S 176099
2d Civil No. B206750
L.A.S.C. Case No. BC351831

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION

Plaintiff and Respondent

vs.

CITY OF LOS ANGELES

Defendant and Appellant

LOS ANGELES ALLIANCE FOR A NEW ECONOMY

Intervener and Appellant

REPLY BRIEF ON THE MERITS OF APPELLANT CITY OF LOS ANGELES (Rule 8.520(a)(1))

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE (B206750)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

FEDERAL STATUTES

CALIFORNIA STATUTES

Code of Civil Procedure

Health and Safety Code

LOS ANGELES MUNICIPAL CODE

SECONDARY AUTHORITY

Appellant City of Los Angeles replies to the Answer Brief on the Merits of respondent California Grocers' Association as follows:

I. THE GROCERY WORKER RETENTION ORDINANCE DOES NOT PURPORT TO REGULATE A FIELD THAT IS FULLY OCCUPIED BY STATE LAW.

The members of the Respondent association realize profit and other benefits from doing business in the City of Los Angeles. The City of Los Angeles therefore has a legitimate interest in protecting the workers of the Respondent's members. The City of Los Angeles believes that the Respondent's members should be prohibited from discarding its workers like stale produce when ownership changes hands. This is the only legislative intent evidenced by the plain meaning of the unambiguous language of the Grocery Worker Retention Ordinance. This is why the ordinance is called the Grocery Worker Retention Ordinance.

Respondent's argument may be summarized as follows:

1. Respondent believes that the preamble of the Grocery Worker Retention Ordinance expresses the City's intention to regulate a field fully occupied by state law; therefore,

2. The ordinance itself may therefore be ignored, as it is

irrelevant whether the ordinance actually regulates in a field area fully occupied by state law: if the preamble expresses an intention to enter an area fully occupied by state law, the ordinance enters a field fully occupied by state law whether it actually does or not.

But Respondent cites no appellate authority for such a ridiculous proposition. In place of such authority, the Answer Brief at page 15 offers a quote out of context

> All that is necessary for preemption is that the local measure "***purports to regulate*** an area that is fully occupied by express provision of the state law." *See Watsonville v. State Dept. of Health Servs.* (2005) 133 Cal. App. 4th 875, 885 (emphasis added)

But the *Watsonville* decision does not support respondent's position at all. In *Watsonville*, the State's Dept of Health Services had ordered fluoridation of the city water supply per Health and Safety Code section 116410, but the municipality responded with a Charter amendment prohibiting the fluoridation required by DHS. The Court of Appeal held the field of public health and water quality to be fully occupied by state law, and easily found a direct conflict between the state mandate and the municipality's prohibition against fluoridation of the public water supply. Thus, the municipal law was held to be preempted because of an actual direct conflict with the requirements

of state law, and not because the municipality had merely announced an intention to enter upon a field fully occupied by state law: if there was a preamble to the Charter amendment, it is nowhere described in the decision. As the court put it, "There is a conflict between a state law and a local ordinance if the ordinance duplicates or contradicts the state law, or if the ordinance *enters an area* fully occupied by general law, either expressly or by implication." *Watsonville supra* at 883, citing *American Financial Services Assn v. City of Oakland* (2005) 34 Cal.4th 1239, 1251 (emphasis added) In the present case, the Respondent, like the court below, has failed utterly to show how the Grocery Worker Retention Ordinance "duplicates or contradicts the state law. . . or *enters* an area fully occupied by general law, either expressly or by implication". *Id* (emphasis added)

The Answer Brief in spite of itself does highlight the fact that phrases like "purports to regulate" and "attempts to regulate" are ambiguous unless placed within a particular context. Standing alone, "purports to regulate" could mean, as Respondent would have it, the expression of a legislative body's mere opinion that its law shall regulate or is intended to regulate a particular field. Or, "purports to regulate" could mean an actual regulation of a field, as in the

Watsonville decision. When this Supreme Court has used the phrase "purports to regulate" in the context of preemption analysis, it has always meant "actually regulate", and not the mere expression or announcement of an opinion as to what is to be regulated. For example, in *Societa per Azioni de Navigazione Italia etc. v. City of Los Angeles* (1982) 31 Cal. 3d 446, 462-463, this Court described the effort by the City of Los Angeles to escape liability for personal injuries caused by its port pilot-employees:

> The Shipowner contends that the tariff/ordinance is void since it **purports to regulate** the tort liability of the City with regard to its negligent employees. According to the Shipowner, such regulation invades a field preempted by the Legislature through the Tort Claims Act (*Gov. Code, § 810 et seq.*) [19] and, therefore, is precluded . . .
>
> . . . To the extent that the tariff/ordinance **purports to exculpate** the City from respondeat superior liability for the torts of its pilot-employees, it is in direct conflict with general state law.

There was no mere expression of opinion; the ordinance did in fact regulate tort liability in direct conflict with the Tort Claims Act. A diligent search finds no California appellate decision which has ever used the phrase "purport to regulate" as meaning only the expression of opinion that a law regulates a particular field.

The phrase "attempt to regulate" is similarly ambiguous. It

could refer to either the mere announcement of an intention to enter a particular regulatory field or an actual regulation in such a field. But here again, this Court has always used the phrase "attempt to regulate" to mean an actual regulation, not a mere announcement of intention or opinion an ordinance's regulatory effect. Thus, Respondent's reliance on *Tolman v. Underhill* (1952) 39 Cal. 2d 708, 712 (Answer Brief pgs. 15 and 18) is misplaced. In *Tolman*, this Court described as an "attempt to regulate" a measure adopted by the Regents of the University of California, acting as a local governmental entity, which actually required loyalty oaths for faculty appointment differing from those required by statute; the measure was preempted because of an actual conflicts, not because of the mere announcement of an intention to enter a field fully occupied by state law. *Id*

The suggestion in the lower court decision and Answer Brief (pg. 22) that the Grocery Worker Retention Ordinance enters a regulatory field defined in Health and Safety Code section 113947.1(e) is more than adequately refuted by the dissenting opinion below. "The Ordinance has no bearing on this provision. The Ordinance contains no requirement regarding the retention of certified employees. Moreover, that the Ordinance expressly excludes

managerial and supervisory employees (L.A.M.C. §181.02(C)) further indicates that the Ordinance does not relate to state concerns about health and sanitation." *California Grocers Association v. City of Los Angeles et al* (2009) 176 Cal. App 4th 51, 83 (dissenting opinion)

The City has always maintained that the Grocery Worker Retention Ordinance is unambiguous. The Answer Brief does not state a position one way or the other. The Answer Brief provides a lengthy if highly-selective account of what was said during public meetings and debates leading up to enactment of the ordinance. But such reference to legislative history is an appropriate tool for statutory interpretation only if the law itself is ambiguous. *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal. 4th 32, 48; *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal. App. 4th 1568, 1576-1580 Respondent points to nothing in the ordinance which is unclear or susceptible to more than one meaning. But if Respondent wants to reference legislative history, it cannot remain agnostic, it must point out an ambiguity which legislative history can help resolve. Respondent has so far failed to do so.

In arguing that reference to extrinsic aids such as legislative

history is not called for in this case, the City does not want to give the impression that it is avoiding a discussion of what was said by City Council members, or members of the public, or the "City Attorney's representatives" in public proceedings leading to adoption of the ordinance. The undersigned "City Attorney's representative" is more than happy to engage the opposition in debate on that subject at oral argument, if this Court believes such a discussion will be of help in resolving this case. But even the Answer Brief is schizophrenic about what it believes the legislative history, in particular, the comments of "City Attorney representatives" actually shows. At times, Respondent suggests that the "City Attorney representatives" are expert witnesses on what the ordinance means; at others, Respondent suggests that the only reason the City Council adopted the ordinance was because of it was somehow defrauded by the "City Attorney's representative" into believing that the ordinance was a regulation of food safety *when it is actually not such a regulation* (see the comments of the Respondent described at page 17 of the Petition for Review and vol. 2 AA pg. 190). The Respondent's counsel seems to recount the "City Attorney representative's" comments with the same glee expressed by Prince Hamlet as he contemplates the reversal of fortune which will lead to

the murders of Rosencrantz and Guildenstern, "For tis the sport to have the engineer/Hoist with his own petar."

But the Answer Brief points to nothing said by the "City Attorney representatives" that was in any way "out of line" for a public discussion and debate leading to the vote on the ordinance. The "City Attorney representative" it may be fairly said cared passionately about this legislation, and employed rhetoric designed to lead City Council members to vote for it, and has no reason to apologize for that strategy. If Respondent believes that the "City Attorney representatives" and other proponents of the ordinance carried the day unfairly, Respondent may re-engage the political process to point this out to the City Council and the voters of the City of Los Angeles and seek repeal or amendment. Otherwise, without showing how legislative history can assist this Court in resolving alleged ambiguities in the ordinance, the Answer Brief's discussion of that topic proves only the obvious: that the Respondent lost the political battle and is being a sore loser about it; that the store owners are not afraid of a local interference with state food safety law, they are afraid of democracy.

The dissent was correct: "The [California Food Retail Code]

does not purport to govern any employment matters not directly related to food safety. . . the Ordinance does not, and does not purport to, establish health and safety standards . . ." *California Grocers Association supra* at 81 (dissenting opinion) There is no preemption.

II. THE GROCERY WORKER RETENTION ORDINANCE IS NOT PREEMPTED UNDER THE *MACHINISTS* DOCTRINE OF THE N.L.R.A.

The City of Los Angeles believes that the dissenting opinion below, and the briefs already submitted by the appellants, adequately respond to the points raised in the Answer Brief regarding preemption under the *Machinists*[1] doctrine of the National Labor Relations Act, 29 U.S.C. section 151 et seq. Neither the Answer Brief nor the decision of the court below offer a plausible scenario in which the ordinance must result in an Association member having to forego "one of its economic weapons" in the bargaining process with organized labor. The Respondent cannot refute the dissenting opinion's observation that "The Ordinance does not mandate or otherwise induce, either directly or indirectly, a successor employer to bargain with any union, adopt the predecessor's collective bargaining agreement, compel the employer to set any specific wages and

[1] *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132

benefits, interfere with any bargaining, or intervene in any employer relations with any union . . . The concept of 'the free play of economic forces' referred to in *Machinists supra* . . . has no applicability here. *California Grocers Association supra* at 91 (dissenting opinion)

The City would add only its agreement with one commentator who has cogently argued that the premises underlying the *Machinists* preemption doctrine have been undermined by changes in the law post-*Machinist*, that is, "The idea of a "uniform national labor policy" lies in shambles . . ." Drummond, Henry H., *"Beyond the Employee Free Choice Act—Unleashing the States in Labor-Management Relations Policy"*, 19 Cornell J. L. & Pub. Pol'y 83, 138-140 (Fall 2009); see also Drummond, Henry H. "*Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*", 70 La. L.R. 97, 178 to 186 (Fall 2009) The City believes in good faith that the United States Supreme Court, if called upon to decide the *Machinists* case today, would allow greater deference to state and local protective laws, and would not find laws such as the Grocery Worker Retention Ordinance to be preempted by the N.L.R.A.

In the absence of any contrary authority on point, the City urges

this Court to follow the reasoning of the decisions in *Washington Service Contractors Coalition v. District of Columbia* (D.C. Cir. 1995) 54 F.3d 811 and *Alcantara v. Allied Properties LLC* (EDNY 2004) 334 F. Supp. 2d 336 in finding that the Grocery Worker Retention Ordinance is the very sort of local law protecting displaced workers which Congress did not intend to preempt under the NLRA. *Southern California Edison Co. v. Public Utilitiies Com* (2006), 140 Cal. App. 4th 1085, 1100-1101

DATE: March 25 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, Rule 14(c), this Reply Brief on the Merits was produced on a computer in 14-point type. The word count including footnotes, as calculated by the word processing program is 3115

DATED: March 25, 2010

GERALD MASAHIRO SATO, Deputy City Attorney
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PROOF OF SERVICE
Business Practice to Entrust Deposit to Others
(CCP SECTION 1013a(3))
(Via Various Methods)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 900 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On March 25, 2010, I served the foregoing document(s) described as **REPLY BRIEF ON THE MERITS OF APPELLANT CITY OF LOS ANGELES (Rule 8.520(a)(1))** on all interested parties in this action by placing copies thereof enclosed in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] BY MAIL - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than (1) day after the date of deposit for mailing in affidavit; and/or

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **March 25, 2010**, at Los Angeles, California.

Colleen Juarez, Secretary

SERVICE LIST

Supreme Court Case S176099
Court of Appeal Case B206750
Superior Court Case BC351831

OPENING BRIEF ON THE MERITS OF THE CITY OF LOS ANGELES (Rule 8.520(a)(1))

March 25, 2010

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