Supreme Court Docket No. S176099
Court Of Appeal, Second Appellate District,
Division Five, Docket No. B206750
Los Angeles Superior Court Case No. BC351831

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION,
Plaintiff and Respondent,

vs.

CITY OF LOS ANGELES,
Defendant and Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,
Intervenor and Appellant.

After A Decision By The Court Of Appeal Of California,
Second Appellate District, Division Five

OPENING BRIEF ON THE MERITS OF PETITIONER LOS ANGELES ALLIANCE FOR A NEW ECONOMY

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STATEMENT OF ISSUES

This case presents the following issues:

1. Does federal labor law preempt the City of Los Angeles's Grocery Worker Retention Ordinance ("the Ordinance" or "the GWRO")?

2. Does California's Health and Safety Code preempt the GWRO?

PRELIMINARY STATEMENT

Congress did not intend, when it passed the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to preempt state and local laws regulating employees' wages, hours and working conditions. As this Court emphasized in Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690, 166 Cal.Rptr. 331, 613 P.2d 57, while the NLRA establishes the right of organized workers to bargain over the terms and conditions of their employment, it is silent when it comes to just what those terms and conditions of employment ought to be or what minimum standards employers must meet. The NLRA therefore does not supplant the States' "broad authority to establish minimum standards related generally to the 'welfare' of employees." 27 Cal.3d at 727-28; *accord* Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 72; Fort Halifax Packing Co., Inc. v. Coyne (1987) 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1.

The Supreme Court has carved out two exceptions to this general rule: the NLRA preempts state and local laws (1) that regulate conduct that is either arguably protected or prohibited by the NLRA, San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, or (2) that restrict the parties' use of economic weapons in a labor dispute or intervene directly in the organizing or bargaining processes regulated by the NLRA. Machinists v. Wisconsin Employment Relations Commission (1975) 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396. The GWRO does not fit within either category.

The Ordinance requires an employer that acquires a grocery store to offer ninety days of employment to the employees who worked at that store before the sale. The GWRO permits the employer to fire any of these employees for cause or lay them off for lack of work during those ninety days and to terminate any or all of them at the end of that period. The Ordinance does not require that employer to recognize or bargain with any union or to adopt any collective bargaining agreement to which the previous employer may have been a party.

The GWRO does not regulate any activity that is arguably protected or prohibited by the Act. The NLRA does not create any protected rights for employers. While the GWRO may obligate the new employer to take actions that the NLRA would not require—in particular, hiring the employees who worked at the store previously—that does not interfere with any rights protected by the Act or sanction any conduct that the Act prohibits.

The California Grocers Association ("CGA") insists, however, that the Ordinance is preempted under Machinists because it would upset the balance of rights and obligations on which the Supreme Court's successorship decisions rest by forcing the new employer to recognize and bargain with any union that represented the employees of the predecessor employer. Both the premise and the conclusion are wrong.

First, the Ordinance does not compel the new employer to recognize or bargain with any union or adopt any collective bargaining agreement to which the previous employer may have been a party. The NLRB—and only the NLRB—will decide, on a case by case basis, whether the new employer is a successor to the old one for purposes of the NLRA and, if it is, what consequences follow from that finding. Fall River Dyeing & Finishing Corp. v. NLRB (1987) 482 U.S. 27, 43, 107 S.Ct. 2225, 96 L.Ed.2d 22.

CGA complains, however, that the Ordinance will make it more likely that the new employer will be a successor if it has to retain the union-represented employees of the previous owner, on the ground that it might not have hired a

majority of its workforce from that group if it had not been required to do so. Even if that is true, that does not require preemption of the Ordinance under Machinists, for there is no federal labor law policy barring, or even discouraging, a new employer from hiring the employees who worked there previously.

The CGA's reading of Machinists, however, treats the fact that the NLRA neither requires nor prohibits the hiring of former employees as if that not only created a federal law right for employers to refuse to hire them, but made that right beyond the power of the states to regulate. That is precisely the misreading of Machinists that the United States Supreme Court warned against in Metropolitan Life and Fort Halifax and that this Court rejected in Industrial Welfare Commission. That misinterpretation runs directly counter to the intent of Congress by uprooting state law employment regulations based on nothing more than the NLRA's silence on the subject.

The Court of Appeal's alternate ground for striking down the Ordinance is just as misguided. The Court of Appeal held that the California Retail Food Code ("the CRFC"), Health and Safety Code § 113700 *et seq.*, preempts the GWRO because the Ordinance operates in an area reserved for state regulation—setting health and safety standards for covered grocery stores.

The Court of Appeal's decision is, however, at odds with the language of the Ordinance itself. The GWRO does not set health and safety standards, or provide an alternative method for enforcing them. Instead it provides grocery workers within the City of Los Angeles with a limited measure of job security when the store where they work changes hands—a wholly different field than the one reserved for state regulation under the CRFC. The Court of Appeal's approach, which ignores the substantive provisions of the Ordinance and focuses instead on its preamble, distorts the intent of both the Legislature that passed the CRFC and the City Council that enacted the GWRO and violates basic canons of statutory construction. The Court of Appeal's decision should be reversed.

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STATEMENT OF THE CASE

CGA filed its complaint, seeking a declaratory judgment and injunctive relief on four claims: (1) the Ordinance is preempted by federal labor law, (2) the Ordinance denies CGA's members the equal protection of the laws, (3) the Ordinance is preempted by the Health and Safety Code and (4) the Ordinance is preempted by Section 2922 of the Labor Code, on May 4, 2006. CGA sought. Petitioner Los Angeles Alliance for a New Economy ("LAANE") was granted leave to intervene as a defendant.

The case proceeded to trial on August 1 and 2, 2007. The Court entered judgment on February 11, 2008, in which it held that the Ordinance denies CGA's members the equal protection of the laws and is preempted by the CRFC. The Superior Court rejected CGA's federal labor law preemption claim.

Both the City of Los Angeles and LAANE appealed. The Court of Appeal, in a decision entered on July 30, 2009, held that the Ordinance is preempted by both the Health and Safety Code and federal labor law. Neither defendant has sought rehearing by the Court of Appeal.

This Court granted both defendants' petitions for review by order entered November 10, 2009.

STATEMENT OF FACTS

The GWRO went into effect on February 13, 2006. As Section 181.00 of the Ordinance states, it is intended to serve three purposes: (1) to maintain health and safety standards in grocery establishments, (2) to preserve the quality of service by employees of such stores, which are essential to the vitality of any community, and (3) to ensure the stability of the workforce upon change of ownership.

The Ordinance seeks to accomplish these goals by requiring employers who take over operations of a covered store—defined in Section 181.01(E) as "a retail store in the City of Los Angeles that is over 15,000 square feet in size and that

sells primarily household foodstuffs for offsite consumption"—to hire from a preferential hiring list of covered employees[1] of the predecessor employer for ninety days after the new employer opens its store to the public (Ordinance, § 181.02(B)) and to retain those employees for ninety days. (Ordinance, § 181.03(A)) The previous employer shall provide the new employer with a list of all "Eligible Grocery Workers" (Ordinance, § 181.02(B)) and give notice of the change in ownership to the community at large by posting information concerning the new owner and the date of the change in ownership in a place where it can be seen by both employees and customers. (Ordinance, § 181.04)

The new employer may lay off employees if it determines that it requires fewer employees than its predecessor; should it do so, then it shall lay off employees by seniority or, if it is party to a collective bargaining agreement that provides a different system for determining layoffs, pursuant to the terms of that agreement. (Ordinance, § 181.03(B)) It may also fire employees for cause during this ninety-day period. (Ordinance, § 181.03(C))

The new employer is not obligated to retain Eligible Grocery Workers at the end of that ninety-day period; instead the Ordinance requires it to conduct a written evaluation of the employee's performance and to consider retention of those whom it deems satisfactory. (Ordinance, § 181.03(D)) Employees wrongfully denied employment or otherwise discriminated against may bring an action in Superior Court to obtain instatement in a suitable position and to recover backpay, attorneys' fees and other appropriate relief. (Ordinance, § 181.05)

The new employer can, if it is a party to a collective bargaining agreement covering these employees, agree as part of that agreement to supersede the provisions of the Ordinance by the terms of the agreement. (Ordinance, § 181.07)

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[1] The Ordinance limits retention rights to those employees whose primary place of employment was at the store in question, and who had worked for the former employer for at least six months before the change in ownership and excludes managerial, supervisory, and confidential employees. (Ordinance, § 181.01(c))

In addition, the Ordinance provides that the invalidity of any portion of the Ordinance shall not impair the validity of the remaining provisions. (Ordinance, § 181.09)

ARGUMENT

A. THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT THE GROCERY WORKERS RETENTION ORDINANCE

The National Labor Relations Act does not attempt to regulate all aspects of the employment relationship—or even most of them, for that matter. Industrial Welfare Commission, 27 Cal.3d at 726, quoting Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen (1943) 318 U.S. 1, 6, 63 S.Ct. 420, 87 L.Ed. 571. The Congress that enacted the NLRA did not intend to supplant state law governing the relations between employers and employees; on the contrary, the NLRA was intended to add to, not detract from those rights.

The Supreme Court put special emphasis on this point when rejecting a similar preemption argument in Metropolitan Life:

> Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. . . .
>
> Federal labor law in this sense is interstitial, supplementing state law where compatible, and

> supplanting it only when it prevents the accomplishment of the purposes of the federal Act. Thus the Court has recognized that it "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. "A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action . . . and would thereby artificially create a no-law area."

Metropolitan Life, 471 U.S. at 756-57 (citations omitted); *accord* Southern California Edison Co. v. Public Utilities Commission (State Building & Construction Trades Council of California) (2006) 140 Cal.App.4th 1085, 1099-1101, 45 Cal.Rptr.3d 485.

The GWRO is just such a minimal employment standard. It applies to all grocery stores of a certain size within the City of Los Angeles and to all employees, both union and non-union, who work there. It creates basic rights for those employees: retention for ninety days, with just cause and seniority rights during that period and the right to an evaluation and consideration for retention at the end of it. It does not require the new employer to adopt any collective bargaining agreements in effect before it took over operations, but allows the employer to apply the terms of such an agreement if it does.

The Court of Appeal, on the other hand, concluded that the Ordinance was preempted because (1) the Ordinance forced the new employer to bargain with the union that represented the employees of the previous employer and (2) thereby

upset the carefully calibrated "balance of protection, prohibition, and laissez-faire" struck by Congress, quoting Chamber of Commerce v. Brown (2008) 554 U.S. ___, 128 S.Ct. 2408, 2412, 171 L.Ed.2d 26. It is wrong on both points. Its decision should be reversed.

1. The Ordinance Does Not Force Employers To Recognize Or Bargain With Any Union

The Ordinance does not require any employer to recognize or bargain with any union. Like the District of Columbia Displaced Workers Protection Act, the Ordinance leaves that issue to the NLRB to decide on a case-by-case basis on the totality of the circumstances. Washington Service Contractors Coalition v. District of Columbia (D.C. Cir. 1995) 54 F.3d 811, 816.

There is absolutely no guarantee that the new employer will be a successor under the NLRA. The issue does not even arise, for one thing, if the prior owner was not unionized. And even if it were, there is no assurance that a significant number of the employees of the prior employer will accept an offer of temporary employment from the new employer. If they do not make up a majority of the new employer's workforce then successorship is not an issue.

Successorship is not automatic, moreover, even if the new employer hires a majority of its workforce from the unionized employees of the prior employer. As Justice Mosk took pains to point out, "[t]he determination whether an employer is a 'successor' 'is primarily factual in nature and is based upon the totality of the circumstances of a given situation.'" (Dissent at 11, citing Fall River, 482 U.S. at 43) The majority not only refused to recognize Fall River's teaching on this issue, but constructed in its place a streamlined—but incorrect—interpretation of federal law that would make successorship automatic simply because the employer offers to retain the prior employer's employees.

Federal law is, however, far more complex. An employer that takes over the business of a unionized employer is not obligated to bargain as a successor

unless and until (1) it hires a representative complement of employees,[2] (2) of which a majority are employees of the predecessor who had been represented by the union, (3) in an appropriate unit,[3] (4) at the time that the union has demanded recognition,[4] (5) provided that the successor does not have a good faith doubt of the union's continuing majority support. NLRB v. Burns International Security Services, Inc. (1972) 406 U.S. 272, 280-81, 92 S.Ct. 1571, 32 L.Ed.2d 61; Fall River, 482 U.S. at 46-52. The NLRB will, moreover, allow the new employer to raise doubts as to the union's actual majority status at any time after it takes over the predecessor's operations.[5]

The Court of Appeal refused to acknowledge any of these uncertainties. Instead it assumed—as it had to in order for its preemption analysis to get off the ground—that employees would always accept the invitation to work under whatever conditions the new employer offered, that these employees would remain a distinct unit and that successor status was therefore unavoidable.

Why should these uncertainties make a difference? Because they mean that the members of the NLRB applying federal law, not the terms of the Ordinance,

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[2] *See, e.g.,* Cascade General v. NLRB (9th Cir. 1993) 9 F.3d 731 (employer that had not hired a representative complement of employees violated Act by recognizing union).

[3] *See, e.g.,* Banknote Corp. v. NLRB (2d Cir. 1996) 84 F.3d 637, 649 (employer not obligated to recognize union when unit was no longer appropriate).

[4] *See, e.g.,* Royal Midtown Chrysler Plymouth (1989) 296 NLRB 1039 (employer not obligated to recognize union that did not demand recognition until after it no longer represented a majority of employees of new employer).

[5] MV Transportation (2002) 337 NLRB 770 (union that obtained bargaining rights with successor employer had only rebuttable presumption of majority status); Nott Co. (2005) 345 NLRB 396 (employer not obligated to bargain with union when union lost majority in consolidated unit formed by adding new employees to its existing workforce). As Justice Mosk notes, the NLRB might apply these cases to an employer that has terminated the employees of the previous employer at the end of ninety days. (Dissent at 10-11)

will determine whether the new employer will or will not be obligated to bargain with any union that represents employees of the prior store owner. The majority's preemption analysis collapses once it admits that possibility.[6]

2. The Ordinance Does Not Invade Any Area That Congress Intended To Leave Unregulated

The Court of Appeal went on to hold that the Ordinance is preempted by the Machinists doctrine because it interferes with "the free play of market forces" that would allow a new employer to hire all or some or none of the previous business's employees. The problem with the Court of Appeal's holding is that Machinists says nothing of the sort.

The Supreme Court in Machinists was concerned with preserving "the free play of economic forces"—by which it meant something very different than the phrase "market forces" that CGA uses in its place. The Court drew this distinction as clearly as possible in Fort Halifax:

> Appellant concedes that, unlike cases in which state laws have been struck down under this doctrine, Maine has not directly regulated any economic activity of either of the parties. *See, e.g.*, Machinists, *supra* (State

[6] The majority did hold out the possibility that the NLRB might not find that the new employer was a successor at one point in its opinion, but immediately declared that in that case "the ordinance will trample the employees' rights to select the bargaining agents of their choice to deal with their employer and to rely on a successor employer's legal obligations under the NLRA." (Majority Opinion at 20) The illogic of this statement is palpable: it assumes that employees have lost something—"the right to rely on a successor employer's legal obligations under the NLRA"—that, under the facts posited by the majority, they did not have.

The majority simply could not let go of its assumption, even when it tried to imagine a different scenario, that successorship was somehow automatic if the employer were required to offer employment to the employees of the prior owner. That unshakeable—but mistaken—belief on the majority's part distorted its preemption analysis.

> enjoined union members from continuing to refuse to work overtime); Garner v. Teamsters (1953) 346 U.S. 485, [74 S.Ct. 161, 98 L.Ed. 228] (State enjoined union picketing). Nor has the State sought directly to force a party to forgo the use of one of its economic weapons. *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles (1986) 475 U.S. 608, 614, [106 S.Ct. 1395, 89 L.Ed.2d 616] (City Council conditioned taxicab franchise renewal on settlement of strike).

482 U.S. at 20. By "economic activity," the Court meant "economic weapons": strikes, slowdowns, picketing, lockouts, boycotts and the like. Machinists, 427 U.S. at 154 ("peaceful methods of putting economic pressure upon one another"). The GWRO does not attempt to regulate any party's use of economic weapons.

The Court has in recent years extended Machinists preemption into two other areas: states' attempts to impose a collective bargaining agreement on private parties, Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. (1993) 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 ("Boston Harbor"), and their efforts to regulate employers' communications with their employees concerning unionization. Brown, *supra*.[7] This Ordinance is not preempted on either ground.

The Ordinance does not, for one thing, require the new employer to adopt the predecessor's collective bargaining agreement.[8] *Cf.* Commonwealth Edison

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[7] The Court has also used the phrase "market freedom" in both Boston Harbor and Brown. In both of those cases, however, the market figured in a wholly different role, as the State argued that it was functioning as a "market participant," rather than as a regulator.

[8] As noted above, the Ordinance does not require the new employer to recognize or bargain with any union. Even if it did, the new employer retains the right to set initial terms and conditions of employment. Burns, 406 U.S. at 281-82; Spruce Up Corp. (1974) 209 NLRB 194, 195.

Co. v. International Brotherhood of Electrical Workers Local 15 (N.D. Ill. 1996) 961 F.Supp. 1169 (statute requiring new employer to adopt collective bargaining agreement was preempted); United Steelworkers v. St. Gabriel's Hospital (D. Minn. 1994) 871 F.Supp. 335 (same). On the contrary, the Ordinance (1) permits the new employer to set wages and benefits at whatever level it desires and (2) allows the new employer and any union that represents its employees to bargain for wholly different terms governing hiring, retention, layoff, and termination of employees.[9] Far from forcing contract terms on a private employer, the Ordinance takes a hands-off approach, leaving it free to set or negotiate such terms as it deems to be in its own best interest.

Nor does the Ordinance make any attempt to intervene in the new employer's relations with any union that might claim to represent its employees. Unlike the statute in Brown, which tried to force private sector employers who had accepted financial assistance of any sort from the State into *de facto* neutrality *vis a vis* union organizing drives, the Ordinance does not take a position on such issues.

The Court of Appeal has held, however, the Ordinance interferes with new employers' freedom not to hire the employees of the businesses they are taking over—just as the plaintiff employers in Washington Service Contractors complained that the DWPA somehow infringed their members' supposed right not to hire the employees of the predecessor employer. As the Court in that case noted, the NLRA does not enshrine any such right.[10] Id., 54 F.3d at 817; *accord*

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[9] The Supreme Court rejected a preemption challenge to a similar opt-out provision in Fort Halifax. Id., 482 U.S. at 21-22.

[10] The National Labor Relations Act was passed in order to "restore equality of bargaining power" between workers and their employers, 29 U.S.C. § 151, by providing workers with the right to organize unions and to bargain with their employers. 29 U.S.C. § 157. The NLRA does not, on the other hand, provide employers with rights, except in a negative sense: they have, for example, (*cont.*)

St. Thomas-St. John Hotel & Tourism Association, Inc. v. Government of U.S. Virgin Islands (3d Cir. 2000) 218 F.3d 232, 244 (upholding Virgin Islands' Wrongful Dismissal Act, which limited employers' right to terminate employees to statutory "just cause" reasons, over Machinists preemption challenge); Alcantara v. Allied Properties, LLC (E.D.N.Y. 2004) 334 F.Supp.2d 336, 344-45 (upholding New York City worker retention ordinance targeted to "building service workers" under Washington Service Contractors Coalition, Fort Halifax, and Metropolitan Life).

Nor does the NLRA bar the states from providing workers with greater rights than what the NLRA might require in this area. On the contrary, Congress passed the NLRA in order to encourage collective bargaining, which Congress

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(*footnote 10 cont.*)

the "right" to fire an employee for "cause," but only in the sense that the Act provides that the Board shall not order reinstatement or backpay for any employee who has been suspended or discharged for cause. 29 U.S.C. § 160(c). The NLRA does not create any federal law of "just cause," much less preempt states' laws that bar employers from firing employees for specified reasons, such as serving on a jury, Labor Code § 230, or taking time off to work as a volunteer firefighter. Labor Code § 230.3, or on any of the grounds prohibited by the Fair Employment and Housing Act, Government Code § 12900 *et seq.*

The same is true for the supposed "right" of an employer to refuse to hire employees of the predecessor employer whose business it has acquired. As the Supreme Court noted in Howard Johnson Co. v. Hotel Employees (1974) 417 U.S. 249, 262, 264, 94 S.Ct. 2236, 41 L.Ed.2d 46:

> [N]othing in the federal labor laws "requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor. . . ."

417 U.S. at 261 (quoting Burns, 406 U.S. at 280 n.5). The "right not to hire" is merely another way of stating that ***federal*** law will not require the employer to do so. That does not mean, on the other hand, that federal law would preempt a state statute that did. Washington Service Contractors, 54 F.3d at 817.

saw as the most effective way to improve workers' economic position, while leaving the states free to regulate in the general field of employment relationships. The United States Supreme Court explained the limits on the reach of the NLRA in Metropolitan Life:

> One of the ultimate goals of the Act was the resolution of the problem of "depress[ed] wage rates and the purchasing power of wage earners in industry," 29 U.S.C. § 151, and "the widening gap between wages and profits," 79 Cong.Rec. 2371 (1935) (remarks of Sen. Wagner), thought to be the cause of economic decline and depression. Congress hoped to accomplish this by establishing procedures for more equitable private bargaining.
>
> The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Metropolitan Life, 471 U.S. at 756 (citations omitted). Holding that state laws of general application cannot apply to unionized employees would, in the words of

the Court in Metropolitan Life, "turn the policy that animated the Wagner Act on its head." Id., 471 U.S. at 755.

This is not just a question of statutory interpretation, but one of federalism as well. As Justice Frankfurter stated more than fifty years ago:

> But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

Day-Brite Lighting, Inc. v. Missouri (1952) 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469; *and see* PruneYard Shopping Center v. Robins (1980) 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741. As the Supreme Court held in Fort Halifax, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." Fort Halifax, 482 U.S. at 21; *accord* California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc. (1997) 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 791 (preemption of state police powers inappropriate "unless that was the clear and manifest purpose of Congress").

The Court of Appeal's decision, if not corrected, could do much broader damage. By treating the NLRA's indifference on a particular issue—in this case the new employer's decision whether to retain the employees of the previous employer—as if it created a federal law right, the Court of Appeal extended Machinists preemption into precisely the sort of area that Congress did not intend to regulate when it passed the NLRA: state law regulation of the employment relationship.

The Court of Appeal's mistaken logic could create similar problems in a wide range of areas. An example illustrates the point: federal labor law does not,

with a few exceptions, require property owners to allow non-employee union organizers access to their sites in order to picket or distribute flyers or speak to employees or customers. Lechmere, Inc. v. NLRB (1992) 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79. But neither the NLRB nor the federal courts claim that the limitations of federal labor law therefore supplant the property law of those states that allow greater access; on the contrary, federal labor law accepts and accommodates itself to state property law on this point. NLRB v. Calkins (9th Cir. 1999) 187 F.3d 1080 (California law); Johnson & Hardin Co. (1991) 305 NLRB 690 (Ohio law).

If the Court of Appeal's decision in this case were correct, on the other hand, those states' property law would have to give way to federal law, since they provide greater rights to individuals than federal courts do when balancing employee rights against property rights in cases such as Lechmere. The NLRA would become, contrary to the intent of Congress, a *de facto* labor code,

The United States Supreme Court has made it clear that neither the NLRA nor its decision in Machinists preempts state law on these grounds. The Court of Appeal's decision must be reversed.

B. THE PLAIN LANGUAGE OF THE CALIFORNIA RETAIL FOOD CODE PRECLUDES PREEMPTION OF THE GROCERY WORKER RETENTION ORDINANCE

The Court of Appeal also held that the California Retail Food Code preempts the Ordinance. In order to reach that conclusion the Court had to ignore the substantive provisions of both the CRFC and the Ordinance, as well as the principles governing preemption of local ordinances by state law.

The Ordinance does not attempt to regulate health and safety conditions within grocery stores in any meaningful way. While the drafters of the Ordinance made reference to health and safety in the preamble of the Ordinance, ***every*** substantive provision of the Ordinance relates to the employer-employee

relationship between grocery workers whose stores have changed hands, their former employers and the entities that have taken over the operation of the stores after the transfer. The Ordinance is just what it declares itself to be: a ***Grocery Worker Retention*** Ordinance.

That is critical, since state laws—even those with express preemption provisions—only preempt local laws that govern the same field that the State has chosen to regulate. Harrahill v. City of Monrovia (2002) 104 Cal.App.4th 761, 770-71, 128 Cal.Rptr.2d 552. The CRFC does not regulate the field of employees' job security, just as the Ordinance does not regulate the field of health and safety standards. It is not preempted.

1. The California Retail Food Code Does Not Attempt To Regulate Grocery Workers' Employment Rights

The starting point for any preemption analysis is to define the field that the legislative body is attempting to regulate. This is a question of law, turning on the language of the statute in question.

The Court of Appeal's decision in Harrahill illustrates the point:

> In order to determine whether state law fully "occupies the field," either by direct legislation or by implication, "the 'field' involved should first be defined." In re Hubbard (1964) 62 Cal.2d 119, 125, 41 Cal.Rptr. 393, 396 P.2d 809. Plaintiffs maintain that the "field" at issue is "truancy," while the City counters that the "field" is "the policing of its streets during the specified daylight hours, and the prevention of juvenile crime and juvenile victimization during those hours." We concur with the City that the "field" at issue is the regulation of off-campus juvenile activity during school hours. And there is no indication that the

> Legislature has sought to occupy this field, either expressly or by implication.

104 Cal.App.4th at 770-71; *accord* Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1152, 45 Cal.Rptr.3d 21, 136 P.3d 821 ("the question of express preemption turns on whether the field the Legislature has occupied in so providing encompasses the County's zone district ordinance"); Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 904, 16 Cal.Rptr.2d 215, 844 P.2d 534 ("At the outset, the subject matter of the ordinance must be specified."); Hubbard, *supra* at 125. In order to determine what field the Legislature intended to regulate when it passed the California Retail Food Code we must look to the language of the CRFC itself.

Section 113705 defines the field in which it sought to preempt all local regulation in terms too clear to be misunderstood:

> The Legislature finds and declares that 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. Except as provided in Section 113709, 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.

(emphasis added). The California Retail Food Code does not define "health and sanitation standard" in express terms. But the statute makes it clear in any number of ways what the Legislature meant, from the reference to the need to adopt "science-based standards" (§ 113703) to the detailed regulation of matters such as

the length of time that raw eggs must be cooked (§ 114004), the use of pasteurized eggs in Béarnaise sauce (§ 114012), the types of bags in which raw shucked shellfish are kept (§ 114039) and the types of wood that may be used for cutting boards and rolling pins. (§ 114132) The Legislature, drawing on nationwide health and safety experience and scientific research, meant to regulate the way that food was handled, stored, cooked and served in very specific detail.

The Code also regulates employee conduct, requiring, *inter alia*, the training of food employees in food safety as it relates to their assigned duties (§ 113947), exclusion of employees with certain specified illnesses from working areas (§ 113950), provision of handwashing facilities (§ 113952), and maintenance of clean fingernails. (§ 113968) The statute does not, on the other hand, even touch on whether employees of a facility have any right to keep their jobs when it changes ownership, their seniority during this transition period or the old owner's obligation to notify the public of a change in ownership.

The Grocery Worker Retention Ordinance, by contrast, is wholly concerned with the rights of employees and the community. The Ordinance requires the incumbent employer (1) to provide the new employer with the name, address, date of hire, and employment occupation classification of each employee and (2) give the community ninety days' notice of the effective date of the transfer of the facility and the name of and contact information for the successor grocery employer. The new employer is (1) required to retain the predecessor's covered employees for a ninety-day period, (2) with the right to discharge these employees for cause or to lay them off by seniority during this period and (3) with the obligation to provide the employee with an evaluation at the conclusion of this period and to retain those employees whose performance is satisfactory.

The Court below, however, largely ignored these substantive provisions to focus instead on the references to health and safety standards found in the preamble of the Ordinance. This was, of course, contrary to basic principles of statutory construction, which direct the courts to base their interpretation of

legislative intent on a review of the statute or ordinance as a whole, State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal.4th 1029, 1043, 12 Cal.Rptr.3d 343, 88 P.3d 71, rather than just the preamble. Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1118, 81 Cal.Rptr.2d 471, 969 P.2d 564 ("legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole").

It also contradicts what this Court held was "a prime rule of construction" in Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal.3d 402, 267 Cal.Rptr. 589, 787 P.2d 996:

> [T]he legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning. An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said.

50 Cal.3d at 412, *quoting* Hennigan v. United Pacific Ins. Co. (1975) 53 Cal.App.3d 1, 7, 125 Cal.Rptr. 408. The Court had no need—or authority—to go beyond the language of the Ordinance to determine its meaning or intent.

The California Retail Food Code does not regulate relations between employer and employee or require notice of a change in ownership of grocery stores. The Grocery Worker Retention Ordinance does not attempt to require food safety training of grocery employees or set health standards of any sort. The statute and the Ordinance do not regulate the same field.

2. The Grocery Worker Retention Ordinance Does Not Set "Health And Safety Standards".

Big Creek Lumber notes that "each phrase within [an express preemption provision] limits the universe of [local action] preempted by the statute." 38

Cal.4th at 1155 (citation omitted). Section 113705 declares that the Legislature intends to occupy "the whole field of health and sanitation standards" and to preempt "local health and sanitation standards." For Section 113705 to preempt the Ordinance, the Court of Appeal would have to find that some or all of its provisions actually were "health and sanitation standards."

The Court did not do so. The Court does not explain anywhere in its decision how a provision requiring preferential hiring of the predecessor's employees, or barring termination without cause or layoff out of seniority for a ninety-day period, or requiring an evaluation of each employee at the end of that period, would constitute either a health or a sanitation standard.

The reason for the Court's silence is simple: it cannot identify any such standard because there are none. The Ordinance does not set or implement standards under the Health and Safety Code, but provides instead for a transitional stabilization period for the benefit of both the employees of those stores and the communities served by those stores. While these retention provisions may also help maintain healthful and safe conditions in those stores—a point raised by some proponents of the Ordinance and included as one of several objects to be gained by its passage—that does not mean that the Ordinance is a health and safety Ordinance, much less that it is preempted.

If that sort of incidental connection were enough to preempt local ordinances, then that rule would wreak havoc on the relationship between local governments and the State. But preemption is not and never has been a mechanical process; instead, as Big Creek Lumber and Harrahill show, the Court asked to apply preemption must always look to the statutory language and what it shows about its intent.

The majority held, however, that the Ordinance does tread on the areas regulated by the California Retail Food Code because the statute also requires retention of key employees. That argument simply collapses on close inspection.

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Section 113947.1 of the CRFC requires every covered facility to have at least one owner or employee who has successfully passed an approved and accredited food safety certification examination. If the facility loses that certified owner or employee, whether by a change in ownership or any other reason, then Section 113947.1(e) gives it has sixty days to certify another owner or employee.

According to the majority, the worker retention provisions of the Ordinance cover the same territory as Section 113947.1. This argument is not even colorable.

Section 113947.1 allows food facilities to pick any one person—an owner, a supervisor or a rank-and-file employee—to be the "certified owner or employee" for that facility. It does not, on the other hand, require that this owner, supervisor or employee remain with the facility when it changes hands. Instead the statute allows a sixty-day window for the new owner to meet the statute's requirements in the event that the certified owner or employee leaves the business during the transition.

The Grocery Worker Retention Ordinance does not mention, much less attempt to regulate, an employer's designation of a particular owner, supervisor or employee as its "certified owner or employee" for a particular facility. Nor does it require the new owner to retain either the previous owner or any supervisors or managers employed by it; on the contrary, the Ordinance expressly excludes "managerial, supervisory, or confidential employee[s]" from its coverage.

It does, on the other hand, require the new employer to retain all of its predecessor's employees, subject to the right to lay them off or fire them for cause. Section 113947.1 is simply irrelevant as far as that retention requirement is concerned, which applies to all employees who have worked for the predecessor for more than twelve months. The two statutes do not even intersect, much less regulate the same field.

The Grocery Worker Retention Ordinance does not impose any "health and sanitation standards." The California Retail Food Code does not preempt it. The Court of Appeal's decision should be reversed.

CONCLUSION

The Court of Appeal's decision would, if allowed to stand, not only reverse this Ordinance, but open up the door to judicial invalidation of any number of state and local legislative efforts. That would not only conflict with federal and California law, but with basic principles of the separation of powers: between the federal government and the states, between the State and local authorities, and between the courts and elected law-making bodies. The Court of Appeal's decision must be reversed.

Dated: December 10, 2009

Respectfully submitted,

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By _____
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CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 8.204(c)

I, HENRY M. WILLIS, declare that:

I am a partner in the law firm of Schwartz, Steinsapir, Dohrmann & Sommers LLP, counsel of record for Petitioner in the above-captioned case.

I certify that the foregoing Opening Brief on the Merits contains 6330 words, not including tables and this certificate, as counted by the Word program used to generate this brief.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on December 10, 2009 at Los Angeles, California.

HENRY M. WILLIS

PROOF OF SERVICE BY MAIL

City of Los Angeles, L.A. Alliance for A New Economy
vs.
California Grocers Association
Superior Case No: BC351831
Appeal Case No: B206750
Supreme Case No: S176099

RENEE RODRIGUEZ certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268.

On December 10, 2009, I caused the foregoing document(s) described as

OPENING BRIEF ON THE MERITS OF PETITIONER LOS ANGELES ALLIANCE FOR A NEW ECONOMY

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