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Via Email

The Honorable Mark Addiego
City Council
400 Grand Ave.
South San Francisco, California 94080

Re: Hazard Pay for Grocery Workers Ordinance

Dear Council Members:

We write on behalf of our client, the California Grocers Association (the "CGA"), regarding the proposed Urgency Ordinance amending Title 8 of the South San Francisco Municipal Code to add Chapter 8.77 "COVID-19 Hazard Pay" to require large grocery stores in the City to pay employees an additional four dollars ($4.00) per hour in hazard pay during the coronavirus (COVID-19) pandemic (the "Ordinance"), that singles out an specific group of grocery stores (i.e., those over 15,000 square feet operated by companies with 500+ employees) and requires them to implement mandatory pay increases. The City Council's rushed consideration of this Ordinance would, if passed, lead to the enactment of an unlawful, interest-group driven ordinance that ignores large groups of essential retail workers. It will compel employers to spend less on worker and public health protections in order to avoid losses that could lead to closures. In addition, the Ordinance, in its proposed form, interferes with the collective-bargaining process protected by the National Labor Relations Act (the "NLRA"), and unduly targets certain grocers in violation of their constitutional equal protection rights. We respectfully request that the City Council reject the Ordinance as these defects are incurable.

The Ordinance fails to address any issue affecting frontline workers' health and safety.
The purpose of the Ordinance is purportedly the "preservation of the public peace, health or safety" during the Covid-19 pandemic. (Ordinance, § 2.) The Ordinance is devoid of any requirements related to the health and safety of frontline workers or the general public and instead imposes costly burdens on certain grocers by requiring them to provide an additional "four dollars ($4.00) per hour for all hours worked at a Large Grocery Store" ("Premium Pay"). (§§ 8.77.040.A). A wage increase does not play any role in mitigating the risks of exposure to COVID-19, nor is there any suggestion that there is any risk of interruption to the food supply absent an increase in wages. If anything, the Ordinance could increase those

risks, as it may divert funds that otherwise would have been available for grocers to continue their investments in public health measures recognized to be effective: enhancing sanitation and cleaning protocols, limiting store capacity, expanding online orders and curbside pickup service, and increasing spacing and social distancing requirements.

The Ordinance also inexplicably chooses winners and losers among frontline workers in mandating Premium Pay. The Ordinance defines "Large Grocery Store" as a "retail or wholesale store that is over 15,000 square feet in size, that is located within the geographic limits of the City, and that sells primarily household foodstuffs for offsite consumption." (§ 8.77.030.L.) Other retail and health care workers are ignored, despite the fact that those same workers have been reporting to work since March. The Ordinance grants Premium Pay for select, employees of the large grocers while ignoring frontline employees of larger, generic retailers that also sell a substantial amount of groceries, and other frontline workers in South San Francisco that face identical, if not greater, risks.

The Ordinance is unlawful. By mandating Premium Pay, the Ordinance would improperly insert the City of South San Francisco into the middle of the collective bargaining process protected by the National Labor Relations Act. The Ordinance suggests that the certain grocery workers require this "relief" on an emergency basis, as "grocery workers-should they and members of their family become infected-risk being unable to work and earn an income, and an inability to pay for housing, childcare and healthcare costs." (Recitals; *see also* §2). South San Francisco employers and workers in many industries have been faced with these issues since March 2020. They are in no way "immediate." More importantly, grocers have continued to operate, providing food and household items to protect public health and safety. In light of the widespread decrease in economic activity, there is also no reason to believe that grocery workers are at any particular risk of leaving their jobs, but even if there were such a risk, grocers would have every incentive to increase the workers' compensation or otherwise bargain with them to improve retention. The Ordinance would interfere with this process that Congress intended to be left to be controlled by the free-play of economic forces. *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Such ordinances have been found to be preempted by the NLRA.

For example, in *Chamber of Commerce of U.S. v. Bragdon*, the Ninth Circuit Court of Appeals held as preempted an ordinance mandating employers to pay a predetermined wage scale to employees on certain private industrial construction projects. 64 F.3d 497 (9th Cir. 1995). The ordinance's purported goals included "promot[ing] safety and higher quality of construction in large industrial projects" and "maintain[ing] and improv[ing] the standard of living of construction workers, and thereby improv[ing] the economy as a whole." *Id.* at 503. The Ninth Circuit recognized that this ordinance "differ[ed] from the [a locality's] usual exercise of police power, which normally seeks to assure that a minimum wage is paid to all employees within the county to avoid unduly imposing on public services such as

welfare or health services." *Id.* at 503. Instead, the ordinance was an "economic weapon" meant to influence the terms of the employers' and their workers' contract. *Id.* at 501-04. The Ninth Circuit explained that the ordinance would "redirect efforts of employees not to bargain with employers, but instead, to seek to set specialized minimum wage and benefit packages with political bodies," thereby substituting a "free-play of economic forces that was intended by the NLRA" with a "free-play of political forces." *Id.* at 504.

The same is true of this Ordinance. While the City has the power to enact ordinances to further the health and safety of its citizens, it is prohibited from interfering directly in employers' and their employees' bargaining process by arbitrarily forcing certain grocers to provide Premium Pay that is both unrelated to minimum labor standards, or the health and safety of the workers and the general public.

The Ordinance also violates the U.S. Constitution and California Constitution's Equal Protection Clauses (the "Equal Protection Clauses"). The Equal Protection Clauses provide for "equal protections of the laws." U.S. Const. amend. XIV, § 1; Cal. Const. art I, § 7(a). This guarantee is "essentially a direction that all persons similarly situated should be treated alike" and "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). No law may draw classifications that do not "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). By requiring that any classification "bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by law." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

As discussed above, the Ordinance here unfairly targets traditional grocery companies and arbitrarily subjects certain 500-employee grocers to the Premium Pay mandate while sparing other generic retailers who also employ frontline workers and who also sell groceries. *See Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) ("[L]egislatures may not draw lines for the purpose of arbitrarily excluding individuals," even to "protect" those favored groups' "expectations."); *Hays v. Wood*, 25 Cal. 3d 772, 786-87 (1979) ("[N]othing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."). Moreover, absent from the Ordinance is any requirement that would actually address its stated purpose of promoting the public's health and safety. Put simply, there is a disconnect between the Ordinance's reach and its stated purpose, making it unlawful and violating the equal protection rights of CGA's members.

CGA disagrees with the Council's characterization of the Ordinance as an "urgency ordinance." There is nothing in the Ordinance that is required for "immediate preservation of the public peace, health and safety." (§ 2.) Even if an emergency ordinance passes, there is no requirement that an emergency ordinance become effective immediately on passage. As this Council has done many times before, an emergency ordinance can become effective at a set date in the future.

Finally, CGA objects to the Ordinance's obligations being tied to the State's ever-changing reopening framework. That framework can be unpredictable due to changes in the spread of the virus, as well as the State's fluid approach to the tier system, and the Ordinance itself recognizes that we are a "long way" from the minimal tier where hazard pay obligations would be lifted. In light of emerging vaccination programs for essential workers, stores' increasing ability to protect patrons and workers from infection using distancing, curbside pickup, and other measures, the Ordinance's use of the county-wide tier system as the sole measure for the duration of hazard pay is not appropriate. We strongly encourage the City to set an alternate deadline for expiration of hazard pay ordinance (i.e., 90 days) so that it can be revisited by the Council in light of the rapidly changing pandemic conditions.

For all of the reasons discussed above, we respectfully request that the City Council reject the Ordinance.

Sincerely,

William F. Tarantino

cc: Honorable Members of the South San Francisco City Council
Ms. Buenaflor Nicolas
Mr. Eddie Flores
Mr. Mark Nagales
Mr. James Coleman