

O

1
2
3
4
5
6
7
8
9
10

**United States District Court
Central District of California**

11 COLUMBIA SUSSEX MANAGEMENT,
12 LLC, and CW HOTEL LIMITED
13 PARTNERSHIP, individually and on
14 behalf of all other hotel owners and
managers operating hotels in Santa
Monica, California,

15 Plaintiffs,

16 v.

17 CITY OF SANTA MONICA,

18 Defendant.

Case № 2:19-CV-09991-ODW (SKx)

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION [24]
and VACATING DECEMBER 23
HEARING**

19 **I. INTRODUCTION**

20 Plaintiffs Columbia Sussex Management, LLC, and CW Hotel Limited
21 Partnership (“Plaintiffs”) sued the City of Santa Monica (“City”) seeking a finding
22 that Santa Monica Municipal Code (“SMMC”) Chapter 4.67.030(a) (the “Ordinance”)
23 is unconstitutional, invalid, and preempted. (First Am. Compl. (“FAC”) ¶ 4, ECF
24 No. 4.) Plaintiffs move with expedited briefing for a preliminary injunction to prevent
25 the Ordinance from taking effect (“Motion”). (See Mot. Prelim. Inj. (“Mot.”), ECF
26 No. 24.) For the reasons below, the Court **DENIES** Plaintiffs’ Motion.¹

27
28 ¹ Having carefully considered the papers filed in connection with the Motion, the Court deems the
matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.
Accordingly, the Court **VACATES** the motion hearing on December 23, 2019, at 10:00 a.m.

1 **II. FACTUAL BACKGROUND**

2 On September 10, 2019, the Santa Monica City Council adopted Chapter 4.67,
3 including the Ordinance, with the stated purpose “to Enhance Protection of Hotel
4 Workers in the Local Hospitality Industry.” (FAC ¶ 18.) Entitled “Measures to
5 Provide Fair Compensation for Workload,” the Ordinance limits hotel employees who
6 clean guest rooms (“Room Attendants”) from cleaning more than a specified square
7 footage of floor space during their scheduled shift. (Mot. 1; FAC ¶ 20 (quoting the
8 Ordinance).) At hotels with fewer than forty rooms, Room Attendants may not be
9 required to clean more than 4000 square feet in an eight-hour workday. SMMC
10 § 4.67.030(a). At hotels with forty or more rooms, Room Attendants may not be
11 required to clean more than 3500 square feet in an eight-hour workday. *Id.* If a Room
12 Attendant is required to exceed these limits, the hotel employer must compensate the
13 Room Attendant at twice the regular rate of pay for all hours worked in that workday.
14 *Id.* The Ordinance may be waived “pursuant to a bona fide collective bargaining
15 agreement.” *Id.* § 4.67.110. As relevant here, Chapter 4.67 will take effect on
16 January 1, 2020. *Id.* § 4.67.130.

17 On November 21, 2019, Plaintiffs filed this class action lawsuit on behalf of
18 “all of the other 40 hotels located within Santa Monica.” (*See* Compl., ECF No. 1;
19 FAC ¶ 45.) Plaintiffs seek declaratory and injunctive relief, including findings that
20 the Ordinance is unconstitutional, invalid, and preempted. (FAC ¶¶ 47–66.) On
21 November 27, 2019, the parties stipulated to an expedited briefing schedule for
22 Plaintiffs’ Motion. (Stipulation, ECF No. 17.) Accordingly, on December 2, 2019,
23 Plaintiffs moved for a preliminary injunction to prevent the Ordinance from going into
24 effect as scheduled. (*See* Mot.) The City opposed and Plaintiffs replied. (Opp’n to
25 Mot. (“Opp’n”), ECF No. 26; Reply, ECF No. 32.) The Court now addresses
26 Plaintiffs’ Motion.

III. LEGAL STANDARD

A preliminary injunction 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); see *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (discussing that plaintiffs “face a difficult task in proving that they are entitled to this ‘extraordinary remedy’”). Pursuant to Federal Rule of Civil Procedure 65, a court may grant preliminary injunctive relief to prevent “immediate and irreparable injury.” Fed. R. Civ. P. 65(b). To obtain this relief, a plaintiff must establish the “*Winter*” factors: (1) “he is likely to succeed on the merits”; (2) “he is likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tips in his favor”; and (4) “an injunction is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20).

In the Ninth Circuit, the *Winter* factors may be evaluated on a sliding scale: “serious questions going to the merits, and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted). Thus, “[r]egardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm.” *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c).

IV. REQUESTS FOR JUDICIAL NOTICE

As a preliminary matter, both parties request that the Court take judicial notice of various documents. Federal Rule of Evidence 201 allows a court to take judicial

1 notice of a fact that “is not subject to reasonable dispute because it: (1) is generally
2 known within the trial court’s territorial jurisdiction; or (2) can be accurately and
3 readily determined from sources whose accuracy cannot reasonably be questioned.”
4 Fed. R. Evid. 201(b); *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003).

5 Plaintiffs request judicial notice of four documents but provide no support for
6 the authenticity of the documents or the propriety of judicial notice. (*See* Pls.’ Req.
7 for Judicial Notice (“RJN”), ECF No. 24-3.) Accordingly, the Court **DENIES**
8 Plaintiffs’ request. The City requests judicial notice of SMMC Chapter 4.63 and
9 California Code of Regulation, title 8, section 3345. (City’s RJN, ECF No. 27.) The
10 Court **DENIES** the City’s request as moot because “the Court need not judicially
11 notice these authorities in order to consider them.” *Otero v. Zeltiq Aesthetics, Inc.*,
12 No. CV 17-3994-DMG (MWRx), 2018 WL 3012942, at *1 (C.D. Cal. June 11, 2018.)

13 V. DISCUSSION

14 Plaintiffs move for a preliminary injunction to prevent the challenged portions
15 of the Ordinance from taking effect on January 1, 2020. (Mot. 1–2.) Plaintiffs
16 challenge only section 4.67.030(a) (“Ordinance” or “Workload Limitation”) and its
17 corresponding collective bargaining waiver provision, section 4.67.110 (“Waiver”);
18 Plaintiffs challenge no other part of the Chapter. (Mot. 1 n.1.) Plaintiffs contend the
19 putative class of Santa Monica hotel owners and operators will be irreparably harmed
20 if these provisions are permitted to take effect on January 1, 2020. (Mot. 2.) They
21 argue the Ordinance is (1) preempted by the National Labor Relations Act, 29 U.S.C.
22 § 151 *et seq.* (“NLRA”) under *Machinists* preemption; (2) invalid under the dormant
23 Commerce Clause (“DCC”); and (3) preempted by the California Occupational Health
24 and Safety Act of 1973, Cal. Lab. Code § 6300 *et seq.* (“CalOSHA”). (Mot. 2.)

25 A. Irreparable Harm

26 “[P]laintiffs seeking preliminary injunctive relief [must] demonstrate that
27 irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22. A
28 mere possibility of irreparable harm is insufficient. *Id.* “[A] party is not entitled to a

1 preliminary injunction unless he or she can demonstrate more than simply damages of
2 a pecuniary nature.” *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 519
3 (9th Cir. 1984) (citing *Los Angeles Mem. Coliseum Comm’n v. NFL*, 634 F.2d 1197,
4 1202 (9th Cir. 1980)); *but see Herb Reed Enters., LLC v. Florida Entm’t Mgmt.*, 736
5 F.3d 1239, 1250 (9th Cir. 2013) (discussing, in the trademark context, that “[e]vidence
6 of loss of control over business reputation and damage to goodwill could constitute
7 irreparable harm”). “[P]laintiff must demonstrate potential harm which cannot be
8 redressed by a legal or an equitable remedy following a trial. The preliminary
9 injunction must be the *only* way of protecting the plaintiff from the harm.” *Campbell*
10 *Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

11 Plaintiffs argue they will suffer irreparable harm because they will have to pay
12 their current Room Attendants double their current rate, or hire and pay additional
13 Room Attendants, because their Room Attendants currently clean more than the
14 permitted square footage under the Ordinance. (Mot. 6.) They contend that additional
15 administrative costs will also result from the need to track Room Attendants’ assigned
16 square footage. (Mot. 7.) Plaintiffs argue this additional cost may result in loss of
17 customers and customer goodwill “if [Plaintiffs and the putative class are] forced to
18 pass along their increased costs to their customer base.” (Mot. 6.)

19 First, Plaintiffs’ alleged harm is merely pecuniary, and insufficient to support a
20 preliminary injunction, to the extent Plaintiffs argue such harm is the result of paying
21 current Room Attendants more, paying additional Room Attendants, or incurring
22 additional administrative costs. *See Idaho v. Coeur d’Alene Tribe*, 794 F3d 1039,
23 1046 (9th Cir. 2015) (“Purely economic harms are generally not irreparable, as money
24 lost may be recovered later, in the ordinary course of litigation.”)

25 Next, Plaintiffs’ alleged harm is speculative, and again fails to support a
26 preliminary injunction, to the extent Plaintiffs argue such harm results from lost
27 customers or customer goodwill. Plaintiffs argue they will lose customers and
28 customer goodwill “if forced to pass along their increased costs to their customer

1 base.” (Mot. 6.) That is, *if* Plaintiffs elect to pass costs along to their customers, they
2 believe they *may* lose customers or goodwill as a result. Plaintiffs offer insufficient
3 facts or evidence to support this belief.² Such unsupported speculation “does not rise
4 beyond the mere ‘possibility’ of harm.” *Int’l Franchise Ass’n, Inc. v. City of Seattle*,
5 803 F.3d 389, 412 (9th Cir. 2015) (quoting *Winter*, 555 U.S. at 22); *see also Regents*
6 *of Univ. of Cal.*, 747 F.2d at 523 (“It is . . . well-settled that a preliminary injunction
7 cannot be issued to prevent a mere speculative injury.”). Further, the alleged harm is
8 self-inflicted, as the choice to pass any additional costs on to clientele is Plaintiffs, and
9 Plaintiffs submit nothing that suggests the other putative class member-Santa Monica
10 hotels will elect to do the same.

11 Even were it not speculative, Plaintiffs’ argument that damage to customer
12 goodwill constitutes irreparable harm is not persuasive. “[E]conomic and
13 reputational injuries’ are generally not irreparable” because they “can be adequately
14 compensated at a later date, in the ordinary course of litigation.” *Woodfin Suite*
15 *Hotels, LLC v. City of Emeryville*, No. C. 06-1254 SBA, 2006 WL 2739309, at *11
16 (N.D. Cal. Aug. 23, 2006). In *Woodfin*, a hotel company sought a preliminary
17 injunction against an ordinance, similar to the Ordinance here, that required the hotel
18 employer to pay time and a half for room cleaners who cleaned more than 5000 square
19 feet in a standard workday. *Id.* at *1. The hotel plaintiff in *Woodfin* made the
20 argument, similar to Plaintiffs here, that loss of customer goodwill constituted a threat
21 of irreparable harm. *Id.* at *11. Here, as in *Woodfin*, “Plaintiffs’ reliance on
22 *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) to
23 support this proposition is misplaced, because it is a trademark case, and irreparable

24 ² Plaintiffs submit the Declaration of Damien Hirsch (“Hirsch Decl.”), general manager for the JW
25 Marriott Santa Monica Le Merigot, and employee of Plaintiff Columbia Sussex Management, LLC.
26 (Hirsch Decl. ¶ 1, ECF No. 24-2.) To begin, Hirsch’s declaration is wholly conclusory, and
27 inadequate to support a likelihood of irreparable injury. *See Am. Passage*, 750 F.2d at 1473. Hirsch
28 simply concludes that the contemplated additional costs will be more than \$1 million per year and
“the price of a room stay . . . will increase by roughly 5-8%” but provides no support for these
figures. (Hirsch Decl. ¶ 8.) What is more, nothing in Hirsch’s Declaration supports the notion that
customers will no longer stay at Plaintiffs’ hotel because Plaintiffs elect to raise room rates.

1 injury may be presumed from a showing of the likelihood of success on the merits . . .
2 in trademark cases.” *Id.* at *11 (citing *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d
3 1199, 1205 n.4 (9th Cir. 2000)). Simply put, Plaintiffs have not shown that the harm
4 they claim cannot be adequately compensated at a later time.

5 Finally, Plaintiffs argue the constitutional violation itself constitutes irreparable
6 harm. (See Mot. 5–6.) To the contrary, irreparable injury is not automatically
7 presumed merely because a constitutional violation is alleged. *DISH Network Corp. v.*
8 *FCC*, 653 F.3d 771, 776 (9th Cir. 2011) (“While a First Amendment claim certainly
9 raises the specter of irreparable harm . . . proving the likelihood of such a claim is not
10 enough to satisfy *Winter*.”) (internal quotation marks omitted). Such a presumption
11 would be inconsistent with the Supreme Court’s requirement for a showing of
12 irreparable harm. See *Winter*, 555 U.S. at 22 (discussing that permitting a preliminary
13 injunction on the “possibility” of irreparable harm was “too lenient”). Instead, a
14 plaintiff must still establish the likelihood of irreparable harm absent a preliminary
15 injunction, as well as the other *Winter* factors. See *DISH Network*, 653 F.3d at 776.

16 Plaintiffs cite *American Trucking Associations* for the proposition that “a
17 constitutional violation alone, coupled with the damages incurred, can suffice to show
18 irreparable harm.” 559 F.3d at 1058. However, in *American Trucking*, “the damages
19 incurred” constituted extreme economic injury, destruction of the plaintiffs’ business
20 or severe disruption “in ways that most likely cannot be compensated with damages
21 alone.” *Id.* No comparable injury is alleged here: Plaintiffs assert lost customers and
22 customer goodwill from an anticipated 5–8% increase in cost-of-stay. (Mot. 6; Hirsch
23 Decl. ¶ 8.) Finally, the constitutional violation at issue is clearly not of the type—free
24 speech, association, and privacy—that is of such qualitative importance as to be
25 presumptively irreparable if lost. See *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014)
26 (finding gay couples would suffer irreparable injury if their constitutional right to
27 marry were stayed pending appeal). Accordingly, Plaintiffs have not established that
28 “irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22.

1 Even under the sliding scale approach, a plaintiff must still show a likelihood of
2 irreparable injury. As Plaintiffs have failed to do so here, Plaintiffs have not
3 established that they are entitled to a preliminary injunction.

4 **B. Likelihood of Success on the Merits**

5 Even had Plaintiffs established a likelihood of irreparable injury, a preliminary
6 injunction is not appropriate because Plaintiffs have not shown a likelihood of success
7 on, or serious questions going to, the merits.

8 To warrant a preliminary injunction, Plaintiffs must show they are likely to
9 succeed on the merits and meet the other *Winter* factors, or raise serious questions
10 going to the merits and show that the balance of hardships tips sharply in their favor.
11 *All. for the Wild Rockies*, 632 F.3d at 1135. Plaintiffs argue they are likely to succeed
12 on the merits because the Ordinance is (1) preempted by the NLRA; (2) invalid under
13 the DCC; and (3) preempted by CalOSHA. (Mot. 8–19.)

14 *1. NLRA Preemption*

15 The NLRA does not contain an express preemption clause, but the Supreme
16 Court has articulated two preemption principles under the NLRA, one of which is
17 “*Machinists*” preemption. *Am. Hotel and Lodging Assn. v. City of Los Angeles*, 834
18 F.3d 958, 963 (9th Cir. 2016) (“*AHLA*”); *Associated Builders v. Nunn*, 356 F.3d 979,
19 987 (9th Cir. 2004) (“*Nunn*”). “*Machinists* preemption prohibits states from imposing
20 restrictions on labor and management’s ‘weapons of self-help’ that were left
21 unregulated in the NLRA because Congress intended for tactical bargaining decisions
22 and conduct ‘to be controlled by the free play of economic forces.’” *Nunn*, 356 F.3d
23 at 987 (quoting *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*,
24 427 U.S. 132, 140 (1976)); *see also AHLA*, 834 F.3d at 963 (noting “‘weapon[s] of
25 self-help,’ such as a strike or lock-out”).

26 In contrast, state minimum “benefit protections” such as minimum wages are
27 not subject to *Machinists* preemption “because they do not alter the process of
28 collective bargaining.” *AHLA*, 834 F.3d at 964. Thus, “state action that intrudes on

1 the mechanics of collective bargaining is preempted, but state action that sets the stage
2 for such bargaining is not.” *Id.*

3 Plaintiffs argue that, because unions can waive the Ordinance, the Ordinance
4 and the Waiver provision are subject to *Machinists* preemption because they
5 “improperly tilt the labor-management playing field.” (Mot. 9.) The Court disagrees.
6 The Ordinance limits the floor space a Room Attendant may be required to clean in a
7 workday to prevent excessive workloads and allows for collective bargaining as to
8 that limitation. SMMC §§ 4.67.030(a), 4.67.110. The Ordinance “do[es] not regulate
9 the mechanics of labor dispute resolution,” but instead “provide[s] the ‘backdrop’ for
10 negotiations,” similar to other state minimum labor standards. *AHLA*, 834 F.3d at 963
11 (citing *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 757 (1985)); *id.* at 965 (rejecting
12 argument that collective bargaining opt-out provision warranted preemption). Thus,
13 the Workload Limitation is a minimum labor standard and a “valid exercise of states’
14 police power to protect workers.” *Id.* at 963 (citing *Fort Halifax Packing Co. v.*
15 *Coyne*, 482 U.S. 1, 21–22 (1987)).

16 Plaintiffs rely on *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir.
17 1995) for the argument that the Workload Limitation “target[s] particular workers in a
18 particular industry” and thus “affect[s] the bargaining process in a way that is
19 incompatible with the general goals of the NLRA.” (Mot. 10.) However, following
20 *Bragdon*, the Ninth Circuit has “explained on several occasions that the NLRA does
21 not . . . pre-empt minimum labor standards simply because they are applicable only to
22 particular workers in a particular industry.” *Nunn*, 356 F.3d at 990. “It is now clear in
23 this Circuit that state substantive labor standards . . . are not invalid simply because
24 they apply to particular trades, professions, or job classifications rather than to the
25 entire labor market.” *Id.*

26 Accordingly, the Court finds that Plaintiffs have not established a likelihood of
27 success on the merits, or serious question going to the merits, that the Ordinance is
28 preempted by NLRA under *Machinists* preemption.

1 2. *Dormant Commerce Clause*

2 Plaintiffs next argue the Ordinance is invalid because it indirectly discriminates
3 against interstate commerce, in violation of the DCC. (Mot. 11–15.)

4 “The primary purpose of the [DCC] is to prohibit ‘statutes that discriminate
5 against interstate commerce’ by providing benefits to ‘in-state economic interests’
6 while ‘burdening out-of-state competitors.’” *Ass’n des Eleveurs de Canards et d’Oies*
7 *di Quebec v. Harris*, 729 F.3d 937, 947 (9th Cir. 2013) (“*Canards*”) (quoting *Nat’l*
8 *Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012)
9 (“*Optometrists*”). Plaintiffs concede that the Ordinance does not directly
10 “discriminate against interstate commerce on its face,” arguing instead that the
11 *indirect* effects inflict a substantial burden. (Mot. 12.) Where a statute regulates
12 evenhandedly but has indirect effects on interstate commerce, the *Pike* balancing test
13 applies. *See Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 451 (9th Cir. 2019)
14 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). An ordinance will be upheld
15 under the *Pike* balancing test where it “effectuates a legitimate local public interest”
16 “unless the burden imposed on interstate commerce is *clearly excessive* in relation to
17 the putative local benefits.” *Id.* (quoting *Pike*, 397 U.S. at 142).

18 “[A] state regulation does not become vulnerable to invalidation under the
19 [DCC] merely because it affects interstate commerce.” *Optometrists*, 682 F.3d at
20 1148 (citing *S. Pac. Co. v. Ariz.*, 325 U.S. 761, 767 (1945)). To the contrary, “there
21 must be a *substantial burden* on *interstate commerce*.” *Id.* “The party challenging the
22 regulation . . . must establish that the burdens that the regulation imposes on interstate
23 commerce clearly outweigh the local benefits” *Rosenblatt*, 940 F.3d at 452.

24 Plaintiffs contend the Ordinance will require them to pay Room Attendants
25 more or hire more Room Attendants, and that Plaintiffs will pass that increased cost
26 on to their primarily out-of-state clientele. Thus, Plaintiffs contend, the Ordinance
27 substantially burdens interstate commerce because it will cause out-of-state travelers
28 to pay more to stay in Santa Monica hotels. (Mot. 12–13; Reply 8.) However,

1 Plaintiffs fail to support that any guests have been deterred, how many guests will be
2 deterred, or that the 5–8% cost-of-stay increase Plaintiffs intend to pass on to their
3 customers will prevent customers from traveling to Santa Monica altogether. In short,
4 Plaintiffs fail to show that the increased cost will result in a *substantial burden* on
5 interstate commerce. *See Rosenblatt*, 940 F.3d at 453 (finding plaintiff failed to allege
6 the magnitude of the burden or how any lost fraction of business significantly
7 burdened interstate commerce); *Pac Nw. Venison Producers v. Smitch*, 20 F.3d 1008,
8 1015 (9th Cir. 1994) (finding plaintiff failed to support the extent of the burden on
9 interstate commerce).

10 Further, as the City points out, the Ninth Circuit in *Rosenblatt* recently
11 recognized that “‘only a small number of . . . cases invalidating laws under the [DCC]
12 have involved laws that were genuinely nondiscriminatory’ but still imposed a clearly
13 excessive burden on interstate commerce.” *Id.* at 452 (quoting *Chinatown*
14 *Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015)). “These cases
15 address state ‘regulation of activities that are inherently national or require a uniform
16 system of regulation’—most typically, interstate transportation” such as interstate
17 trucking or professional sports leagues. *Id.*; *see also Canards*, 729 F.3d at 952. In
18 contrast, the Ordinance regulates local work conditions, protecting hotel employees
19 from excessive workloads. It does not interfere with activity that is inherently
20 national or that requires a uniform system of regulation. As such, Plaintiffs have not
21 shown that the Ordinance substantially burdens interstate commerce.³

22 Accordingly, the Court finds that Plaintiffs have not established a likelihood of
23 success on the merits, or serious questions going to the merits, that the Ordinance is
24 invalid under the DCC.

25 3. *CalOSHA Preemption*

26 Lastly, Plaintiffs argue the Ordinance is preempted by CalOSHA because it is a

27 ³ As Plaintiffs have not met their burden to establish that the Ordinance substantially burdens
28 interstate commerce, the Court does not reach the Ordinance’s local benefits. *See Canards*, 729 F.3d
at 952–53.

1 health and safety statute, not a labor standards overtime provision, as the City
2 contends. (Mot. 15–19; Opp’n 21.)

3 CalOSHA, in conjunction with California Labor Code Section 142.3, vests the
4 California Occupational Safety and Health Standards Board (the “Standards Board”)
5 with the sole authority to adopt occupational safety and health standards. (Mot. 17.)
6 In *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993), the California
7 Supreme Court set out the standard for state preemption of a local ordinance as
8 follows:

9 Under . . . the California Constitution, a county or city may make and
10 enforce within its limits all local, police, sanitary, and other ordinances
11 and regulations not in conflict with general laws. If otherwise valid local
12 legislation conflicts with state law, it is preempted by such law and is
13 void. A conflict exists if the local legislation duplicates, contradicts, or
14 enters an area fully occupied by general law, either expressly or by
15 legislative implication. Local legislation is ‘duplicative’ of general law
16 when it is coextensive therewith. Similarly, local legislation is
17 ‘contradictory’ to general law when it is inimical thereto. Finally, local
18 legislation enters an area that is ‘fully occupied’ by general law when the
19 Legislature has expressly manifested its intent to ‘fully occupy’ the area
20 or when it has impliedly done so

21 *Id.* at 897–98 (internal quotation marks and citations omitted).

22 Plaintiffs argue that the Legislature intended the Standards Board’s decisions to
23 fully-occupy the field and so the Workload Limitation, as an occupational health and
24 safety provision, must be preempted. (Mot. 16–17.) Alternatively, Plaintiffs argue
25 that the Workload Limitation concerns excessive work rate, which the Standards
26 Board regulates through the requirement to maintain a musculoskeletal injury
27 prevention program (“MIPP”), thus impliedly preempting the Ordinance. (Mot. 17–
28 18.) The City responds that the Workload Limitation is a compensation provision, not
an occupational health and safety provision, because it requires additional
compensation for additional work. (Opp’n 21–25.) The City notes that Plaintiffs cite
no California workplace health and safety standard that permits an employer to

1 impose unsafe working conditions on employees so long as they are paid more.
2 (Opp’n 21.)

3 The City points to other courts that have considered and rejected Plaintiffs’
4 arguments under similar facts. (Opp’n 21 (citing *Cal. Hotels & Lodging Ass’n v. City*
5 *of Oakland*, 393 F. Supp. 3d 817 (N.D. Cal. 2019) (“*CHLA*”); *Woodfin*, 2006 WL
6 2739309, at *18).). In *CHLA*, the court considered an Oakland ordinance, similar to
7 the Ordinance here, that imposed maximum workload requirements for hotel workers
8 and required additional payment when employees cleaned more than a specified
9 square footage (“Room Cleaner Provision”). *Id.* at 821. The court in *CHLA* rejected
10 the very arguments Plaintiffs put forward here. *Compare CHLA*, 393 F. Supp. 3d at
11 824–27 *with* (Mot. 16–20). The court found no field preemption because “[b]oth
12 CalOSHA and the Labor Code explicitly leave room for local control of aspects of
13 employment unrelated to safety and health.” *CHLA*, 393 F. Supp. at 826. The Court
14 also found the Room Cleaner Provision was an overtime provision addressing
15 compensation, not an occupational health and safety provision designed to prevent
16 injuries like the MIPP, which does not address compensation. *Id.* at 826–27.

17 The Court finds the reasoning in *CHLA* persuasive. First, CalOSHA leaves
18 room for additional local action in regulating places of employment unrelated to safety
19 and health, so there is no field preemption. *Id.* at 826 (citing *T-Mobile W. v. San*
20 *Francisco*, 6 Cal. 5th 1107, 1122 (2019)). Second, the Ordinance here concerns
21 compensation for work done, requiring additional compensation for additional square
22 feet cleaned; it says nothing regarding potential injuries or injury risks. *See* SMMC
23 § 4.67.030(a). In contrast, MIPP concerns preventing musculoskeletal injuries and
24 disorders, addresses the nature of potential injuries, and requires evaluations of
25 physical injury risks. *CHLA*, 393 F. Supp. at 826 (quoting 8 Cal. Code. Regs. § 3345).
26 It says nothing regarding compensation. As in *CHLA*, “[t]hese differences are not . . .
27 distinctions without a difference.” *Id.*

1 Accordingly, the Court finds that Plaintiffs have not established a likelihood of
2 success on the merits, or serious question going to the merits, that the Ordinance is
3 preempted by CalOSHA.

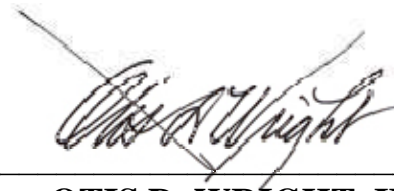
4 **VI. CONCLUSION**

5 Plaintiffs have not established that there is a likelihood of irreparable harm in
6 the absence of a preliminary injunction, or that they are likely to succeed on the
7 merits. Nor have they raised serious questions going to the merits. Accordingly, the
8 Court need not reach the balance of hardships or the public interest.⁴ *See All. for the*
9 *Wild Rockies*, 632 F.3d at 1135 (“‘[S]erious questions going to the merits’ *and* a
10 balance of hardships that tips sharply towards the plaintiff can support issuance of a
11 preliminary injunction, *so long as the plaintiff also shows that there is a likelihood of*
12 *irreparable injury* and that the injunction is in the public interest.”) (emphasis added).
13 Accordingly, the Court finds that Plaintiffs have not satisfied the difficult task to
14 establish that they are entitled to the extraordinary remedy of a preliminary injunction.

15 For the reasons discussed above, the Court **DENIES** Plaintiffs’ Motion for a
16 preliminary injunction. (ECF No. 24.)

17
18 **IT IS SO ORDERED.**

19
20 December 18, 2019



21
22
23 **OTIS D. WRIGHT, II**
24 **UNITED STATES DISTRICT JUDGE**

25 _____
26 ⁴ Plaintiffs do not address the public interest factor in their moving papers and expressly consider it
27 for the first time in reply. (*See generally* Mot.; Opp’n 11; Reply 3–4.) Generally, courts decline to
28 consider arguments raised for the first time in reply. *See, e.g., FT Travel-New York, LLC v. Your*
Travel Center, Inc., 112 F. Supp. 3d 1063, 1079 (C.D. Cal. 2015) (refusing to consider argument
raised for first time in reply). Accordingly, even were the Court to reach the issue, the Court
declines to consider Plaintiffs’ argument as to the public interest.