SUPREME COURT COPY

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

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION

Plaintiff and Respondent

vs.

CITY OF LOS ANGELES

Defendant and Appellant

LOS ANGELES ALLIANCE FOR A NEW ECONOMY

Intervenor and Appellant

REPLY TO THE ANSWER
(CRC Rule 8.500(e)(5))

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

CARMEN A TRUTANICH, City Attorney
LAURIE RITTENBERG, Assistant City Attorney
JOHN A. CARVALHO, Deputy City Attorney
GERALD MASAHIRO SATO, Dep. City Atty SBN 82780
900 City Hall East
200 North Main Street
Los Angeles, California 90012-4129
Telephone No.: (213) 978-7734
Fax No.: (213) 978-7710
Attorneys for Appellant CITY OF LOS ANGELES

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

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION

Plaintiff and Respondent

vs.

CITY OF LOS ANGELES

Defendant and Appellant

LOS ANGELES ALLIANCE FOR A NEW ECONOMY

Intervenor and Appellant

REPLY TO THE ANSWER
(CRC Rule 8.500(e)(5))

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

CARMEN A TRUTANICH, City Attorney
LAURIE RITTENBERG, Assistant City Attorney
JOHN A. CARVALHO, Deputy City Attorney
GERALD MASAHIRO SATO, Dep. City Atty SBN 82780
900 City Hall East
200 North Main Street
Los Angeles, California 90012-4129
Telephone No.: (213) 978-7734
Fax No.: (213) 978-7710
Attorneys for Appellant CITY OF LOS ANGELES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

STATUTES

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant CITY OF LOS ANGELES replies to the Answer of the California Grocers Association to the Petition for Review herein as follows:

I. THE ANSWER HAS NOT DIRECTED THIS COURT'S ATTENTION TO ANY OPERATIVE PROVISION OF THE CITY'S GROCERY WORKER RETENTION ORDINANCE WHICH CONFLICTS WITH STATE LAW.

The City contends that the court below based its decision upon the non-operative statements of purpose in the preamble of the Grocery Worker Retention Ordinance, while ignoring the operative effect of the unambiguous ordinance itself. The Respondent Association, however, contends that the court below did consider both the purposes stated in the preamble and the operative effects of the body of the ordinance in finding preemption by the California Retail Food Code, Health and Safety Code section 113700 et seq. Thus, the Answer at page 8 argues:

> . . . "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' . . . The court found that the **ninety-day retention requirement 'results in the preservation of health and safety standards** at the store during the transition period." (emphasis added)

However, neither the Answer nor the decision of the court below can point to any part of the Grocery Worker Retention Ordinance—neither the preamble nor the operative ordinance--which purports to establish "experience" criteria for the employees who will be retained by the successor employer (or any other criteria, other than that they are employed by the outgoing employer). Likewise, while it may be assumed and hoped that the retention requirement will result in the preservation of health and safety standards through the continued employment of experienced employees, neither the Answer nor the decision of the court below can point to any part of the Grocery Worker Retention Ordinance in which such a result could be enforced. The Answer cannot point to any legal burden placed upon either employers or employees regarding food health and safety by the Grocery Worker Retention Ordinance because there are none. The Answer underscores the conflict between the decision of the court

below, and authority which holds that the state law preemption issue requires analysis of both the purpose and effect of the local law, see authority cited in the City's Petition for Review.

It is respectfully submitted that if, as Respondent posits, an actual "effect" of the operative ordinance was the intrusion upon the California Retail Food Code, the court would not have even considered the preamble at all, as preemption would exist without the need to examine any stated purposes. The court below proceeded to move the focus of its analysis from the unambiguous employer-employee regulations created by the operative ordinance to the statement of purposes set forth in the preamble, then somehow "re-interpreted" the unambiguous ordinance through what it believed to be the purposes stated in the preamble, because it mistakenly believed it was required to do so under *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal. App. 4th 383. The reasons the City believes that the court below misinterpreted *Bravo* are discussed in the City's Petition for Review, pgs. 11 to 12 on file herein

The Answer does not respond to the City's contention that the preamble, correctly understood, cannot reasonably be interpreted as even evidencing intent to intrude upon the regulatory field preempted

by the California Retail Food Code. Whether analyzed apart or in connection with the operative ordinance, the preamble does not indicate any intent on the part of the City to establish or enforce standards of experience or training for retail grocery workers, or otherwise create regulations regarding food health and safety which are inferior or superior to, or merely duplicative of the California Retail Food Code. Petition for Review pgs. 23, 24 on file herein

The approach to statutory interpretation of the court below, the legal significance it gives to a preamble's statement of purpose the plain language of which creates no legal rights and imposes no legal burdens upon employers, employees, or anyone else, is in conflict with prevailing appellate authority. Similarly, its reliance upon selected excerpts from the ordinance's legislative history when the language of the ordinance is unambiguous is likewise in conflict with other authority. Thus, the legal significance of the decision goes well beyond the context of worker retention laws; it has significance for any case in which the court is called upon to determine the intent of the Legislature and to decide what a written law *means*. For these reasons, review should be granted.

II. THE ANSWER DOES NOT DISPUTE THAT THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH FEDERAL APPELLATE AUTHORITY INTERPRETING THE NATIONAL LABOR RELATIONS ACT.

The Answer repeats the Association's merits argument on the issue, but does not and cannot argue that court below acknowledges a conflict with federal authority and expresses its disagreement with *Washington Service Contractors Coalition v. District of Columbia* (1995) 54 F.3d 811 (D.C. Cir. 1995) and *Alcantara v. Allied Properties*, LLC, 334 F.Supp.2d 336 (EDNY 2004) To put it another way, the Answer does not dispute the grounds for review asserted by the City regarding the NLRA/federal preemption issue.

III. THE CITY DOES NOT OPPOSE GRANTING REVIEW ON THE MERITS OF RESPONDENT'S EQUAL PROTECTION CLAIM.

The City does not oppose the Respondent Association's request for review of its Equal Protection cause of action, if the City's petition for review is granted. For all of the reasons set forth in the Appellant's Opening Brief and the dissenting opinion of the court below, nothing about the Grocery Worker Retention Ordinance subjects the Association's member to any irrational discrimination or classification or otherwise deprives them of the Equal Protection of

the Laws. Slip op., dissenting opinion pgs 8 to 10 citing *Kasler v. Lockyer* (2000) 23 Cal. 4th 472.

CONCLUSION

For all of the above reasons, and the reasons set forth in the Petitions for Review and the dissenting opinion of Justice Mosk in the court below, review should be granted.

DATED: October 6, 2009

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
LAURIE RITTENBERG, Asst.City Atty
JOHN A. CARVALHO, Deputy City Attorney

GERALD MASAHIRO SATO,
Dep. City Attorney
Attorneys for Appellant *CITY OF LOS ANGELES*

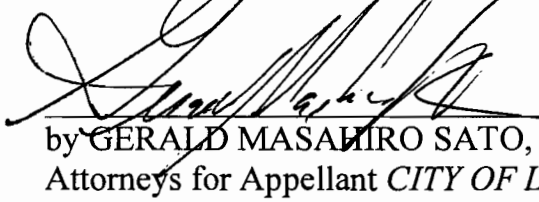
CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, Rule 14(c), this REPLY TO THE ANSWER was produced on a computer in 14-point type. The word count including footnotes, as calculated by the word processing program is 1,690.

DATED: October 6, 2009

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
LAURIE RITTENBERG, Assistant City Atty
JOHN A. CARVALHO, Deputy City Attorney



by GERALD MASAHIRO SATO, Deputy City Attorney
Attorneys for Appellant *CITY OF LOS ANGELES*

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 October 6, 2009, I served the foregoing document(s) described as **REPLY TO THE ANSWER** 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 **October 6, 2009**, at Los Angeles, California.

Colleen Juarez, Secretary

SERVICE LIST

Supreme Court Case No. S 176099
Court of Appeal Case No. B206750
Superior Court Case No. BC351831

REPLY TO THE ANSWER

October 6, 2009

Office of the Clerk
California Court of Appeal
Second Appellate District Div. 5
300 South Spring Street
Los Angeles, CA 90013-1213

Los Angeles County Superior Court
Honorable Ralph W. Dau, Dept. 57
111 North Hill Street
Los Angeles, CA 90012

Richard S. Ruben
Jones Day
3 Park Plaza, Suite 1100
Irvine, CA 92614-8505

Craig E. Stewart
Nathaniel P. Garrett
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104

Michael J. Finnegan
Pillsbury, Madison & Sutro
725 S. Figueroa Street, Suite 2800
Los Angeles, CA 90017

National Chamber Litigation
Center, Inc.
Robin S. Conrad
Shane B. Kawka
1615 H Street, N.W.
Washington, D.C. 20062

Henry M. Willis
Margo Feinberg
Schwartz, Steinsapir, Dohrmann
& Sommers
6300 Wilshire Blvd, Suite 2000
Los Angeles, CA 90048-5202

Mitchell Silberberg & Knupp LLP
Adam Levin
Tracy L. Cahill
11377 West Olympic Blvd
Los Angeles, CA 90064-1683