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

Intervenor and Appellant

OPENING BRIEF ON THE MERITS (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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ISSUES PRESENTED FOR REVIEW (Rule 8.520(b)(2)(B))

Issue No. One: Do California food safety laws preempt an ordinance of the City of Los Angeles that requires a grocery store, after a change of ownership, to retain the employees of the former for a 90-day transition period?

Issue No. Two: Do federal labor laws preempt that ordinance?

STATEMENT OF THE CASE

On November 10, 2009, this Supreme Court granted petitions for review of *California Grocers Association v. City of Los Angeles et al* (2009) 176 Cal. App. 4th 51 (*Cal. Grocers Ass'n*), in which the court below held that the Grocery Worker Retention Ordinance of the City of Los Angeles, Los Angeles Municipal Code Section 181.00 (Vol. 2 Appellant's Appendix pgs. 170-174) is pre-empted by (1) the California Retail Food Code, Health and Safety Code sections 113700 et seq and (2) the National Labor Relations Act, 29 U.S.C. section 151 et seq under the "*Machinists*[1] preemption doctrine".

Grocery Worker Retention Ordinance

The Grocery Worker Retention Ordinance begins with a Statement of Purpose, Los Angeles Municipal Code (L.A.M.C.)

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

section 181.00:

> '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 applies to "grocery establishments," which includes (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 10 percent of their sales floors for the sale of nontaxable merchandise. (L.A.M.C., §§ 181.01E, 12.24U.14.a.) Businesses that sell primarily bulk merchandise and require customers to pay a periodic fee are excluded from the regulation. (L.A.M.C., § 12.24U.14.a.)

When control of a grocery establishment changes due to the sale or transfer of the assets or controlling interest, the Grocery Worker Retention Ordinance requires the successor grocery employer to hire employees from a list of employees who worked at the store prior to the change in control, other than managerial, supervisory, or confidential employees. (L.A.M.C., §§ 181.01, 181.02B.)

If the successor employer needs fewer employees than its predecessor, the employees must be hired based on seniority or pursuant to the terms of a relevant collective bargaining agreement. (L.A.M.C., § 181.03B.)

For 90 days after the establishment is fully operational and open to the public, the successor employer cannot discharge the employees hired under the ordinance except for cause. (L.A.M.C., § 181.03A, C.) At the end of the 90-day period, the employer must provide a written performance evaluation as to each employee. (L.A.M.C., § 181.03D.) If the employee's performance was satisfactory, the employer must consider offering the worker continued employment. (L.A.M.C., § 181.03D.)

The Grocery Worker Retention Ordinance does not require the employer to provide the same wages or benefits as the previous

business or recognize or bargain with any union. Indeed, the ordinance provides that parties subject to the ordinance may execute a collective bargaining agreement that supersedes requirements of the ordinance. (L.A.M.C., § 181.06.)

Workers may bring an action against the predecessor or successor employer, as appropriate, for violations of the Grocery Worker Retention Ordinance. (L.A.M.C., § 181.05.)

California Retail Food Code

The CRFC is a comprehensive statutory scheme regulating health and sanitation standards for retail food facilities. The CRFC encompasses a wide range of provisions regulating food facilities, including building plan review (*§ 114380*), employee knowledge (*§ 113947 et seq.*), food storage (§ 114047 et seq.), and sanitation practices for equipment and utensils (*§ 114095 et seq.*).

In *section 113705*, the Legislature declares its intention to occupy fully the regulatory field of food safety: "the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that the food will be pure, safe, and unadulterated . . . it is the intent of the

Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities."

Under *section 113709*, local governing bodies are permitted to adopt an evaluation or grading program for food facilities, to prohibit any type of food facility, to adopt an employee health certification program, to regulate consumer toilet and handwashing facilities, and to adopt public safety requirements concerning vending from vehicles.

The CRFC regulates employee knowledge of food safety. Food facilities that provide nonprepackaged potentially hazardous food must have an owner or employee who has passed an accredited food safety certification examination. (*§ 113947.1, subd. (a)*.) "A food facility that commences operation, changes ownership, or no longer has a certified owner or employee pursuant to this section shall have 60 days to comply with this subdivision." (*Id., subd. (e)*.)

The CFRC requires that food employees must have adequate knowledge and be properly trained in food safety as it relates to their assigned duties. (*§ 113947*.) The certified owner or employee is

responsible for ensuring that all employees who handle nonprepackaged foods have "sufficient knowledge to ensure the safe preparation or service of the food, or both. The nature and extent of the knowledge that each employee is required to have may be tailored, as appropriate, to the employee's duties related to food safety issues." (*§ 113947.1, subd. (f).*) A local government program that requires employees of a food facility to obtain approved food safety training or certification is enforceable only if the program existed prior to January 1, 1998, and only in the form that the program existed prior to January 1, 1998. (*§§ 113794.1, 113947.5.*)

The CRFC mandates that employees report to their employer if they are diagnosed with specified infectious diseases or have a lesion or open wound on their hands or arms (*§ 113949.2*); that employees keep their hands, arms and fingernails clean (*§§ 113952, 113968*); and that employees wear gloves when contacting food (*§ 113973*). The CRFC does not address labor matters such as employee pay, benefits, seniority, or job retention on a change of ownership.

National Labor Relations Act

The court below summarized the National Labor Relations Act:

"The NLRA 'is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce.' [Citation.]" (*Com. Edison Co. v. Intern. Broth. Of Elec. Workers* (N.D.Ill. 1997) 961 F.Supp. 1169, 1178.) "The NLRA declares the policy of the United States to eliminate or mitigate obstructions to the free flow of commerce caused by industrial strife, unrest, and unequal bargaining power, 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' (29 U.S.C. § 151.)" *Cal. Grocers Ass'n supra* at pg. 67 citing *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1096-1097

Proceedings in the courts below

Respondent California Grocers Association commenced this action to have the Grocery Worker Retention Ordinance ruled invalid as pre-empted by the California Retail Food Code and the National Labor Relations Act. The Association also contended that the ordinance violated the equal protection clauses of the California and

United States Constitutions as "not rationally related to promoting public health and safety" and creating an irrational discrimination between different classes within industries with employees who handle food. Vol. 1 AA pg. 110, lines 16 to 24 The trial court ruled in favor of the Association on its state law pre-emption and equal protection claims, but rejected its NLRA federal preemption argument.

The court of appeal below affirmed the ruling that the California Retail Food Code pre-empts the Grocery Worker Retention Ordinance. More specifically:

> We conclude that the ordinance requires successor grocery employers to employ experienced workers in order to maintain health and safety standards at the store during the transition to new management.

Cal. Grocers Ass'n supra at 56 The decision quotes at length statements by City Council members and "city attorney's representatives" describing the ordinance as a regulation of health and safety. *Cal. Grocers Ass'n supra* at pp. 58 to 62. The court concluded:

> It is clear from the operative provisions of the ordinance, the express statement of purpose, and the legislative history that the City intended to regulate health and

> sanitation standards in grocery establishments through enactment of the Grocery Worker Retention Ordinance. The ordinance is preempted.

Id at pg. 65

The court below also reversed the trial court's ruling rejecting the Association's NLRA argument, finding instead that the Grocery Worker Retention Ordinance intruded upon "a zone protected and reserved for market freedom"[2] and was therefore preempted by the NLRA under *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132 and its progeny. see *Chamber of Commerce of U.S. v. Brown* (June 19, 2008, No. 06-939) ____U.S.____ [128 S.Ct. 2408, 2412] In general, the *Machinists* doctrine prohibits States from imposing restrictions on labor and management's "'weapon[s] of self-help'" that were left unregulated in the NLRA because Congress

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[2] Code of Civil Procedure section 906 in certain specified circumstances allows respondents to request leave to assert errors committed by the trial court without the necessity of filing a notice of cross-appeal, and grants the court of appeal discretion to grant such leave. However, the Association never requested such leave prior to simply presenting its federal preemption argument in its merits brief. The City argued in its Reply Brief that the respondent waived its NLRA preemption argument. It was an abuse of discretion for the court below to consider and rule upon the Association's federal preemption claim. See *Cal. Grocers Ass'n supra* at pgs. 85, 86 (Mosk, J. dissenting)

intended for tactical bargaining decisions and conduct "'to be controlled by the free play of economic forces.'" *Associated Builders v. Nunn,* 356 F.3d 979, 987 (9th Cir. 2004) citing *Machinists supra* at 140 see *Cal. Grocers Ass'n supra* at pgs. 66 to 77

The court below rejected the holding of *Washington Service Contractors Coalition v. District of Columbia et al* 54 F.3d 811 (D.C.Cir. 1995) ("*Washington Service*"), which had held that a worker retention ordinance similar to the Grocery Worker Retention Ordinance was not preempted by the NLRA:

> The court of appeals for the District of Columbia considered a similar retention ordinance in [*Washington Service*] and held, in a divided opinion, that the ordinance was not preempted. We disagree with the reasoning of the majority in *Washington Service*. The majority suggested that if the NLRB were to consider a case under the District of Columbia ordinance and find that the acquiring employer was not required to bargain because the employer had been forced to hire the predecessor's employees, then no conflict with federal labor law existed. However, this analysis disregards the conflict that would arise with regard to the protection of employees' rights under those circumstances. The *Washington Service* majority also reasoned that if the NLRB considered a case under the District of Columbia ordinance and found the successorship doctrine applied, then the NLRB's judgment would be that the ordinance was congruent with the goals of federal labor policy, and therefore, could not be said to conflict with the NLRA. This is clearly incorrect. In *Burns*[3], the NLRB concluded the substantive provisions of a collective bargaining agreement

[3] *NLRB v. Burns Security Services, Inc.* (1972) 406 U.S. 272, 281-282

> could be imposed on a successor company in keeping with the policies of federal labor law and the *Burns* court rejected the NLRB's interpretation. The *Washington Service* majority also reasoned that employers are not free to refuse to hire employees on the basis of union membership, and therefore, no employer freedom was compromised by the ordinance. This analysis ignores the fact that employers are free under federal labor law not to hire a predecessor's employees for other reasons. We agree with the dissent in *Washington Service* that the Supreme Court cases interpreting the NLRA have made it clear that "Congress intentionally left the area of successorship obligations to be controlled by the free play of market forces" and therefore, *Machinists* preemption applies. (*Washington Service, supra, 54 F.3d at p. 820* (dis. opn. of Sentelle, J.).)

Cal. Grocers Ass'n supra at pgs. 76, 77

ARGUMENT

For all of the following reasons, the decision of the court below is incorrect and should be reversed. The reasoning of the dissenting opinion is entirely correct and should be adopted by this Supreme Court.

I. THE GROCERY WORKER RETENTION ORDINANCE IS NOT PREEMPTED BY THE CALIFORNIA RETAIL FOOD CODE.

The court below failed to follow general principles established by this Supreme Court for determining whether state law preempts local law.

A. General Principles for Determining Whether State Law Preempts Local Law.

Local ordinances within the scope of a city's traditional police powers are presumed valid. For that reason, the party challenging the ordinance has the burden of demonstrating preemption. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149; *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580, 584 In *O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1067 et seq this Supreme Court articulated the general principles for analyzing the issue of state law preemption of local law:

> **(1)** . . . "Under *article XI, section 7 of the California Constitution*, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws.' [¶] 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation " '*duplicates, contradicts*, or *enters an area fully occupied* by general law, either expressly or by legislative implication.' " ' [Citations.]" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, italics added, fn. omitted (*Sherwin-Williams)* . . .
>
> **(2)** A local ordinance *duplicates* state law when it is "coextensive" with state law. (*Sherwin-Williams, supra,* 4 Cal.4th at pp. 897-898, citing *In re Portnoy (1942)* 21 Cal.2d 237, 240 [as "finding 'duplication' where local legislation purported to impose the same criminal prohibition that general law imposed"].)
>
> **(3)** A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law. (*Sherwin-*

Williams, supra, 4 Cal.4th at p. 898, citing *Ex parte Daniels (1920) 183 Cal. 636, 641-648* [as finding " 'contradiction' " in a local ordinance that set the maximum speed limit for vehicles below that set by state law].)

(4) A local ordinance *enters a field fully occupied* by state law in either of two situations--when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra, 4 Cal.4th at p. 898*; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p. 551 ["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

Article XI, section 7 of the California Constitution further provides, "[a] county or city may make and enforce within it limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Article XI, section 5 of the California Constitution*, commonly referred to as the "home rule" doctrine, "reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern.' [Citation.]" *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580, 584-585 "[W]hen local government regulates in an area over which it traditionally has exercised control, ... California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state

statute." *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149

Therefore, in analyzing whether state law has preempted local law: " 'First, a court must determine whether there is a genuine conflict between a state statute and a municipal ordinance. [Citations.] Only after concluding there is an actual conflict should a court proceed with the second question; i.e., does the local legislation impact a municipal or statewide concern?' [Citation.] Courts should avoid making unnecessary choices between competing claims of municipal and state governments 'by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.' [Citation.] In other words, the preemption question begins with an inquiry into the existence of a conflict. If there is no conflict, the home rule doctrine is not brought into play." *Horton, supra,* 82 Cal.App.4th at p. 585

B. There is no actual conflict between the California Retail Food Code and the Grocery Worker Retention Ordinance.

Neither the court below nor the Association has been able to

demonstrate any actual conflict between the Grocery Worker Retention Ordinance or any part of the ordinance and state food safety law. The Respondent utterly fails to carry its burden to demonstrate preemption. *Big Creek Lumber supra* at 1149; *Horton supra* at 584

The court below concluded that "the ordinance requires successor grocery employers to employ experienced workers in order to maintain health and safety standards", but does not cite to any part of the Grocery Worker Retention Ordinance which either imposes such a burden on the successor employer or limits the protections of the ordinance only to "experienced" workers. Nothing in the Grocery Worker Retention Ordinance duplicates, contradicts, or intrudes in any way upon state law's requirements for employee knowledge, safety procedures, accreditation, etc.

Neither the court below nor the respondent Association can dispute the observation made in the dissenting opinion of Justice Mosk that:

> The [Grocery Worker Retention Ordinance] operates to regulate the employer-employee relationship. The Ordinance does not purport to deal with "health and sanitation standards" or otherwise enter into the field of regulation occupied by the CRFC. The Ordinance grants

> employees retention rights and confers those rights on employees regardless of whether they handle food, are trained in sanitation standards, are certified in food safety, or have any health and safety expertise. The Ordinance does not, for example, distinguish between employees who prepare ready-to-eat foods and those who do not, such as janitors, cashiers, security personnel, or baggers.

Cal. Grocers Ass'n supra at pg. 83 (Mosk, J. dissenting) The "Ordinance at issue here does not prescribe 'health and sanitation standards for retail food facilities.' (*§ 113705.*)" *Id* at pg. 82

The court below believed that the preamble of the Grocery Worker Retention Ordinance betrayed an intention on the part of the City Council to intrude upon the regulatory field fully occupied by the state food code. Such an approach to interpreting the ordinance was unsound because "A statute's preamble . . . does not override its plain operative language." *Chambers v. Miller* (2006) 140 Cal. App. 4th 821, 825-826 citing *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 480 The "preamble" is typically not even considered to be part of the operative statute itself. Legislative findings and statements of purpose in a statute's preamble can be illuminating if a statute is ambiguous. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.) But a preamble is not binding in the interpretation of the statute. Moreover,

the preamble may not overturn the statute's language. (*Id.* at p. 1119; *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52)" *Yeager v. Blue Cross of California* (2009) 175 Cal. App. 4th 1098, 1103 "The preamble to the Ordinance is not even conclusive as to the purpose of the Ordinance. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, ["legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole ..."]; see also *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 The court below ignored the unambiguous operative ordinance, and failed to recognize that the intent of the legislative body is not gleaned solely from introductory statements, but from the law as a whole, which includes its particular directives. *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013

Much of the court's decision is devoted to quoting statements of City Council members and city attorneys, apparently to support the court's finding of an intent to intrude upon the regulatory field of the state food laws. However, such comments and expressions of "motivation", are not relevant to the meaning of the unambiguous ordinance: "The general rule is that, in construing a statute, we do not

consider the motives or understandings of either its author or the individual legislators who voted for it." *Bravo v. City of Rancho Mirage* (1993) 16 Cal. App. 4th 383, 402, fn 11 The present record of proceedings on the adoption of the Grocery Worker Retention Ordinance is replete with statements by lawmakers, attorneys, and the public reflecting various points of view, including conflicting interpretations of the ordinance[4]; these only serve to underscore the problematic nature of relying upon such "legislative history" materials when an ordinance is unambiguous in its operative terms. *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1576-1580

Finally, the court's interpretation of the ordinance's introductory "statement of purpose" is unreasonable, erroneously concluding that the City Council expresses therein an intent to intrude upon the regulatory field fully occupied by the state food laws. When the "statement of purpose" declares "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", the declaration does not commit the City to creating

[4] See Petition for Review on file herein, pgs. 17 to 19

in the ordinance itself any actual regulation of health and safety standards in groceries. And when the statement goes on to say, "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", an *assumption* is made that all the grocery workers protected by the ordinance are most likely *already* experienced with appropriate knowledge for their industry (probably as a result of their compliance with the state food safety code), and a *hope* expressed that the ordinance will enable these experienced workers to remain employed. But the City Council's expressed assumption and hope that workers of the prior employer which will be retained by the successor employer pursuant to the ordinance is a far cry from expressing an intent to duplicate, contradict, modify, add or detract from, or otherwise actually regulate and thereby intrude upon the worker training and safety standards created by state law. No particular experience or training is required for workers to enjoy the

rights provided in the ordinance.

For all of these reasons, the Grocery Worker Retention Ordinance is not preempted by the California Retail Food Code.[5]

II. THE NLRA DOES NOT PREEMPT THE GROCERY WORKER RETENTION ORDINANCE.

As noted above, the Grocery Worker Retention Ordinance obliges the new employer to hire from a list of the predecessor employer's employees. The Ordinance does not require the new employer to hire more employees than are needed, nor to hire any particular number of employees at all. The employees so hired by the new employer during a 90-day transition period can be terminated only for cause. The rights of the employees and the duties of the employers are the same, regardless of whether the employees, while employed by the predecessor employer, were members of a collective bargaining unit. The provisions of the Grocery Worker Retention Ordinance may be superseded by a new collective bargaining agreement.

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[5] Because respondent's equal protection claim was premised on the Grocery Worker Retention Ordinance being an actual regulation of health and safety in the food industry, a ruling in favor of the City on the state law preemption issue would necessarily be a ruling in its favor on the equal protection claim, as well.

In short, nothing in the Grocery Worker Retention Ordinance affects how the "free market" determines whether the new workplace shall be unionized. There is no equivalent in the present ordinance of the provisions of the statute found preempted in *Chamber of Commerce etc. v. Brown supra* which prohibited several classes of employer receiving state funds from using the funds "to assist, promote, or deter union organizing." *Id* at 2410 The Grocery Worker Retention Ordinance cannot be used as a weapon in the collective bargaining process by any party. Without even the possibility that the ordinance can be such a weapon, the NLRA does not preempt the Grocery Worker Retention Ordinance under the *Machinists* doctrine.

The Grocery Worker Retention Ordinance contains no provisions which would affect whether a successor employer is required to acknowledge the collective bargaining representative from the old workplace. Thus, the court below erroneously found that the ordinance is in conflict with worker rights established in *Burns, supra.*

As the court below acknowledged, there is no meaningful difference between the present case and *Washington Service supra.* In that case, the District of Columbia adopted a Displaced Workers Protection Act (DWPA); the DWPA in its operative effect was nearly

identical to the Grocery Worker Retention Ordinance. The D.C. Circuit explained that there was no way, merely by examining the regulatory effects of the DWPA, to determine whether a successor employer might be required under federal law to bargain with the union which had represented the workers in the prior workplace. Thus even assuming:

> . . . a contractor to be required by the DWPA to retain its predecessors' union employees as a majority of its workforce, it is not at all clear whether the NLRB would oblige the new employer to bargain with the union of its predecessors' employees. ... [T]he application of the successorship doctrine depends on the 'totality of the circumstances'; where the employer has been required by local law to hire a majority of its predecessors' employees, the NLRB may or may not impose successorship obligations on the new employer. We will not know until the NLRB addresses the issue. At that time, if the NLRB determines that the successorship doctrine does not apply, appellees' alleged 'conflict' will disappear. On the other hand, if the NLRB--the body to whom Congress has entrusted the evolution of federal labor policy [citation]--determines that the successorship doctrine should apply in such circumstances, it is difficult to see how appellees could argue that the result would invoke 'conflict' between the DWPA and the NLRA. Such a ruling by the NLRB would presumably represent the Board's judgment that enforcing its successorship requirement in the context of DWPA hires would be congruent with the aims of the NLRA."

Washington Service, supra, 54 F.3d at pp. 816-817. Just as the DWPA did not, the Grocery Worker Retention Ordinance does not affect whether the successorship doctrine under the NLRA shall

require the new employer to bargain with the "old" union. "The concept of "'the free play of economic forces'" referred to in *Machinists, supra, 427 U.S. at page 140*, has no applicability here. The Ordinance does not "directly" regulate "any economic activity of either of the parties" or seek "directly to force a party to forgo the use of one of its economic weapons" [citation omitted] or otherwise regulate the parties' "methods of putting economic pressure upon one another ..." (*Machinists, supra, 427 U.S. at p. 154*)." *Cal. Grocers Ass'n supra* at 81 (Mosk, J. dissenting) See also *Alcantara v. Allied Properties, LLC* (E.D.N.Y. 2004) 334 F.Supp.2d 336, 339, 344 [New York City ordinance requiring purchasers of large buildings to retain service employees of seller for 90 days not preempted by NLRA]; et al., Cal. Practice Guide: Federal Employment Litigation (The Rutter Group 2009) § 10:1199, pp. 10-101 to 10-102 ["The NLRA does not preempt state laws protecting displaced workers (e.g., from being terminated within a specified time after a business is sold). Such laws have nothing to do with the rights to organize or bargain collectively."]

As the dissenting opinion below pointed out, "The Grocery Worker Retention 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 benefits, interfere with any bargaining, or intervene in any employer relations with any union. As noted, whether a successor employer is required to bargain with a union under the successorship doctrine is left to be determined by the NLRB on a case-by-case basis, in light of the totality of the circumstances. (*Fall River Dyeing & Finishing Corp. v. NLRB,* (1987) 482 U.S. 27, 4.) The Grocery Worker Retention Ordinance does not "directly" regulate "any economic activity of either of the parties" or seek "directly to force a party to forgo the use of one of its economic weapons" or otherwise regulate the parties' "methods of putting economic pressure upon one another ..." (*Machinists, supra,* 427 U.S. at p. 154)." *Cal. Grocers Ass'n supra* at 91 (Mosk, J. dissenting)

The Grocery Worker Retention Ordinance is not preempted by the NLRA.

CONCLUSION

Neither state nor federal law preempts the Grocery Worker Retention Ordinance and the modicum of job security which it is intended to provide. For all of the above reasons, and the reasons set

forth in the merits briefs of the Los Angeles Alliance for a New Economy and the dissenting opinion of Justice Mosk below, the decision of the court below should be reversed in its entirety.

DATED: December 9, 2009

Respectfully submitted,

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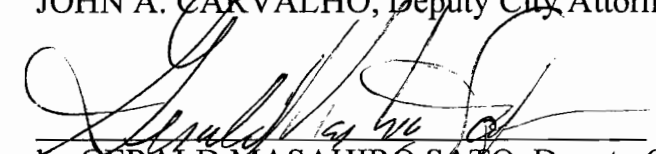

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, Rule 14(c), this Opening 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 4994.

DATED: December 9, 2009

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 December 9, 2009, I served the foregoing document(s) described as **OPENING BRIEF ON THE MERITS (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 **December 9, 2009**, 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 (APPELLANT CITY OF LOS ANGELES)

(Rule 8.520(a)(1))

December 9, 2009

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