S176099

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION,

Plaintiff-Respondent,

v.

CITY OF LOS ANGELES,

Defendant-Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,

Intervenor-Appellant.

After A Decision By The Court Of Appeal
Second Appellate District, Division Five
Case No. B206750

Appeal from the Los Angeles Superior Court
Honorable Ralph W. Dau, Judge
Case No. BC351831

ANSWER TO PETITIONS FOR REVIEW

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STATEMENT OF ADDITIONAL ISSUE

Whether the trial court's ruling, undisturbed on appeal, that the Grocery Worker Retention Ordinance violates the Equal Protection Clause of the federal and state constitutions provides an alternative basis for affirmance.

INTRODUCTION

This Court should deny the petitions for review. The Court of Appeal correctly applied well-settled principles of law in ruling that the City of Los Angeles' Grocery Worker Retention Ordinance ("GWRO") is preempted by the California Retail Food Code ("CRFC") and the National Labor Relations Act ("NLRA").

The GWRO mandates that when control of a grocery store changes hands, the new owner hire the employees of the former owner. The ordinance's stated purpose is to "ensur[e] the welfare of the residents of [Los Angeles] communities through the maintenance of health and safety standards in grocery establishments." Los Angeles Municipal Code ("L.A.M.C.") § 181.00. The ordinance seeks to achieve this purpose "by requiring successor grocery store employers to hire the experienced employees of the prior grocery store operator," who are "knowledgeable about health and sanitation standards." Court of Appeal Opinion ("Op.") at 12. But the State of California already occupies the entire field of health and safety at grocery stores. And it does so in a less onerous manner than the City's announced standards. For that reason, both the trial court and the Court of Appeal concluded that the ordinance intrudes into a field fully occupied by state law and granted judgment in plaintiff's favor.

The Court of Appeal's state-law preemption analysis presents no issue worthy of this Court's review under California Rule of Court 8.500(b)(1). The law in this area is well settled: a court must analyze both the purpose and effect of an ordinance to determine whether that ordinance is preempted by state law. And that is precisely what the court below did. The court did not announce any new rules of law or any new mode of analysis—and its holding correctly gave effect to the express language of both the CRFC and the GWRO.

The Court of Appeal also correctly found that the GWRO is preempted by the NLRA because it intrudes upon an area—successorship obligations—that Congress intended to be left to the free play of market forces. The petitions make only a cursory attempt at explaining why the Court of Appeal's NLRA preemption ruling deserves this Court's attention under the standards of Rule 8.500(b)(1). Petitioners suggest that the Court of Appeal's decision is important because it sounds a death knell for retention ordinances across California. That argument is unfounded. As the City Attorney recognized when he proposed the ordinance, the GWRO represents a radical departure from traditional retention ordinances because it is untethered from the City's role as a market participant. All but one of the retention ordinances cited by petitioners that pre-date the GWRO were enacted pursuant to California municipalities' role as "market participant" and therefore are not subject to preemption under the NLRA.

The petitions are largely devoted to seeking review on the ground that the Court of Appeal supposedly erred in ruling in plaintiff's favor. It is well settled, however, that this is not a basis for granting review. *People v.*

Davis, 147 Cal. 346, 348 (1905). Even if it were, the Court of Appeal's decision is correct. Accordingly, the petitions should be denied.

THE DECISION BELOW

A. Enactment of the GWRO

The Los Angeles City Council enacted the GWRO on December 21, 2005. The ordinance's preamble, codified at L.A.M.C. § 181.00, set forth its purpose:

> Supermarkets and other grocery retailers are the main points of distribution for food and daily necessities for the residents of Los Angeles and are essential to the vitality of any community. The City has an interest in ensuring the welfare of the residents of these communities through the maintenance of health and safety standards in grocery establishments. Experienced grocery workers with knowledge of proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve are instrumental in furthering this interest. A transitional retention period upon change of ownership, control, or operation of grocery stores ensures stabilization of this vital workforce, which results in preservation of health and safety standards. Through this ordinance, the City seeks to sustain the stability of a workforce that forms the cornerstones of communities in Los Angeles.

The ordinance purports to promote health and safety through employee knowledge by requiring that, whenever a "change in control" occurs of a covered grocery store or its owner, the successor grocery employer hire the employees for that store from a "preferential hiring list" of employees who worked at the predecessor store for at least six months.[1]

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[1] "Grocery establishments" covered by the ordinance include: (1) retail stores over 15,000 square feet that sell primarily household foods for offsite consumption; and (2) retail stores with sales floors over 100,000 square feet that sell personal and household merchandise and use more than (continued)

L.A.M.C. § 181.02. For ninety days after the establishment is fully operational and open to the public, the successor employer cannot discharge the employees hired under the ordinance "without cause." *Id.* § 181.03(C). At the end of the ninety-day period, the employer must provide a written performance evaluation as to each employee. *Id.* § 181.03(D). If the employee's performance was satisfactory, the employer must "consider" offering the worker continued employment. *Id.* A successor employer may opt out of the ordinance, but only if the employer signs a collective bargaining agreement that supersedes the ordinance's requirements. *Id.* § 181.06.

The GWRO was originally proposed in a motion the Los Angeles City Council adopted on July 22, 2005. The motion recited that supermarkets "provide essential services to members of the public" and "play a major role in determining the health of their community." 2 Appellant's Appendix ("AA") 177. The motion therefore proposed that the City Attorney prepare an ordinance that would adopt standards for supermarkets to "address public safety concerns, provide amenities to the public and to maintain quality of life standards." *Id.*

In submitting the draft ordinance as directed, the City Attorney noted that, unlike other worker retention ordinances passed by the City, the proposed GWRO applies to *all* grocery employers, rather than only those employers that contract with the City. *See* 2 AA 197. As a result, the City could not justify the GWRO as an exercise of the City's power as a market

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10% of their sales floors for the sale of non-taxable merchandise (*i.e.*, food). *See* L.A.M.C. §§ 181.01(E), 12.24(U)(14)(a).

participant, but only as an exercise of the City's "police powers." *See* 2 AA 199. The City Attorney concluded, however, that the GWRO fell within the City's police powers because the ordinance was intended to "ensur[e] the welfare of [the City's] residents through the maintenance of health and safety standards in grocery establishments." 2 AA 197. As the City Attorney explained:

> Experienced grocery workers with knowledge of the proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve are instrumental in furthering this interest. A transitional retention period upon change of ownership or operation of grocery stores ensures stabilization of this vital workforce, which results in preservation of health and safety standards.

Id.

The City Council held a hearing on the proposed ordinance on December 14, 2005. At that hearing, the City Attorney's representative again explained that the ordinance was an exercise of the City's police power "to promote the health, welfare and safety of its residents." 2 AA 284-85. He elaborated that, "in dealing with grocery store workers in a transitional period basis, the concerns that would be focused on would involve sanitary procedures, the proper handling of food, possibly knowing the maybe unique clientele" of a specific store. *Id.* Council Member Padilla, who originally proposed that the City Attorney prepare the ordinance, similarly described the ordinance in food safety terms. Consistent with his initial motion proposing the ordinance, he stated that, "when it comes to recognizing the significance of the stability in the work force, these workers ensure that our food is safe and sanitary." *Id.*

Without questioning the health and safety purpose, some of the public witnesses and a few of the council members who spoke at the hearing offered their view that the proposed ordinance would assist in providing job security for grocery workers. In response to such comments, the City Attorney's representative again clarified that the ordinance was proposed as a food safety measure. In particular, he noted that the ninety-day transition period was designed specifically "as an appropriate period of time to ensure that the workers [have] . . . familiarity and an understanding of sanitary procedures and other health and safety issues when it comes to grocery store[s] and handling food . . . . So, that's where the 90 days comes from again, is, this concern over health, safety and welfare." 2 AA 297.

This same theme was continued at the final legislative hearing. In introductory remarks, Council Member Padilla cautioned that grocery store employees affect "the very health and safety of our city residents" and that "[t]hose who handle the produce, those who handle the meats and the poultry, the very items we put into our bodies throughout the city, should be a big concern for policymakers at all levels of government." 2 AA 355-56. Council Member Padilla encouraged his colleagues to support the ordinance as "a way to help strengthen the health and safety regulations within the city of Los Angeles." 2 AA 356. Likewise, Council Member Rosendahl expressed his support for the ordinance as a worker retention tool, but acknowledged that the ordinance was being considered from a "health and safety" perspective. 2 AA 371. The City Attorney asserted that the ordinance filled a void left by the Los Angeles County Health

Department, which "doesn't require workers to retain [knowledge of existing laws] during a transition." 2 AA 360.

Respondent California Grocers Association filed a complaint against the City seeking to enjoin the GWRO on May 4, 2006. After a two-day bench trial, the trial court entered judgment declaring the ordinance void because the ordinance enters a field—health and sanitation in food retail facilities—fully occupied by the CRFC. The trial court also concluded that the ordinance violates the equal protection provisions of the federal and California constitutions. Op. at 10.

B. Court of Appeal Decision

1. State preemption

The Court of Appeal affirmed the trial court's conclusion that the GWRO is preempted because it regulates in an area fully occupied by state law. The court noted that the CRFC is a comprehensive statutory scheme, which includes an express declaration of the State legislature's intent to occupy the entire field of "health and sanitation standards for retail food facilities." Op. at 5 (quoting Cal. Health & Safety Code § 113705) (emphasis omitted)).

In addition to this express occupation of the field, the court observed that the CRFC contains "several provisions regulating employee knowledge of food safety," including a provision requiring that all covered food facilities have at least one owner or employee on staff who has passed an accredited food safety examination. *See* Op. at 3. Importantly, the CRFC also specifically addresses employee knowledge standards in the event of a change in ownership by granting successor grocery establishments sixty

days to comply with the employee knowledge requirements, Cal. Health & Safety Code § 113947.1(e), thus "balanc[ing] the interest in maintaining health and sanitation standards . . . with reasonable hiring and training costs." Op. at 13.

Because the CRFC expressly occupies the whole field of health and sanitation in grocery establishments, including the health and safety experience requirements for store employees when a grocery store is sold, the court recognized that "there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair.'" Op. at 11 (quoting *Lancaster v. Mun. Court*, 6 Cal. 3d 805, 808 (1972)). To determine whether the GWRO intrudes into the field of health and safety at grocery establishments, the court looked "not only at the face of the ordinance, but also at the purpose for which the ordinance was enacted." Op. at 12 (quoting *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383, 404 (1993)).

With respect to the "face" of the GWRO, the court found that the ordinance's "operative provisions . . . accomplish the City's purpose to preserve health and safety standards in grocery establishments by requiring successor grocery store employers to hire the experienced employees of the prior grocery store operator." Op. at 12. The court found that the ninety-day retention requirement "result[s] in the preservation of health and safety standards at the store during the transition period." *Id.* at 12-13. Thus, the GWRO regulates the same area as the CRFC—"health and sanitation standards for retail food facilities"—but does so in a more onerous way by

requiring the uninterrupted employment of employees with knowledge of food and safety standards. *Id.*

The court's ruling was buttressed by the ordinance's express purpose of regulating in the preempted field of health and sanitation standards. Given the statute's express language, the court concluded that it is not relevant that some individual city council members may have supported the ordinance for the additional reason that it *also* offered job security for grocery store workers. Op. at 13. The court concluded, after a searching review of the record, that "[i]t is clear that the ordinance was carefully tailored to maintain health and safety standards and not designed simply to protect displaced workers." *Id.*

2. Federal preemption

The Court of Appeal also found that the ordinance is independently preempted by federal labor law. The court analyzed the ordinance under so-called *Machinists* preemption, which prevents states and municipalities from regulating "conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces." Op. at 16-17 (quoting *Chamber of Commerce of U.S. v. Brown*, 128 S.Ct. 2408, 2412 (2008) (internal quotation marks and citation omitted)). This doctrine recognizes that Congress "chose to regulate some aspects of labor activities and to leave others unrestricted by *any* governmental power to regulate." *Id.* at 17 (quoting *United Steelworkers of America v. St. Gabriel's Hosp.*, 871 F. Supp. 335, 340 (D. Minn. 1994) (internal quotation marks and citation omitted)).

The court found the GWRO preempted under *Machinists* because it intrudes into the area of "successorship obligations," which Congress intentionally left "to be controlled by the free play of market forces." Op. at 28 (quoting *Wash. Serv. Contractors Coal. v. Dist. of Columbia*, 54 F.3d 811, 820 (D.C. Cir. 1995) (Sentelle, J., dissenting)). The Supreme Court's jurisprudence on federal successorship law holds that the decision whether to hire a majority, or even any, of a predecessor's employees is a matter that the NLRA left to the prerogative of the successor and the free play of market forces. Op. at 22. The successor's election has important ramifications because "if a substantial continuity is found to exist between the two businesses, the new employer is required to bargain with the representative of employees of a former employer." *Id.* at 26. Technically, whether a "substantial continuity" exists turns on several factors, but as a practical matter, "a new employer who hires all of the employees of a predecessor company will generally be required to bargain with the employee's representative, regardless of any other circumstances." *Id.* at 27.

The Court of Appeal found that the GWRO intrudes upon this area by obligating successors to hire their predecessor's employees, thereby effectively forcing successors to recognize the predecessor employees' representative. "Thus," the court wrote, "in cases subject to the NLRA, the ordinance imposes a bargaining obligation on all new grocery store employers that the NLRA imposes on only those employers who freely hire the predecessor's employees." Op. at 27.

3. Equal protection

The majority opinion did not address the trial court's ruling that the GWRO is also invalid on equal protection grounds. The dissent found the classifications drawn by the ordinance—including the classification between: (1) grocery stores on the one hand and membership clubs on the other; (2) grocery establishments more than 15,000 square feet in size and those less than 15,000 square feet in size; (3) grocery establishments and other food retailers; and (4) stores whose employees enter a collective bargaining agreement with the owner and those that do not—reasonably related to its objectives, and would have reversed the trial court on that basis. Op. Dissent at 8-10.

WHY THE PETITION SHOULD BE DENIED

Consistent with its unique role, this Court exercises its discretionary power to entertain appeals in civil cases "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1). Because neither concern is implicated by the Court of Appeal decision, this Court should deny the petitions.

I. THE STATE PREEMPTION RULING CORRECTLY APPLIED WELL-SETTLED PREEMPTION PRINCIPLES.

A. The Court of Appeal Properly Evaluated Both the Stated Purpose and the Effect of the GWRO.

Petitioners argue that review is proper to secure uniformity of decision. According to petitioner LAANE (Int. Pet. at 4), the Court of Appeal's preemption analysis conflicts with *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139 (2006), and *Harrahill v. City of Monrovia*, 104 Cal. App. 4th 761 (2002). But those cases stand only for the

unremarkable proposition that when a court examines whether an ordinance is preempted by a state statute that fully occupies a field of regulation, the court must first define the field at issue. *Big Creek Lumber*, 38 Cal. 4th at 1152; *Harrahill*, 104 Cal. App. 4th at 770. Here, the Court of Appeal *did* define the field fully occupied by the CRFC—"health and sanitation standards for retail food facilities, including employee knowledge of food safety," (Op. at 12)—and concluded that the ordinance intruded into that field. No conflict in decisions exists.[2]

Petitioners also contend that the Court of Appeal deviated from traditional statutory analysis by analyzing only the ordinance's preamble, rather than its "purpose *and* effect." Def. Pet. at 8; *see also* Int. Pet. at 19-20 (arguing that the Court of Appeal ignored the GWRO's substantive provisions and focused entirely on the preamble). However, the Court of Appeal *did* examine both the ordinance's purpose and its effect. The court first examined the GWRO's text and anticipated effect and found that "[t]he operative provisions" of the ordinance intrude into the field of health and sanitation at grocery stores by obligating new grocery employers to hire "an experienced workforce that is knowledgeable about health and sanitation standards for the first 90 days of operation." Op. at 12. The court concluded that it was improper for the City to enact an ordinance that had

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[2] LAANE also suggests that the decision below conflicts with *So. Cal. Edison Co. v. Pub. Util. Comm'n*, 140 Cal. App. 4th 1085 (2006). Int. Pet. at 4. That case found that a requirement that utilities pay a "prevailing wage" to utility construction workers was not preempted by the NLRA because it was a generally applicable labor standard that neither encouraged nor discouraged collective bargaining. That decision is irrelevant here for the reasons discussed below (*see infra*, pp. 21-22, 22 n.4).

the effect of requiring grocery employers "to hire employees with more training and experience than required under state law." *Id.* at 13.

The court then also examined the express statement of purpose and the legislative history and concluded that "the City intended to regulate health and sanitation standards in grocery establishments through enactment of the Grocery Worker Retention Ordinance." Op. at 14. The court recognized that, to determine whether the GWRO attempts to enter the preempted field of health and sanitation at grocery stores, the court had to look "not only at the face of the ordinance, but also at the purpose for which the ordinance was enacted." Op. at 12 (quoting *Bravo Vending*, 16 Cal. App. 4th at 404). Review of both purpose and effect is critical because, if the legislature intends to fully occupy a field, "then local entities should not be allowed to frustrate that intent by enforcing ordinances which have the purpose and effect of intruding into that restricted subject matter, but which are so carefully drafted as to avoid the appearance of doing so." Op. at 12 (quoting *Bravo Vending*, 16 Cal. App. 4th at 405).

Because the Court of Appeal faithfully applied settled law, there is no conflict between the Court of Appeal's preemption analysis and the analysis used by other California courts. In fact, it is petitioners who propose a preemption analysis that California courts have soundly rejected. In LAANE's view, no conflict need be found if one ignores both the preamble and the real-world effect of the ordinance, and focuses solely on the form—or perhaps just the title—of the ordinance. *See* Int. Pet. at 2 ("The GWRO is just what its name states. . . . [T]he Ordinance does not purport to set health and safety standards applicable to any grocery

stores."). But as *Bravo Vending* held, it is not determinative what the GWRO *purports* to regulate; if it were, municipalities could evade preemption simply by artful drafting. The determinative question, rather, is whether the purpose and effect of the ordinance is to enter a field fully occupied by state law.

Likewise groundless is petitioners' assertion that the decision below will invalidate other worker retention laws throughout California. Def. Pet. at 14-15. First, the state law preemption holding does not have any bearing on retention ordinances that apply outside of the grocery context. For example, retention ordinances for hotel workers, *see* Los Angeles Service Contract Worker Retention Ordinance, Los Angeles Administrative Code § 10.36, and janitors, Cal. Labor Code §§ 1060-1065, do not threaten the State's interest in "uniform statewide health and sanitation standards for retail food facilities."

Second, the Court of Appeal's ruling does not address ordinances enacted pursuant to a local government's role as market participant. The Court's ruling thus does not preclude local governments from arguing that such ordinances are not subject to preemption because they represent an exercise of a local government's contracting power rather than its regulatory power. *See Burns Int'l Sec. Servs. Corp. v. County of Los Angeles*, 123 Cal. App. 4th 162, 178 (2004). The Court of Appeal's state preemption ruling extends no further than this case and the handful of "copy-cat" grocery retention ordinances passed in the wake of the GWRO. *See* Santa Monica, Cal., Grocery Retention Ordinance, Municipal Code ch. 5.40 (enacted May 25, 2006); S.F., Cal., Grocery Retention Ordinance,

Police Code art. 33D (enacted May 12, 2006); Gardena, Cal., Grocery Worker Retention Ordinance, Municipal Code ch. 5.10 (enacted Apr. 27, 2006).

B. The Court of Appeal's Ruling that the GWRO Intrudes Into a Field Fully Occupied by the CFRC Was Correct.

In addition to not conflicting with other decisions, the Court of Appeal's ruling was correct. In enacting the California Retail Food Code, the California Legislature made plain that it intended "to occupy the whole field of health and sanitation standards for retail food facilities." Cal. Health & Safety Code § 113705. Field preemption in this area is important because "uniform statewide health and sanitation standards for retail food facilities . . . assure the people of this state that the food will be pure, safe, and unadulterated." *Id.*

Under settled principles of "field preemption," any local regulation that "attempts to impose additional requirements" in that occupied field is invalid. *Tolman v. Underhill*, 39 Cal. 2d 708, 712 (1952). It is immaterial whether the GWRO's requirements could be reconciled with the CRFC; all that is necessary to establish preemption is that the GWRO "purports to regulate an area that is fully occupied by express provisions of the state law." *City of Watsonville v. State Dep't of Health Servs.*, 133 Cal. App. 4th 875, 885-86 (2005).

The foregoing principles establish that the GWRO is preempted by state law. Using the broadest possible preemptive language, the California Legislature unambiguously declared its intent to occupy the entire field of health and safety standards related to retail food facilities. By doing so, the

Legislature precluded local regulation on the same subject. Yet when the Los Angeles City Council adopted the GWRO, it enacted a regulation that both expressly purports to enter the preempted field and does, in fact, establish health and safety standards in grocery stores.

Even if the GWRO's preamble were shorn from its text, the ordinance would be void on the ground that its substantive provisions enter a preempted field. *See Stephenson v. City of Palm Springs*, 52 Cal. 2d 407, 410 (1959) (holding that municipal "right-to-work" ordinance impermissibly invaded field occupied by the State, despite announced intention of ordinance to prohibit only agreements neither prohibited nor authorized by state laws). The CRFC requires that "food employees" be "properly trained in[] food safety" (Cal. Health & Safety Code § 113947), and that each food facility have at least one owner or employee who is certified in food safety. *Id.* § 113947.1. Most importantly, the Legislature specified that grocery stores are not required to maintain any certified employees upon a change of control for a sixty-day grace period. *Id.* § 113947.1(e). By these provisions, the Legislature made clear that requirements relating to retention of trained and experienced food service employees—particularly in connection with a change in control of the store—are "health and sanitation standards" over which the State has reserved exclusive control.

The GWRO not only attempts to regulate in the preempted field, it does so in a different and more onerous way. The GWRO requires all employees to have food health and safety expertise and thus mandates retention of all employees upon a change in ownership. By contrast, the

CRFC (1) requires that only certain employees be trained in food safety, (2) requires that only one employee per store be certified in food safety, (3) does not require that even the certified employee be retained when the store is purchased, and (4) gives a full sixty days for the new owner to come into compliance with the certification requirement. In drafting the CRFC's employee knowledge provisions, the Legislature carefully balanced two competing considerations, *i.e.*, the need to protect the public from food contamination and the concern that requiring food safety knowledge on the part of multiple employees or mandating immediate compliance with the statute upon a change of ownership would unduly burden supermarket owners. The GWRO upsets that balance, thereby obstructing the full purpose of the CRFC.

The City Council's statement of purpose confirms that the GWRO is preempted. Despite the fact that state law preempts the field of health and sanitation in retail food facilities, the Los Angeles City Council expressly announced its intention to establish more onerous standards for "health and safety" in grocery stores. The City Attorney, which repeatedly and unambiguously advised the City Council that the sole purpose of the GWRO was to protect food health and safety, now takes the position that the City was acting to protect jobs, without regard to health and safety issues. The Court of Appeal found that the City's current position is not credible, as it is contradicted by the express language of the ordinance and the contemporaneous statements of the City Attorney and the City Council.

"[W]here the Legislature has expressly declared its intent, we must accept the declaration." *Tyrone v. Kelley*, 9 Cal. 3d 1, 11 (1973). In

combination with the effect of the ordinance, the ordinance's express but impermissible purpose mandates the GWRO's invalidation. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992) (holding that a "state law that expressly declares a legislative purpose of regulating occupational health and safety" is preempted under a federal statute precluding such state law regulation).

II. THE COURT OF APPEAL'S FEDERAL PREEMPTION RULING LIKEWISE DOES NOT MERIT REVIEW.

Petitioners also seek review of the Court of Appeal's ruling that the GWRO is preempted under federal labor law. This aspect of the court's decision likewise fails to merit review under the standards of Rule 8.500(b)(1).

A. The Asserted Conflict with Certain Federal Decisions on an Issue of Federal Law Does Not Support Review.

Petitioners first assert that the review should be granted because the decision below conflicts with other decisions and threatens to invalidate similar ordinances. But petitioners have identified no conflict between the Court of Appeal's decision and the decision of another California court. Instead, they rely solely on an asserted conflict with a split decision of the D.C. Circuit and of a single federal district court that followed that decision without analysis. *Wash. Serv. Contractors Coal. v. Dist. of Columbia*, 54 F.3d 811 (D.C. Cir. 1995); *Alcantara v. Allied Properties, LLC*, 334 F. Supp. 2d 336, 343 (E.D.N.Y. 2004). This asserted conflict on an issue of federal law between the decision below and some federal decisions is ill-

suited for this Court's discretionary review. *See, e.g.*, *So. Cal. Edison*, 140 Cal. App. 4th at 1103-04 (review denied even though Court of Appeal expressly declined to follow Ninth Circuit on an issue of NLRA preemption). Indeed, review of this federal issue is particularly inappropriate here given that the federal preemption ground is determinative only if the Court were to first reverse the lower courts' alternative justifications for voiding the ordinance: state law preemption and violation of the equal protection clause.

Nor are petitioners correct that review is appropriate because the decision below "not only blocks enforcement of this Ordinance, but casts doubt on California's worker retention statute . . . and a number of local ordinances." Int. Pet. at 4; *see also* Def. Pet. at 14-15. As the City Attorney explained to the Los Angeles City Council when presenting the GWRO for review, "[a] municipality such as the City has a broader ability to establish requirements for contractors when it is acting in its capacity as a market participant, rather than as a market regulator." 2 AA 199. That is so because "once a state's action falls within the 'market participant' exception, it is not preempted under the NLRA." *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1083 n.5 (9th Cir. 2006) (en banc), *overruled on other grounds by Chamber of Commerce of U.S. v. Brown*, 128 S.Ct. 2408 (2008). Thus, any retention ordinance that regulates businesses with which the State and municipalities contract is likely not subject to preemption by federal labor law. *See Build. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229-30 (1993) (holding that a state may act without

offending the preemption principles of the NLRA when it acts as a proprietor and its acts therefore are not "tantamount to regulation" or policymaking).

B. The Court of Appeal Correctly Applied Federal Law.

At bottom, petitioners seek review because they disagree with the Court of Appeal's decision on the merits. Not only is that not a proper basis for review, however, but the Court of Appeal was entirely correct in ruling that, by effectively forcing employers to collectively bargain with the unionized employees of its predecessor, the GWRO impermissibly trespasses on an area of bargaining conduct that Congress intended to be left to the free play of economic forces.

When it enacted the NLRA, Congress implicitly forbid states from regulating conduct "that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408, 2412 (2008) (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). The *Machinists* doctrine preempts any state or local law that "govern[s] conduct which Congress intended to leave unregulated." *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir. 1999). Because Congress, in enacting the NLRA, was concerned with maintaining "the equality of bargaining power" between labor and management rather than with establishing minimum terms of employment, states and local governments may establish *substantive* minimum labor standards. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

They may not, however, enact legislation that "interfere[s] in the collective bargaining process." *Nat'l Broad. Co., Inc. v. Bradshaw*, 70 F.3d 69, 72 (9th Cir. 1995).[3]

Petitioners construe the ordinance as an attempt to establish minimum standards of employment, comparable to a living wage ordinance, and rely on cases like *St. Thomas-St. John Hotel & Tourism Association, Inc. v. Government of U.S. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000), which involve classic examples of laws that impose "minimum substantive standards on contract terms." *Id.* at 242. The court in *St. Thomas* upheld a law that limited the grounds for terminating employees in the Virgin Islands because such a law "neither regulates the process of

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[3] LAANE's contention that *Machinists* preemption is a narrow doctrine applicable only in limited circumstances, Int. Pet. at 8, is belied by the great variety of contexts in which the doctrine has been applied. "*Machinists* preemption has been held to preempt a range of governmental conduct that interferes with the ordinary free play of the market and rises to the level of a regulatory act." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1418 n.16 (9th Cir. 1996). Under the doctrine, the Supreme Court alone has preempted a California statute prohibiting covered employers from using state funds to assist or deter union organizing, *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (2008), prohibited states from awarding punitive damages for business losses resulting from a secondary boycott, *Local 20, Teamsters, Etc., Union v. Morton*, 377 U.S. 252, 260 (1964), and prohibited a city from conditioning a taxi company's franchise renewal on the employer's settlement of a labor dispute with its workers, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). The Court has also prohibited states from restricting picketing permitted under federal law, *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485 (1953), and from enjoining employees from refusing to work overtime or outlawing strikes and lockouts, *Machinists*, 427 U.S. at 147.

bargaining nor upsets the balance of power of management on one side and labor on the other that is established by the NLRA." *Id.* at 244.

But the same cannot be said of the GWRO. The GWRO both upsets the balance of power established by the NLRA and alters the "process[] of bargaining," *Metro. Life Ins. Co.*, 471 U.S. at 756, by effectively mandating that grocery store purchasers become "successors" for NLRA purposes, thereby forcing them to collectively bargain with the union of their predecessor's employees.[4]

Under the "successorship doctrine," which "arises [out of the] operation of the [NLRA]," *Maintenance, Inc.*, 148 NLRB 1299, 1301 (1964), an employer must recognize and bargain with the union that had been named the bargaining representative of the employees under a predecessor employer if "there is 'substantial continuity' between the enterprises." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The NLRB, which has the exclusive jurisdiction to make the successorship determination, has, for thirty years, made it clear that the

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[4] Even aside from its intrusion on the collective bargaining process, the GWRO does not qualify as a permissible "minimum employment standard." The courts have found NLRA preemption as to alleged employment standards where, as here, the law at issue is not one of general applicability but "targets particular workers in a particular industry" for special protection as to rights that would normally be the subject of collective bargaining. *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995) (finding preempted a county "prevailing wage" ordinance that applied to private industrial contract projects with a cost of over $500,000); *see also 520 South Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1124 (7th Cir. 2008) (finding preempted a state statute that required hotel owners in Cook County to provide extended meal and rest breaks to hotel room attendants).

primary factor in determining successorship is whether the new company hires a majority of its predecessor's employees, the so-called "majority test." *Id.* at 41-43.

The Supreme Court has held that whether to hire a majority—or even any—of the predecessor's employees is a matter that the NLRA left to the prerogative of the successor and the free play of market forces. In *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 281 n.5 (1972), the Supreme Court observed that the NLRB has never interpreted the NLRA as requiring "that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor." The Court went further in *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249 (1974), holding that a successor employer "ha[s] the right not to hire any of the former [predecessor] employees, if it so desire[s]." *Id.* at 262. In concluding that the NLRA does not oblige a successor to hire its predecessor's employees, the Court emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision." *Id.* at 261 (quoting *Burns*, 406 U.S. at 287-88).

Burns and *Howard Johnson* establish that where an employer purchases the assets of another business and hires its predecessor's employees, the NLRA imposes a successorship obligation of bargaining; however, where the successorship doctrine does not apply, Congress intentionally left the area of successorship obligations to be controlled by the free play of market forces. Under the GWRO, however, even if a

successor employer would prefer to change the composition of the labor force, the employer will often be required to hire a majority of its predecessor's employees and thereby become obligated to bargain with the representative union. Put simply, a state statute or municipal ordinance cannot obligate parties to bargain or negotiate without running afoul of *Machinists*. *Cf. Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994) (finding state statute requiring that cemeteries and gravediggers negotiate as to a specific condition preempted by *Machinists*).

The federal courts are unanimous that states and local governments cannot enact laws that obligate successors to honor the collective bargaining agreement signed by their predecessor's employees. *See United Steelworkers of America v. St. Gabriel's Hosp.*, 871 F. Supp. 335, 341-43 (D. Minn. 1994); *Commonwealth Edison Co. v. Int'l Bhd. of Elec. Workers*, 961 F. Supp. 1169, 1884 (N.D. Ill. 1997). These laws are preempted by *Machinists* because they prohibit employers from exercising their "well-established right" "to not hire any of the employees of its predecessor." *St. Gabriel's Hospital*, 871 F. Supp. at 342, 343. It is true that the GWRO operates indirectly, whereas the successor statutes at issue in *St. Gabriel* and *Commonwealth Edison* directly bound successors to the predecessor union's collective bargaining agreement. However, a state may not accomplish indirectly what it is forbidden to accomplish directly. *See Brown*, 128 S. Ct. at 2414-15. A city has no authority to introduce its own standard of "properly balanced bargaining power," whether the introduction of that standard occurs explicitly or implicitly. *Thunderbird Mining Co. v. Ventura*, 138 F. Supp. 2d 1193, 1199 (D. Minn. 2001) (quotation omitted).

Petitioners argue that there is "no guarantee that the new employer will be a successor under the NLRA" since the issue does not arise if the predecessor was not unionized or if a significant number of employees decline the offer of employment. *See* Int. Pet. at 8-9. Petitioners, however, miss the point. Congress intended for successorship obligations to be dictated by the free play of market forces in every instance and the GWRO violates that intent.

For the same reason, it is no answer to argue that the ordinance is permissible because the NLRB *could* decide that a successor forced to hire his predecessor's employees should not have to recognize their union. *Id.* at 9. Because Congress intended for the area of successorship obligations to be controlled by the free play of economic forces, it contravenes federal labor policy to subject grocery employers to even the risk of being adjudged a successor, since the considerable threat of successorship obligations will influence employers' behavior.

Additionally, petitioners, like the *Washington Service* majority, fail to appreciate that, whichever way the NLRB decides the successorship issue, the NLRB's hand will have been forced by the *fait accompli* imposed by the GWRO. If the NLRB determines that no successorship obligation is proper, it will be sacrificing the interests of the employees (recognized by the federal successorship doctrine) in continuing to be represented by their chosen collective bargaining representative when they continue working in the same workplace. Similarly, if, to accommodate the interests of the employees, the NLRB determines that the employer is bound as a successor, that determination will be in derogation of the general federal

policy against imposing successor obligations when the employer did not voluntarily hire a majority of the employees. Either way, the City of Los Angeles has intruded into an area that Congress intended to close off from municipal legislation favoring one side or the other.

III. THE GWRO'S INCOMPATIBILITY WITH EQUAL PROTECTION PRINCIPLES PROVIDES AN ADDITIONAL REASON FOR AFFIRMANCE.

If the Court grants review, then it must also consider an additional issue not raised in the petitions: whether the trial court's conclusion, undisturbed on appeal, that the GWRO violates equal protection principles provides an alternative basis for affirmance. Because a majority of the Court of Appeal did not reverse—indeed did not even address—the trial court's ruling that the GWRO violates the equal protection clause, that ruling remains the law of the case and must be considered if the Court is inclined to reverse on any of the grounds raised in the petitions.

The superior court held that the GWRO is invalid under the federal and state equal protection clauses because the ordinance draws two classifications that are not reasonably related to its objectives. Specifically, the court held that there was no rational justification for applying the ordinance to grocery establishments more than 15,000 square feet in size but not those less than 15,000 square feet in size, or for creating an exemption for grocery stores whose employees enter a collective bargaining agreement with the owner. Throughout this case, respondent has also argued that the ordinance draws an irrational distinction between grocery stores and membership clubs, and between grocery establishments and other food retailers. If the Court grants review of any of the grounds raised

in the petition, it should also review respondent's equal protection arguments and affirm on that basis.

1. The GWRO's distinction between grocery establishments over 15,000 square feet in size and those under 15,000 square feet cannot be justified by reference to the City's food safety objective. Grocery stores of all sizes are engaged in the same activities in relation to food, and therefore all grocery stores present the same safety risks. If anything, the natural conclusion would be that smaller grocery stores are less likely to have institutional systems designed to prevent food contamination.

The City has defended this distinction on the ground that the City Council could have reasonably concluded that the ordinance would not hinder the sale of large grocery chains, but may have a negative impact on the sale of small grocery stores. But there is no rational basis for concluding that the size of the grocery store has any connection at all to the size of the purchaser of that store or its ability to bear the economic burden of having to retain unwanted employees. To the contrary, the evidence at trial demonstrated that small grocery stores are operated by such significant business entities as Whole Foods, Trader Joe's, Smart & Final and Tesco (the latter being the third largest supermarket owner in the world). On the other hand, larger stores are owned not only by large chains but by smaller independent grocers.

Before the Court of Appeal, LAANE defended the ordinance under a different rationale—that larger stores employ more workers and thus the economic impact of those workers losing their jobs in a change of control would be greater. At best, however, this is a rationale for *including* larger

stores within the GWRO. It does not provide any rational basis for *excluding* smaller stores.

2. As the superior court recognized, the GWRO irrationally excludes from its coverage new employers that enter into a collective bargaining agreement with the employees of the former owner. This collective bargaining exception obviously has no relationship to the GWRO's stated health and safety purpose. Nor does it have any connection to any job protection purpose, as it does not require that the collective bargaining agreement contain any provision regarding retention of any specified number of employees. Its only apparent purpose is to promote unionization, which the City does not advance as one of the GWRO's objectives.

3. The GWRO applies to grocery stores over 15,000 square feet as well as "Superstores," as that term is defined by Los Angeles Municipal Code section 12.24(U)(14)(a). The ordinance does not apply, however, to superstores that charge membership dues, which are expressly excluded from section 12.24's "Superstore" definition.

This distinction between grocery stores that charge membership dues and those that do not is not rationally related to any valid purpose behind the GWRO. The GWRO's stated purpose of protecting food health and safety certainly does not support any such distinction. Membership clubs excluded from the ordinance have grocery sections, and would face identical food security risks during a change of ownership as would any other large store that sells food. Thus, to the extent there is any need to

have experienced workers for the first ninety days after the sale, that need exists equally for membership clubs as it does for any other store.

Nor does any purpose to provide for worker job security supply a valid basis for distinguishing membership stores from the stores covered by the GWRO. If there is a need to protect workers from the normal operation of the marketplace, the workers at membership stores are just as much in need of such protection as the workers at other stores.

4. The GWRO also distinguishes between grocery stores and other retail food businesses, including restaurants, fast-food establishments, and convenience stores. This distinction also bears no relationship to any valid legislative purpose. To the extent any food safety risks exist during a change in ownership, they are no less likely to exist at restaurants and fast-food establishments than at grocery stores. Indeed, sanitary breaches are more likely to result in foodborne illness when noncompliant businesses are in the primary business of selling food for direct consumption rather than for home preparation. Nor is there any basis for thinking that job security is of greater concern in grocery stores than in restaurants or fast-food establishments.

All of these equal protection violations represent independently sufficient reasons for affirming the Court of Appeal, and would have to be addressed by this Court if the petition is granted.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: September 28, 2009

Respectfully submitted,

JONES DAY

By: Richard Ruben (RP6)
Richard S. Ruben

Attorney for Respondent
CALIFORNIA GROCERS
ASSOCIATION

CERTIFICATE OF WORD COUNT

Pursuant to Cal. R. Ct. 8.504(d)(1), I certify that the attached answer contains 8361 words.

Dated this 28th day of September, 2009.

By: Richard Ruben (RSR)
Richard S. Ruben

PROOF OF SERVICE

Re: S176099, *California Grocers Association v. City of Los Angeles & Los Angeles Alliance for a New Economy*

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of San Francisco and my business address is 555 California Street, 26th Floor, San Francisco, CA 94104-1500.

On September 28, 2009, I served the attached document described as an **ANSWER TO PETITIONS FOR REVIEW** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in San Francisco, California, addressed as follows:

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

Executed on September 28, 2009, at San Francisco, California.

By: 
Virginia Aldajani