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CALIFORNIA GROCERS ASSOCIATION

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 CALIFORNIA GROCERS ASSOCIATION,
a California non-profit organization,

17 Plaintiff,

18 v.

19 CITY OF SAN JOSE, a charter
20 municipality,

21 Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

22
23
24 Plaintiff California Grocers Association (“Plaintiff” or “CGA”) brings this
25 action against Defendant San Jose (“Defendant” or “City”) and alleges as follows in
26 this Complaint for declaratory and injunctive relief:
27
28

INTRODUCTION

1
2 1. At the onset of the COVID-19 pandemic, the State of California
3 and various counties, cities, and other regulatory bodies throughout the state issued
4 a series of emergency orders and regulations in an effort to stem the spread of the
5 virus and protect the public health and welfare. These early efforts—aimed at
6 balancing the public’s basic economic and social needs with a desire to minimize
7 COVID morbidity and mortality—came at a steep price, especially for essential
8 businesses, and the millions of employees and members of the public who rely on
9 them.

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

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

24 4. For worker safety, grocers have provided supplies to employees
25 including face masks and protective gear in addition to encouraging employees to
26 stay home if feeling ill and implementing paid leave policies. Plexiglas shields,
27 physical distancing measures, and contactless payment and delivery services have
28 been implemented to protect employees. Some of California’s largest grocers such

1 as Kroger and Albertsons joined the United Food and Commercial Workers
2 International Union just last year to urge federal and state governments to designate
3 grocery store employees as emergency first responders.

4 5. Yet on February 23, 2021, the City adopted the “Grocery Store
5 Employee Hazard Premium Pay Ordinance” (“Ordinance”) which requires
6 employers, starting thirty (30) days after the adoption of the Ordinance, to pay a \$3
7 per hour premium on whatever the employees existing wage is at the time of
8 enactment, regardless of any existing bonus or incentive program that the employer
9 may have in place.

10 6. The Ordinance unreasonably singles out specific grocers, while
11 ignoring employers or essential frontline workers outside the grocery industry.
12 Plaintiff seeks a declaration that the law is invalid and unconstitutional as applied to
13 CGA’s Members, and an injunction halting any action to enforce the Ordinance as
14 to CGA’s Members on the grounds that it (1) is preempted by federal law
15 regulating collective bargaining and unfair labor practices; (2) violates the equal
16 protection and contracts clauses of the U.S. and California constitutions.

17 **JURISDICTION AND VENUE**

18 7. This Court has jurisdiction over the subject matter of this suit
19 pursuant to 28 U.S.C. §1331, as the Plaintiffs’ claims arise under federal laws;
20 namely, the National Labor Relations Act, 29 U.S.C. §141 *et seq.*; Article VI of the
21 U.S. Constitution which designates the Constitution and Laws of the United States
22 as the supreme law of the land; and the equal protection clause and contracts clause
23 of the U.S. Constitution.

24 8. This Court has supplemental jurisdiction over this subject matter
25 pursuant to 28 U.S.C. §1367(a), as the Plaintiffs’ claims arising under the
26 California Constitution are so closely related to the federal question claims that they
27 form part of the same case or controversy under Article III of the U.S. Constitution.

28 9. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b), as

1 this Court is sited in the federal judicial district where the events giving rise to the
2 CGA's claims have occurred, are now occurring, and will occur in the future if not
3 prevented through actions of this Court. CGA's members are situated in this district
4 and are and will continue to be adversely affected by the irreparable harms sought
5 to be remedied and prevented by this Court's action upon this Complaint.

6 **PARTIES**

7 10. Plaintiff California Grocers Association has served as the voice of
8 the state's grocery community for over 120 years. As a nonprofit, statewide trade
9 association, CGA's membership is comprised of over 300 retailers and
10 approximately 150 grocery supply companies. As part of its mission, CGA has
11 advocated on behalf of its member retailers on important policy issues.

12 Headquartered in Sacramento, California, CGA brings this action on behalf of its
13 members operating stores in the City of San Jose.

14 11. Defendant, San Jose, is and at all relevant times has been a public
15 entity duly organized and existing under and by virtue of the laws of the State of
16 California as a charter municipality.

17 **FACTUAL BACKGROUND**

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

25 13. Several Members operate grocery stores in the City that employ
26 members of a specific labor union, United Food and Commercial Workers
27 International, Local 5 ("UFCW 5"), and those employees are parties to collective
28 bargaining agreements that govern the terms of their employment, including wage

1 scales. Other Members operate grocery stores that do not employ unionized
2 workers, but those employees are free to organize and select a collective bargaining
3 unit, should they choose to do so.

4 14. Members have suffered or will continue to suffer economic and
5 non-economic harm as a result of the enactment of the Ordinance, and its
6 foreseeable consequences on union organizing, ongoing collective bargaining, and
7 labor relations for both unionized and non-union grocery stores in the City of San
8 Jose. Members are required to alter the wage scales and other terms of their existing
9 collective bargaining agreements, regardless of any bonuses, or other non-monetary
10 compensation provided to their employees to ease the burden of the COVID-19
11 pandemic.

12 15. By design, the Ordinance picks winners and losers. It singles out
13 large grocery companies with unionized workforces (i.e., UFCW 5's members)
14 without providing any reasonable justification for the exclusion of other employers
15 or frontline retail workers. The Ordinance arbitrarily and improperly targets certain
16 grocery store businesses in San Jose for disparate treatment while not requiring the
17 same commitments from similarly situated businesses, or conferring *any* benefits
18 on similarly situated employees. There is no support for any of the City's
19 statements that the Hazard Premium Pay will protect public health, address
20 economic insecurity, and promote job retention.

21 THE ORDINANCE

22 16. The Grocery Store Employee Hazard Premium Pay Ordinance, also
23 known as Ordinance No. 30534, is attached hereto as **Exhibit A**. It applies only to
24 grocery stores employing over three hundred (300) or more employees nationwide,
25 regardless of where those employees are employed. Section 5.C.1. Grocery Store
26 is defined as “a retail store in the City that sells household foodstuffs for offsite
27 consumption, with at least ten percent (10%) of its sales floor area dedicated to sale
28 of non-taxable merchandise[.]” Section 5.C.M.

1 preempted by the NLRA. *See Machinists v. Wisconsin Employment Relations*
2 *Comm'n*, 427 U.S. 132 (1976).

3 23. In particular, the NLRA preempts any and all state and local
4 enactments that, by design or consequence, regulate or interfere with the then-
5 existing balance of economic power between labor and management with respect to
6 zones of activity that, under federal labor law, are intended to be left to the free play
7 of economic forces. Laws subject to NLRA preemption include laws that interfere
8 with or attempt to regulate the economic tools available to labor or management
9 during the course of collective bargaining or that otherwise interfere with the
10 collective bargaining process, such as those that alter the parties' rights and
11 economic alternatives during collective bargaining, or the processes and procedures
12 utilized for union organizing.

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

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

28 26. The Ordinance is preempted by the NLRA as it regulates zones of

1 activity that Congress intentionally left to be controlled by the free play of
2 economic forces.

3 27. The City's application and enforcement of the Ordinance will cause
4 CGA's Members to suffer irreparable harm for which they have no adequate
5 remedy at law, even if the Ordinance is later declared by this Court to be void and
6 unenforceable. This claim is also brought pursuant to 42 U.S.C. §1983 and
7 §1988(b).

8 28. CGA is entitled to judgment declaring the Ordinance to be void and
9 unenforceable under the Supremacy Clause of the U.S. Constitution and equitable
10 and injunctive relief to prevent San Jose or any other private enforcer from
11 attempting to enforce or give effect to the Ordinance.

12 **SECOND CAUSE OF ACTION**

13 **Declaratory and Injunctive Relief**

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

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

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

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

27 32. The Ordinance improperly singles out certain grocery store
28 businesses in San Jose for disparate treatment while not requiring the same

1 treatment of similarly situated businesses. More importantly, the ordinance
2 implicates the Members' fundamental right to be free from unreasonable
3 governmental interference with their contracts, specifically their collective
4 bargaining agreements and other employment agreements.

5 33. The stated purpose of the Ordinance, namely, to protect public
6 health, address economic insecurity, and promote job retention during the COVID-
7 19 emergency by requiring grocery stores to provide hazard premium pay is not
8 rationally related to the discriminatory treatment of CGA's Members. No
9 significant and legitimate public purpose exists for the Ordinance. The City's
10 stated objectives are merely an attempt to impose a public policy rationale on
11 interest-group driven legislation for labor unions and, in particular, for UFCW 5.

12 34. By virtue of the foregoing, application of the Ordinance to the
13 CGA's Members within the City violates the equal protection guarantees of the
14 U.S. Constitution.

15 35. The City's application and enforcement of the Ordinance will cause
16 Plaintiff's members to suffer irreparable harm for which they have no adequate
17 remedy at law, even if the Ordinance is later declared by this Court to be void and
18 unenforceable.

19 **THIRD CAUSE OF ACTION**

20 **Declaratory and Injunctive Relief**

21 **(Equal Protection Clause of the California Constitution)**

22 36. CGA incorporates herein by this reference the allegations contained
23 in Paragraphs 1 through 35, inclusive.

24 37. CGA hereby seeks declaratory, equitable and injunctive relief to
25 prevent the City from depriving CGA's members of the protections afforded to
26 them under the Equal Protection Clause of the California Constitution, which like
27 the U.S. Constitution, guarantees each and all of them equal protection of the laws.
28 (Cal. Const., Art. I § 7.)

1 38. For the same reasons set forth in Paragraphs 29 through 35 above,
2 the Ordinance violates the Equal Protection Clause of the California. Such
3 application will cause CGA’s Members to suffer irreparable harm for which they
4 have no adequate remedy at law.

5 **FOURTH CAUSE OF ACTION**

6 **For Declaratory and Injunctive Relief**

7 **(Contracts Clause of the U.S. Constitution)**

8 39. CGA incorporates herein by this reference the allegations contained
9 in Paragraphs 1 through 38, inclusive.

10 40. CGA hereby seeks declaratory, equitable and injunctive relief to
11 prevent the City from depriving CGA’s Members of the protections afforded to
12 them under the Contracts Clause of the U.S. Constitution, which provides in
13 pertinent part that: “No State shall . . . pass any . . . Law impairing the Obligation of
14 Contracts” (U.S. Const., Art. I, § 10, cl. 1). The Contract Clause imposes
15 limits upon the power of a State, and Municipalities operating under the color of
16 State law, to abridge existing contractual relationships, even in the exercise of its
17 otherwise legitimate police power.

18 41. The Ordinance substantially interferes with Members’ contracts,
19 including its collective bargaining agreements with its employees, without any
20 significant or legitimate public purpose. The City’s stated objectives are to protect
21 public health, address economic insecurity, and promote job retention. None of
22 these justifications support this measure, because the City’s stated objectives are
23 merely an attempt to impose a public policy rationale on interest-group driven
24 legislation for labor unions and, in particular, for UFCW.

25 42. Even if the City could show a significant and legitimate public
26 purpose behind the regulation, the substantial impairment to the Members’
27 contractual rights and obligations (i.e., the terms of the Members’ existing
28 collective bargaining agreements) are neither reasonable nor necessary to fulfill any

1 such public purpose.

2 43. By virtue of the foregoing, application of the Ordinance to CGA's
3 members constitutes a substantial and unconstitutional impairment of those
4 members existing contractual relationships that will cause them to suffer irreparable
5 harm for which they have no adequate remedy at law.

6 **FIFTH CAUSE OF ACTION**

7 **Declaratory and Injunctive Relief**

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

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

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

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays for the following relief:

26 1. On the first cause of action, a judgment declaring that the
27 Ordinance, as well as any act taken in furtherance of the Ordinance by any person,
28 is preempted by the National Labor Relations Act, and its implementing regulations

1 and guidance, and are therefore void and unenforceable, and entering a preliminary
2 and permanent injunction enjoining the City from enforcing or taking any action
3 under the Ordinance;

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

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

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

17 5. For such other and further relief as the Court may deem just and
18 proper.

19
20 Dated: March 12, 2021

MORRISON & FOERSTER LLP

21
22
23 By: /s/ William F. Tarantino
William F. Tarantino

24 Attorneys for Plaintiff
25 CALIFORNIA GROCERS
26 ASSOCIATION
27
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