under this

Ordinance plus interest, back pay, reinstatement, front pay in lieu of reinstatement, and rescission.

3. In addition to any other remedies set forth in this Ordinance, a person that acts with malice, fraud, or oppression in violating a grocery worker's rights shall be liable for exemplary damages in the amount of two times the monetary damages suffered by the aggrieved grocery worker.

I. ENCOURAGEMENT OF MORE GENEROUS POLICIES.

1. Nothing in this Ordinance shall be construed to discourage or prohibit a covered employer from the adoption or retention of premium pay policies more generous than the one required herein.

2. Nothing in this Ordinance shall be construed as diminishing the obligation of a covered employer to comply with any contract or other agreement providing more generous protections to a grocery worker than those required by this Ordinance.

SECTION 3. MINIMUM REQUIREMENTS. This Ordinance provides minimum requirements for premium pay while working for a covered employer and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for premium pay, or that extends other protections to grocery workers. Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nothing in this Ordinance shall be construed as restricting a grocery worker's right to pursue any other remedies at law or equity for violation of their rights.

SECTION 4. SEVERABILITY. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held for any reason to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance and each section, subsection, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 5. URGENCY. The adoption of this Ordinance as an urgency ordinance is necessary for the immediate preservation of the public peace, health, or safety. In accordance with California Government Code section 36937(b), and in order to protect the public peace, health, or safety, the City Council finds and determines there is an urgent need to adopt the provisions of this Ordinance in order to reduce or eliminate the current and immediate threats related to the COVID-19 virus and pandemic, as set forth in the Recitals.

SECTION 6. CERTIFICATION AND PUBLICATION. The City Clerk shall certify to the passage of this Ordinance and this Ordinance shall be published as required by law and shall take effect as provided by law.

SECTION 7. EFFECTIVE DATE. This Ordinance, as an urgency ordinance for the immediate preservation of the public peace, health, or safety, shall take effect immediately upon its passage and adoption by not less than a four-fifths vote pursuant to California Government Code Section 36937(b).

PASSED AND ADOPTED by the City Council of the City of Irvine at a regular meeting held on the ____ day of _____, 2021.

MAYOR OF THE CITY OF IRVINE

ATTEST:

INTERIM CITY CLERK OF THE CITY OF IRVINE

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS
CITY OF IRVINE)

I, CARL PETERSEN, Interim City Clerk of the City of Irvine, HEREBY DO CERTIFY that the foregoing ordinance was duly adopted at a regular meeting of the City Council of the City of Irvine held on the ___ day of _____, 2021, and becomes effective immediately.

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:
ABSTAIN: COUNCILMEMBERS:

INTERIM CITY CLERK OF THE CITY OF IRVINE