S176099

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION,

Plaintiff-Respondent,

v.

CITY OF LOS ANGELES,

Defendant-Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,

Intervener-Appellant.

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

Appeal From The Los Angeles Superior Court
Case No. BC351831
Honorable Ralph W. Dau, Judge

ANSWER BRIEF ON THE MERITS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Grocery Worker Retention Ordinance ("GWRO") is preempted by the California Retail Food Code because it regulates in the field of health and sanitation standards for retail food facilities.

2. Whether the GWRO is preempted by the National Labor Relations Act because it invades an area that Congress intended to be controlled by the free play of economic forces.

3. Whether the GWRO violates equal protection by drawing classifications that are not rationally related to its objectives.

INTRODUCTION

The court of appeal correctly ruled that the GWRO is constitutionally invalid. The City enacted the GWRO for the express purpose of promoting health and safety in grocery stores. But the California Legislature has already enacted a state statute that comprehensively regulates food health and safety in grocery stores. Reflecting the need for uniform statewide regulation, that statute expressly "occup[ies] the whole field of health and sanitation standards for retail food facilities" and precludes "all local health and sanitation standards" in that area. Moreover, the statute addresses the very subject – retention following a change in control of employees knowledgeable about food safety – that the GWRO regulates. The GWRO is preempted because it imposes substantive employee retention standards that not only cover the same subject matter as state law, but are more onerous than the state standards.

The ordinance is also preempted by the National Labor Relations Act ("NLRA"). A state or local law cannot interfere in the union

organization and collective bargaining process without running afoul of *Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132. The GWRO violates this principle because, by forcing a grocery store purchaser to hire its predecessor's employees, it significantly enhances the ability of unions to maintain or achieve their representative status and to impose collective bargaining on the purchaser. That the GWRO operates indirectly is of no moment; the government may not do indirectly what it is forbidden to do directly.

Finally, the GWRO violates equal protection by drawing classifications that are not rationally related to any possible purpose for the ordinance. The ordinance covers large stores with grocery sections such as Wal-Mart but excludes essentially identical membership warehouses simply because they charge a membership fee. Similarly irrational is the ordinance's distinction between stores over 15,000 square feet and those under. While a legislature may "strike an evil" incrementally, petitioners fail to explain – as they must – why the City's decision to "strike" in the discriminatory manner it did is rational in light of the City's objectives.

STATEMENT OF FACTS

A. The Grocery Worker Retention Ordinance.

The GWRO applies to "Grocery Establishments," defined in relevant part 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." *See* Los Angeles Municipal Code ("L.A.M.C.") § 181.01(E); 2 Appellant's Appendix ("AA") 171. It includes

"superstores" with grocery sections, but only if they do not charge membership dues. *Id.* Thus, Wal-Mart is included but Costco is not.

In its Statement of Purpose, codified in the ordinance itself, the GWRO expressly states that the City enacted the GWRO to maintain "health and safety standards in grocery establishments":

> 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.

L.A.M.C. § 181.00 (emphasis added).

The ordinance seeks to maintain health and safety by requiring that purchasers of grocery stores retain the existing workforce. Whenever a "change in control" occurs, the new owner must hire the employees for that store from a "preferential hiring list" of employees who have worked at the store for at least six months. *See id.* § 181.02(B). If the successor employer requires fewer than all of the predecessor's employees, it must hire workers from that list by seniority. *Id.* § 181.03(B).

Grocery stores must retain the workers for ninety days, during which time the employee may be terminated only for cause. *See id.* § 181.03(A), (C). At the end of the ninety-day period, the employer must give a written

performance evaluation to each employee. If the worker's performance was satisfactory, the employer must "consider" offering the worker continued employment. *See id.* § 181.03(D). The ordinance allows workers to sue their employer for violations of the ordinance, and to seek reinstatement, front and back pay, value of lost benefits and attorney's fees. *Id.* § 181.05.

A successor employer may opt out of the ordinance, but only if the employer convinces a union to sign a collective bargaining agreement that supersedes the ordinance's requirements. *See id.* § 181.06.

B. The Ordinance's Legislative History.

The GWRO was originally proposed by City Council Member Alex Padilla. Reciting that supermarkets "provide essential services to members of the public" and "play a major role in determining the health of their community" (2 AA 177), his motion proposed that the City Attorney prepare an ordinance that would adopt standards for supermarkets to "address public safety concerns, provide amenities to the public and to maintain quality of life standards." The motion further proposed that the ordinance "provide for . . . transitional worker retention to assure the maintenance of these standards when supermarket establishments change ownership." *Id.*

The City Attorney submitted a draft ordinance on December 9, 2005. In his accompanying written report to the City Council, the City Attorney concluded the GWRO fell within the City's police powers because the ordinance was intended to "ensure the welfare of [the City's] residents

through the maintenance of health and safety standards in grocery establishments." As the City Attorney explained:

> 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 or operation of grocery stores ensures stabilization of this vital workforce, which results in preservation of health and safety standards.

2 AA 197.

At the first hearing on the proposed ordinance, the City Attorney's representative again explained, at the council chairperson's invitation, that the ordinance was an exercise of police power "to promote the health, welfare and safety of its residents." 2 AA 284-85. The representative elaborated that, "in dealing with grocery store workers in a transitional period basis, the concerns that would be focused on would involve sanitary procedures, the proper handling of food, possibly knowing the maybe unique clientele" of a specific store. 2 AA 285.

No council member took issue with the City Attorney's statement of the GWRO's purpose. Council Member Padilla also described the ordinance in food safety terms. 2 AA 285. Consistent with his initial motion proposing the ordinance, he stated that, "when it comes to recognizing the significance of the stability in the work force, these workers ensure that our food is safe and sanitary." *Id.*

Without questioning the health and safety purpose, a few council members offered their view that the proposed ordinance materialized because the unionized Albertson's chain intended to turn some of its stores

into the non-unionized "Bristol Farms chain" with the attendant "risk of stores being closed down, employees being let go, but in the near future, substitute markets . . . being opened with new employees coming in at lower wages, fewer benefits, because it may be good for somebody's corporate model." 2 AA 228; *see also* 2 AA 289, 302-04.

Responding to such comments, the City Attorney's representative clarified that the ordinance was a food safety measure. In particular, he explained that the GWRO was prepared "as an appropriate period of time to ensure that the workers . . . have familiarity and an understanding of sanitary procedures and other health and safety issues when it comes to grocery store[s] and handling food . . . . So, that's where the 90 days comes from again, is, this concern over health, safety and welfare." 2 AA 297; *see also* 2 AA 303 (describing the ordinance as "protecting health, safety and welfare" by making sure "that at least on a transitional basis there are employees working there who understand the needs of that community, understand the sanitary procedures and other sort of health and safety issues that go along with selling food and food-related products").

The City Attorney's representatives were also asked to identify the "rational basis" for the ordinance should it be challenged on equal protection grounds. 2 AA 305-06. Again, they responded that protecting food safety was the basis for the ordinance:

> It's a legitimate government concern, to want to protect the health and safety of residents, since grocery establishments are main points of distribution of food which have to be handled in accordance with OSHA, county regulations, FDA regulations, regarding distribution of specific kinds [of] raw meats and produce.

> The City has an interest in making sure that those standards are maintained. The rational basis, then, is to keep the industry knowledge for a transition period when the establishments change ownership so that knowledge isn't lost when the personnel changes.

2 AA 306.

At no time in any hearing did the City Attorney's office express any potential purpose for the ordinance other than what is stated in the preamble to the ordinance: to ensure health and safety. At no time did any council member express disagreement or question that stated purpose. The ordinance was presented and adopted as a food health and safety measure.

This same theme continued at the final legislative hearing. Council Member Padilla quipped that, during the council's debate on the ordinance, "we were reading in the newspaper that the sale of the Albertsons chain is pending. Coincidence? I think not." 2 AA 355. But he emphasized that "[i]t's not that we are going after Albertsons only or anything like that." *Id.* Instead, he asserted that the ordinance was needed because grocery store employees affect "the very health and safety of our city residents" and that "[t]hose who handle the produce, those who handle the meats and the poultry, the very items we put into our bodies throughout the city, should be a big concern for policymakers at all levels of government." 2 AA 355-56. Council Member Padilla encouraged his colleagues to support the ordinance as "a way to help strengthen the health and safety regulations within the city of Los Angeles." 2 AA 356.

The City Attorney's office also once again confirmed the health and safety rationale for the ordinance, explaining that "the government's

legitimate concern is preserving the health and safety of its citizens through the proper handling of food – meat, produce, et cetera – following OSHA, FDA, county regulations. By preserving the industry knowledge from the incumbent grocery employer's personnel to the successor grocery employer's personnel, we are maintaining those health and safety standards." 2 AA 370. The City Attorney asserted that the ordinance filled a void left by the Los Angeles County Health Department, which "doesn't require workers to retain [knowledge of existing laws] during a transition." 2 AA 360.

PROCEDURAL HISTORY

A. Trial Evidence.

The California Grocers Association ("CGA") filed suit in May 2006 to enjoin the GWRO. The superior court conducted a two-day bench trial in August 2007. CGA called nine witnesses, including officers of local and regional grocery companies. The City and intervener Los Angeles Alliance for a New Economy ("LAANE") offered no witnesses and no documentary evidence in support of the GWRO.

Officers from three different grocery companies testified that they have not purchased stores in Los Angeles because of the GWRO. *See* Reporter's Trial Transcript of Proceedings ("RT") 68:11-14, 117:16-118:12; 147:6-10. The witnesses testified that their ability to choose their own workforce is critically important for numerous reasons. First, when a grocery company sells a particular store, it is "usually" because the store is "troubled." *See* RT 144:11-15. The failing store's plight may result from the workforce itself. RT 192:16-21. Thus, "keeping employees of a former

company that had failed in that location, it would be a serious business problem." RT 64:25-65:8. The problem is especially acute because of the significant investment involved in purchasing a grocery store. Super Center Concepts, for example, typically spends $5.5 to $6 million to buy and refurbish a store, and invests as much as another $2.5 million in the first year or so of operation. RT 65:24-66:6.

Second, grocery stores often fill a niche, and the ordinance prevents grocery companies from hiring workers suited to that niche. For example, because Rio Ranch Markets is "focused toward the Latino population," the company requires "specialized things" of prospective employees, "like we ask [that] the people be bilingual for our type of markets." RT 140:28, 142:27-28. In its hiring decisions, Bristol Farms focuses predominantly on experience in preparing fresh foods and the display and sale of fresh products; the company has often found that "the existing employees of [its predecessors'] stores don't have that experience or knowledge." RT 118:13-16. The GWRO, however, takes no account of an employer's hiring needs, or of the employer's preference for using its own personnel to staff the new store, for hiring from the community, and for hiring workers after an interview process. *See* RT 74:28-75:2, 76:15-20, 142:18-22.

That the retention requirement is nominally limited to ninety days does not eliminate its adverse effect. The first ninety days are "probably the most important time. That's the time when you establish your image in the community and you have to deliver. The supermarket business is a very competitive business, and if you don't deliver to the customers in the first 90 days, you've probably lost them." RT 143:20-25. There was no

evidence at trial that there is any increased health or safety risk in the ninety days following the sale or acquisition of a grocery store. RT 97:20-98:6.

B. Decisions Below.

The trial court ruled that the GWRO is preempted by the California Retail Food Code ("CRFC") because it enters an area of exclusive state authority. The trial court also concluded that the ordinance violates the equal protection provisions of the federal and California constitutions.

The court of appeal affirmed the trial court's conclusion that the GWRO is preempted by the CRFC. The court noted that the CRFC is a comprehensive statutory scheme, which includes an express declaration of the Legislature's intent to occupy the entire field of "health and sanitation standards for retail food facilities." *Cal. Grocers Ass'n v. Los Angeles*, No. B206750 Slip Op. at 3 (Cal. Ct. App. July 30, 2009) (hereinafter "Slip Op.") (quoting Health & Safety Code § 113705).

The court observed that the CRFC contains "several provisions regulating employee knowledge of food safety," including a provision requiring that all covered food facilities have at least one owner or employee on staff who has passed an accredited food safety examination. Slip Op. 3. Importantly, the CRFC also specifically addresses employee knowledge standards in the event of a change in ownership by granting successor grocery establishments sixty days to comply with the certified employee requirement, Health & Safety Code § 113947.1(e), thus "balanc[ing] the interest in maintaining health and sanitation standards . . . with reasonable hiring and training costs." Slip Op. 13. After examining both the "face" of the GWRO and its codified purpose, the court found the

ordinance is preempted because, by requiring the uninterrupted employment of employees with knowledge of food and safety standards, it regulates the same field as the CRFC. Slip Op. 12-14.

The court of appeal also found that the ordinance is preempted by federal labor law because it intrudes into the area of "successorship obligations," which Congress intentionally left to be controlled by the free play of market forces. Slip Op. 28. The GWRO intrudes upon this area by obligating successors to hire their predecessor's employees, thereby effectively forcing successors to recognize the predecessor employees' representative if such employees were unionized. "Thus," the court wrote, "in cases subject to the NLRA, the ordinance imposes a bargaining obligation on all new grocery store employers that the NLRA imposes on only those employers who freely hire the predecessor's employees." Slip Op. 27.

ARGUMENT

I. THE GWRO IS PREEMPTED BY THE CALIFORNIA RETAIL FOOD CODE.

A. The CRFC Expressly Occupies the Entire Field of Health and Sanitation Standards for Retail Food Facilities.

The preemptive effect of a state statute "is determined by deciding both whether a preemptive effect was intended, and if so, the scope of the field of regulation which it was intended to occupy." *Bravo Vending v. Rancho Mirage* (1993) 16 Cal. App. 4th 383, 412-13. The California Legislature left little doubt as to its preemptive intent when it enacted the CRFC. In language that is "accepted as expressly preempting all local

power over a given topic" (*Viacom Outdoor, Inc. v. Arcata* (2006) 140 Cal. App. 4th 230, 240), the Legislature stated:

> 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,[1] 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.

Health & Safety Code § 113705 (emphasis added).

The CRFC encourages food safety by establishing detailed and comprehensive sanitation standards that reflect considered policy judgments based on sound public health principles. As its broad preemption clause exhibits, the CRFC's purpose is to ensure that food health and safety standards are based on science and legitimate public safety concerns and that statewide uniformity and consistency exists in retail food safety enforcement. *See* Respondent's Appendix 9-10, 15-16.

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[1] Section 113709 provides that local governments are permitted to: (1) adopt an evaluation or grading system for food facilities; (2) prohibit any type of food facility; (3) adopt an employee health certification program; and (4) regulate the provision of consumer toilet and handwashing facilities. Health & Safety Code § 113709. Los Angeles County has adopted a certification ordinance that – like the CRFC – provides for a sixty-day grace period in the event of a change in ownership. *See* Los Angeles County Code § 11.11.080.

The City does not contend that the GWRO falls within any of these exceptions – and it clearly does not.

Consistent with the Legislature's intent to comprehensively regulate health and safety at retail food facilities, the CRFC regulates everything from the receipt of food (Health & Safety Code § 114039.2), to food storage (*id.* § 114053), food display (*id.* § 114077), cleaning and sanitation of equipment and utensils (*id.* § 114099.4), ventilation (*id.* § 114149.2), refuse (*id.* § 114245.2), and vermin (*id.* § 114259.3). Implementing regulations enacted by the California Department of Public Health – formerly Department of Health Services – pursuant to section 113707 create an additional layer of detail for select food facilities. *See, e.g.*, Cal. Code Regs. tit. 17, § 30730 (2010).

The CRFC's standards, however, are not limited to such things as food temperature and equipment sanitizing. Instead, recognizing that grocery workers play an integral part in safeguarding public health, the Legislature also adopted a myriad of provisions that regulate retail food facility employees and employee conduct. *See* Health & Safety Code §§ 113945-113978.

Of particular import in this case, the CRFC's "Employee Knowledge" article requires that all food employees "have adequate knowledge of," and "be properly trained in, food safety as it relates to their assigned duties." *Id.* § 113947. Food facilities that prepare or handle nonprepackaged potentially hazardous food must also have at least one owner or employee on staff who has passed an accredited food safety examination. *Id.* § 113947.1(a).

Certified individuals must recertify every five years by passing a food safety certification examination that covers: (1) foodborne illness;

(2) the relationship between time and temperature with respect to foodborne illness; (3) the relationship between personal hygiene and food safety; (4) methods of preventing food contamination; (5) procedures for cleaning and sanitizing equipment and utensils; (6) problems and potential solutions associated with facility and equipment design, layout, and construction; and (7) problems and potential solutions associated with temperature control, preventing cross-contamination, housekeeping, and maintenance. *Id.* §§ 113947.1(h), 113947.2. Violations of the CRFC's employee knowledge requirements are punishable by a fine of up to $100 for each day of operation in violation. *Id.* § 113947.6.

Importantly, the CRFC addresses the very issue that the GWRO seeks to address: the requirements for maintaining employee food health and safety knowledge in the transition period following a change in ownership. Recognizing the disruption involved in changing ownership, the Legislature granted successor food retailers a sixty-day grace period after sale in which to comply with the certification requirements. *Id.* § 113947.1(e) ("A food facility that . . . changes ownership . . . shall have 60 days to comply with this subdivision.").

B. Municipalities Cannot Establish Health and Sanitation Standards for Grocery Stores in Addition to Those Imposed by the CRFC.

The California Constitution prohibits municipalities from enforcing ordinances "in conflict with general laws." Cal. Const. art. XI, § 7. If local legislation is "in conflict" with a state law, it is void. *See Morehart v. Santa Barbara* (1994) 7 Cal. 4th 725, 747. A conflict exists if, *inter alia*, a municipal ordinance "enters an area fully occupied by general law, either

expressly or by legislative implication." *Sherwin-Williams Co. v. Los Angeles* (1993) 4 Cal. 4th 893, 897 (quotations and citations omitted).[2]

Because the California Legislature expressly occupied the whole field of health and sanitation standards for retail food facilities, this case concerns "field preemption." *See Viacom*, 140 Cal. App. 4th at 240 n.7. Under well-settled field preemption principles, "local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute." *Tolman v. Underhill* (1952) 39 Cal. 2d 708, 712. Field preemption is so powerful that it prohibits local governments from imposing ***any*** requirements within a preempted field, even if the requirements are consistent with or could otherwise be reconciled with state law. *See Ex Parte Lane* (1962) 58 Cal. 2d 99, 102. All that is necessary for preemption is that the local measure "***purports to regulate*** an area that is fully occupied by express provisions of the state law." *See Watsonville v.*

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[2] The City contends that the GWRO should be analyzed under the "home rule" doctrine. City Br. 13. The City did not argue this point in the court below and thus has waived it. *See Estate of Leslie* (1984) 37 Cal. 3d 186, 202. In any event, the doctrine does not change the analysis here because "home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation." *Bishop v. San Jose* (1969) 1 Cal. 3d 56, 61-62; *see also Bellus v. Eureka* (1968) 69 Cal. 2d 336, 346 (holding that "[c]hartered cities have full power to regulate municipal affairs, and ordinances governing municipal affairs supersede general laws insofar as the latter conflict with the ordinance ***unless the state has preempted the field***") (emphasis added).

State Dep't of Health Servs. (2005) 133 Cal. App. 4th 875, 885 (emphasis added).[3]

A municipality's attempt to regulate within a preempted field is all the more offensive when the local law imposes more onerous requirements than state law. In that circumstance, the local regulation is additionally invalid on the ground of an actual conflict. *See, e.g., Am. Fin. Servs. Ass'n v. Oakland* (2005) 34 Cal. 4th 1239, 1245 (invalidating ordinance that imposed more rigorous requirements in an area occupied by state law); *Wilson v. Beville* (1957) 47 Cal. 2d 852, 856 (invalidating city charter provision that imposed requirements on persons seeking compensation for a taking that were more onerous than those imposed by a state law that occupied the field of eminent domain).

C. The GWRO Impermissibly Attempts to Regulate Health and Sanitation in Grocery Stores.

The foregoing principles establish that the GWRO is preempted by state law. Using the broadest possible preemptive language, the Legislature unambiguously occupied the entire field of health and safety standards related to retail food facilities. By doing so, the Legislature precluded local regulation on the same subject. Yet the City Council adopted precisely such prohibited regulation when it adopted the GWRO. For the express purpose of maintaining "health and safety," the City has mandated that grocery stores retain "[e]xperienced grocery workers with knowledge of

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[3] *See also Indus. Truck Ass'n, Inc. v. Henry* (9th Cir. 1997) 125 F.3d 1305, 1309 (describing field preemption as a "potent species" of preemption because "under field preemption the state regulation is preempted whether or not it actually conflicts with the federal scheme").

proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve." 2 AA 170. It is difficult to imagine a local regulation that falls more squarely within the preempted field.

To try to save the ordinance, the City and LAANE argue: (1) the GWRO's statement of purpose should be disregarded; or (2) the GWRO's statement of purpose is trumped by the ordinance's substantive provisions, which they contend have nothing to do with food safety in grocery stores. Neither argument withstands scrutiny.

1. The Statement of Purpose Cannot be Disregarded.

Petitioners cite no authority suggesting that a court may disregard a legislative body's express statement of its purpose when evaluating whether the enactment invades a preempted field. The law is directly to the contrary.

When the "Legislature has expressly declared its intent, [this Court] must accept the declaration." *Tyrone v. Kelley* (1973) 9 Cal. 3d 1, 10-11. The Court is "obliged to construe the statute according to the Legislature's own statement of its purpose, if it can." *Botello v. Shell Oil Co.* (1991) 229 Cal. App. 3d 1130, 1135 (citing *People ex rel. Younger v. El Dorado* (1971) 5 Cal. 3d 480, 493). The Court's task is "to effectuate the purpose of the law." *Catholic Mut. Relief Soc'y v. Super. Ct.* (2007) 42 Cal. 4th 358, 369 (quotation and citation omitted).

In evaluating federal law preemption of state occupational health and safety standards, the United States Supreme Court has made clear that a "state law that expressly declares a legislative purpose of regulating occupational health and safety" is preempted under a federal statute

precluding such state law regulation. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 105; *see also English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 84 (recognizing that "part of the pre-empted field is defined by reference to the purpose of the state law" that is challenged as preempted). Similarly, the court of appeal has correctly recognized that, "in determining whether an ordinance regulates the same field of conduct . . . as a state statute, a court must look, not only at the face of the ordinance, but also at the purpose for which the ordinance was enacted." *Bravo Vending*, 16 Cal. App. 4th at 404.[4] As these cases recognize, a legislature that announces its intention to regulate health and safety in grocery stores plainly has "attempt[ed] to impose additional requirements in a field which is fully occupied by statute." *Tolman*, 39 Cal. 2d at 712.[5]

The City argues that "legislative intent is not gleaned solely from the preamble . . . it is gleaned from the statute as a whole." City Br. 17

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[4] *Bravo Vending* concluded that the ordinance in that case was not preempted. But it did not do so by disregarding the city's express statement. Instead, it concluded that a state criminal statute prohibiting sale of cigarettes to minors did not preempt cities from adopting ordinances to discourage that same activity. This case, however, does not involve a state criminal statute that permits local ordinances intended to encourage compliance. Instead, it involves a comprehensive state health and safety regulatory regime that expressly precludes local governments from adopting any standards at all relating to the same subject matter.

[5] An expressed intention to regulate a preempted field is sufficient, but not necessary, to trigger preemption. Thus, state legislatures cannot avoid preemption merely by articulating a purpose other than regulating the preempted field; otherwise, state legislatures could "nullify nearly all unwanted federal legislation" by identifying an alternative, yet disingenuous, purpose. *Gade*, 505 U.S. at 105-06 (quotation and citation omitted).

(quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118). But that principle is of no value to the City because reviewing the "statute as a whole" here leads to precisely the same result. The GWRO's statement of purpose describes the City's intent to protect food health and safety by retaining workers, and the rest of the ordinance implements that purpose by prescribing the manner in which workers must be retained.

Rather than reading the GWRO as a whole, the City is asking that the Court simply disregard the statement of purpose. But as *Briggs* holds, the Court must harmonize the various provisions of a statute and give effect to each. 19 Cal. 4th at 1118-19. Thus, in *Briggs*, this Court did not reject the preamble but gave it effect by construing matters of "public significance" to include "participation in official proceedings." *Id.* Here, harmonizing each part of the GWRO requires no extended analysis – the statement of purpose and the rest of the ordinance do not even arguably conflict. Rather, both reflect the same legislative objective of preserving health and safety by retention of "[e]xperienced grocery workers." LAANE is quite right that this Court "may not speculate that the legislature meant something other than what it said." LAANE Br. 20 (quoting *Mutual Life Ins. Co. v. Los Angeles* (1990) 50 Cal. 3d 402, 412). But that principle cuts against LAANE, because the City Council said in the statute itself that it was adopting a health and safety standard.

Briggs also concluded that any other reading of the statute there would "contravene[] the specific legislative intent" expressed not only in the statute but also in the legislative history. 19 Cal. 4th at 1119. The same

is true here. As shown above (*supra*, pp. 4-8), the GWRO was proposed as a public health and safety measure, and then was repeatedly and emphatically described in precisely those same terms at every step along the way to its adoption. *Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1046.

The City asserts that the legislative history reflects "conflicting interpretations of the ordinance." City Br. 18. If that were true, that would be all the more reason to give effect to the unambiguous statement of purpose codified in the ordinance itself. In fact, however, the legislative history is remarkable for its clarity in identifying protecting health and safety as the GWRO's operative purpose. The supposedly "conflicting interpretations" to which the City refers do not contradict this fundamental purpose but merely indicate that a few members may have been personally motivated by additional concerns. Unlike the express health and safety purpose repeatedly identified at the hearings – and codified in the ordinance itself – there is no indication that these individual views were joined by the Council as a whole. *See Grupe Dev. Co. v. Super. Ct.* (1993) 4 Cal. 4th 911, 922 (courts "do not consider the motives or understandings of an individual legislator even if he or she authored the statute") (internal quotation marks omitted).

Likewise unavailing is LAANE's assertion that health and safety in grocery stores is merely "one of several objects to be gained" by the GWRO's passage. LAANE Br. 21. Even if that were true, a local ordinance that regulates in an area the Legislature has reserved exclusively to the state is not saved merely because some council members – or even the council as a whole – may also have been motivated by additional

reasons outside the concern of the preemptive state statute. *Gade*, 505 U.S. at 106-07 (holding that a local regulation is not saved from preemption "simply because the regulation serves several objectives rather than one"). If it were, local governments could always evade state preemption – and frustrate the Legislature's intent – through the simple expedient of articulating some supposed "additional" purpose that its ordinance would address.

Nor is the GWRO saved by the City's assertion that it did not actually intend to intrude upon state law but only "assumed" that experienced grocery workers are knowledgeable about food safety and "hoped" that the ordinance would enable these experienced workers to remain employed. City Br. 19. This is only an admission that the City was indeed legislating in the preempted field. A preempted law is not saved merely because the local government only "assumed" or "hoped" its law would advance health and safety, rather than having an actual factual basis for believing it would do so. Nor is it relevant whether the City specifically intended to invade the preempted field. Whether the City knew it was adopting an invalid ordinance, or only mistakenly believed it could permissibly adopt a health and safety standard for grocery stores, either way the City has entered a field that the Legislature has expressly reserved for uniform, statewide state legislation.

2. The GWRO Adopts a Health and Safety Standard.

Also meritless is petitioners' assertion that, regardless of the City's expressly stated intent to maintain "health and safety standards in grocery establishments" (L.A.M.C. § 181.00), the GWRO does not in fact adopt

any health and safety standards within the meaning of the CRFC. Petitioners argue that the GWRO deals only with worker retention, which they claim is unaffected by the CRFC.[6]

That contention, however, is inconsistent with the CRFC itself, which includes provisions addressing this very subject. As discussed above, the CRFC requires that "food employees" be "properly trained in[] food safety" (Health & Safety Code § 113947) and that each food facility have at least one owner or employee who is certified in food safety. *Id.* § 113947.1.[7] Most importantly, the Legislature specified that, upon a change in control, grocery stores are not required to retain knowledgeable food employees or certified employees, and have a sixty-day grace period to obtain new certified employees. *Id.* § 113947.1(e). By these provisions, the Legislature made clear that requirements relating to retention of trained and experienced food service employees – particularly in connection with a

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[6] It is striking that the City Attorney's office – which repeatedly and unambiguously informed the City Council that the sole purpose of the GWRO was to protect food health and safety – now takes the position that some other purpose existed and was codified by section 181.00. To believe that the GWRO was prepared by the City Attorney's office to also support a second, concealed purpose of worker retention means that the City Attorney's representatives misled the City Council and the public in its written report and in its many statements at council hearings.

[7] In contrast to the approach taken by the GWRO, the CRFC does not define "food employee" as every employee working in the grocery store. Instead, it includes only those employees working with a "raw, cooked, or processed edible substance, ice, beverage, an ingredient used or intended for use or for sale in whole or in part for human consumption, and chewing gum." Health & Safety Code §§ 113781, 113788.

change in control of the store – are in fact "health and sanitation standards" over which the state has reserved exclusive control.

Echoing the dissent below, petitioners assert that the GWRO cannot be a health and safety ordinance because it requires retention of all workers, whether or not "they handle food, are trained in sanitation standards, are certified in food safety, or have any health and safety expertise." Slip. Op. Dissent 8. That the City elected to paint with such broad strokes, however, means simply that the City has elected to advance health and safety in a manner different from the state Legislature. Rather than showing that the City was regulating outside the sphere of the CRFC, the breadth of the GWRO's requirement only reflects the City Council's conclusion that the entire workforce was "vital" and therefore must be retained to ensure "preservation of health and safety standards." L.A.M.C.§ 181.00. This contrasts with the CRFC's approach of allowing the purchaser to select a food specialist of the employer's choice – and by giving the purchaser sixty days in which to do so, rather than requiring that it do so immediately. The CRFC also relies on training and certification as the best way to ensure food safety, rather than relying on "experience" as the GWRO does. Far from defeating preemption, the City's differing approach is only further reason to find it.

These conflicting standards cannot be characterized as merely "incidental," as LAANE suggests. LAANE Br. 21. In drafting the CRFC's employee knowledge provisions, the California Legislature carefully balanced two competing considerations, *i.e.*, the need to protect the public from food contamination and the concern that requiring food safety

knowledge on the part of multiple employees or mandating immediate compliance with the statute upon a change of ownership would unduly burden supermarket owners. The GWRO, if enforced, would directly and substantially upset that careful balance, thereby obstructing the full purpose of the CRFC. *See Am. Fin. Servs. Ass'n*, 34 Cal. 4th at 1257 (striking down municipal ordinance regulating in preempted field of predatory lending practices, which upset legislature's balance between protecting vulnerable consumers and concern that homeowners not be unduly hindered in accessing equity in their homes).

LAANE asserts that the two laws are harmonious because the GWRO does not dictate which employee the purchaser designates to be its "certified owner or employee" under the CRFC. LAANE Br. 22. But that again reflects only that the City has adopted a different approach from the CRFC. Rather than requiring only that the employer designate one "certified" employee (and giving a new employer sixty days to comply with that requirement), the GWRO requires retention of all employees with no grace period. Regulating health and safety in a manner different from the statewide regulation imposed by the CRFC is a reason for finding preemption, not denying it.

Nor is it relevant that the GWRO is congruent with the CRFC in the limited sense that it does not require retention of "managerial, supervisory, confidential employee[s]." LAANE Br. 22. A local ordinance need not conflict with a preemptive state statute in every respect to be invalid.

LAANE's arguments in any event "conflate field preemption with conflict preemption." *Scheiding v. Gen. Motors Corp.* (2000) 22 Cal. 4th

471, 482. The California Legislature determined that the best way to balance public safety and transition costs in a change in ownership is to not require retention of the prior workforce and to give new grocery stores sixty days to find and hire an employee certified in food safety. It is immaterial whether that approach is "consistent" with the City Council's determination that public safety would be better served by requiring new groceries to employ their predecessor's experienced employees, *i.e.*, those with more than six months experience. L.A.M.C. § 181.02(B). Having occupied the entire field of health and safety in grocery stores, the California legislature "left no area within which" municipalities may act. *Scheiding*, 22 Cal. 4th at 482.

II. THE GWRO IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The court below also correctly ruled that the GWRO is preempted under the NLRA's *Machinists* doctrine because it intrudes on a zone that Congress intended be "'protected and reserved for market freedom.'" Slip Op. 26 (quoting *Chamber of Commerce of U.S. v. Brown* (2008) 128 S.Ct. 2408, 2412).[8]

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[8] The City argues in a footnote that CGA should have cross-appealed the trial court's adverse ruling on the NLRA. City Br. 9 n.2. But it is black-letter law that a respondent may request affirmance on an alternate ground asserted in the lower court, without the need to cross-appeal. *In Re Marriage of Burgess v. Burgess* (1996) 13 Cal. 4th 25, 32 ("We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked."); *Hermosa Beach Stop Oil Coal. v. Hermosa Beach* (2001) 86 Cal. App. 4th 534, 548 n.8 ("Macpherson's cross-appeal seeks review of two adverse rulings by the trial court that, if reversed, would each provide an alternative basis for affirming the trial court's decision to deny Stop Oil's request for declaratory and injunctive

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A. *Machinists* Preemption Precludes Local Governments from Tipping the Bargaining Scales.

The NLRA, 29 U.S.C. §§ 151-169, was enacted to federalize and bring uniformity to labor-management relations. It is "a comprehensive national labor law ... for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces." *Amalgamated Ass'n of State Elec. Ry. & Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 286. It is designed "to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *NLRB v. Nash-Finch Co.* (1971) 404 U.S. 138, 144 (internal quotation and citation omitted).

Although the NLRA contains no express preemption provision, "it is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.* (1986) 475 U.S. 282, 286. As particularly relevant to this case, the NLRA "forbids both the National Labor Relations Board and States to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of

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relief. Both of these grounds for affirmance are properly urged by Macpherson under Code of Civil Procedure section 906 without the need for a cross-appeal."); *Cal. State Elec. Ass'n v. Zeos Int'l. Ltd.* (1996) 41 Cal. App. 4th 1270, 1275 ("[W]e follow the established rule that a summary judgment, like any other, will be affirmed if legally correct, without regard for the particular reasons invoked by the trial court. Contrary to plaintiff's assertion, such review and affirmance do not require a cross-appeal by Zeos, which does not assert error in the judgment but merely seeks to defend it on an alternative ground, which was asserted below.") (citations omitted).

economic forces." *Brown*, 128 S. Ct. at 2412 (quoting *Machinists,* 427 U.S. at 140) (internal quotation omitted).

In recognizing this strain of preemption – known as *Machinists* preemption – the Supreme Court concluded that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes," that it intended not to be disturbed by state law. *Machinists*, 427 U.S. at 141 n.4 (quotation and citation omitted). By prohibiting "state and municipal regulation of areas that have been left to be controlled by the free play of economic forces," preemption "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc.* (1993) 507 U.S. 218, 226 (internal quotation and citation omitted); *see also Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton* (1964) 377 U.S. 252, 260 (states may not "upset the balance of power between labor and management expressed in our national labor policy"); *Golden State Transit Corp. v. Los Angeles* (1986) 475 U.S. 608, 614 ("Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests.") (internal quotation and citation omitted).

Machinists preemption is not, as LAANE suggests, a narrow doctrine that applies only to laws that limit the use of specific economic weapons, such as strikes or picketing. LAANE Br. 11. To the contrary, the Supreme Court has construed the doctrine "broadly." *Derrico v. Sheehan*

Emergency Hosp. (2d Cir. 1988) 844 F.2d 22, 28. "*Machinists* preemption has been held to preempt a range of governmental conduct that interferes with the ordinary free play of the market and rises to the level of a regulatory act." *Alameda Newspapers, Inc. v. Oakland* (9th Cir. 1996) 95 F.3d 1406, 1418 n.16.[9] A state statute or local ordinance that intrudes into an area intended to be left to the free play of market forces is invalid in its entirety, even if it applies, on its face, to union and non-union employers equally. *See, e.g., 520 South Michigan Ave. Assocs., Ltd. v. Shannon* (7th Cir. 2008) 549 F.3d 1119, 1130 (striking down on *Machinists* grounds state statute that applied to union and nonunion hotels equally), *cert. denied*, 130 S. Ct. 197 (2009); *Thunderbird Mining Co. v. Ventura* (D. Minn. 2001) 138 F. Supp. 2d 1193, 1200-01 (finding state law that applied to union and non-union taconite producers equally preempted under *Machinists*).[10]

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[9] The Supreme Court has, under *Machinists* preemption, invalidated a California statute prohibiting covered employers from using state funds to assist or deter union organizing, *Brown*, 128 S. Ct. at 2408, prohibited states from awarding punitive damages for business losses resulting from a secondary boycott, *Morton*, 377 U.S. at 260, and prohibited a city from conditioning a taxi company's franchise renewal on the employer's settlement of a labor dispute with its workers, *Golden State*, 475 U.S. at 608. The Court has also prohibited states from restricting picketing permitted under federal law, *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776* (1953) 346 U.S. 485, and from enjoining employees from refusing to work overtime or outlawing strikes and lockouts, *Machinists*, 427 U.S. at 147.

[10] The other form of NLRA preemption is known as *Garmon* preemption, which prohibits state regulation of activities that are protected by section 7 of the NLRA or constitute an unfair labor practice under section 8. *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, 244. *Garmon* preemption also extends to conduct that is "arguably" prohibited or protected under the NLRA. *Id.* at 244-45. Because

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B. The GWRO Tips the Scales of Economic Power by Dramatically Enhancing the Power of the Employees' Union to Compel Bargaining.

Among the fundamental principles of the NLRA – and thus a point that falls squarely within *Machinists* preemption – is that government should not augment or diminish the economic power that labor and management each bring to the question of union organization. The NLRA leaves the decision whether to organize to the free play of market forces, subject only to limited federal regulation of practices that prevent those market forces from freely operating. *See Machinists*, 427 U.S. at 140 n.4 (NLRA provides "a legal framework for union organization . . . that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests") (quotation and citation omitted); *Garner*, 346 U.S. at 499-500 (finding preempted state regulation of recognitional picketing).

The GWRO violates this principle because it significantly skews the market forces in a way that gives an incumbent union a significant, artificial advantage in keeping its representative status and forcing the new employer to collectively bargain.

Machinists preemption clearly applies, the Court need not reach the question of *Garmon* preemption. But *Garmon* preemption also supports affirmance here because, for the reasons discussed below, the GWRO contravenes section 8(d) of the NLRA, which "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). The GWRO runs afoul of this principle by compelling successor grocery stores to honor, against their will, the collective bargaining unit of the predecessor's employees. *See United Steelworkers v. St. Gabriel's Hosp.* (D. Minn. 1994) 871 F. Supp. 335, 341.

Absent the GWRO (or having previously entered a collective bargaining agreement that covers the facility), a purchaser of a facility such as a grocery store is generally free to hire whatever employees it wishes for that store. The Supreme Court has held that whether to hire a predecessor's employees is a matter the NLRA left to the prerogative of the successor and the free play of market forces. In *NLRB v. Burns International Security Services, Inc.* (1972) 406 U.S. 272, 280 n.5, the Supreme Court observed that the NLRB has never interpreted the NLRA as requiring "that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor." To the contrary, in *Howard Johnson Co., Inc. v. Hotel & Restaurant Employees* (1974) 417 U.S. 249, 262, the Court recognized that a successor employer has an affirmative "right not to hire any of the former [predecessor] employees, if it so desire[s]." *See also id.* at 264 (recognizing the "new employer's right to operate the enterprise with his own independent labor force"). The Court emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision." *Id.* at 261 (quoting *Burns*, 406 U.S. at 287-88).

In addition to having the right to select its own employees, the employer is also not bound to collectively bargain with the employees it chooses to hire unless (1) the employer is found to be a "successor" under the NLRA by having hired a majority of the existing employees, or (2) the employees follow the election and certification procedures under the NLRA to be represented by a union.

The GWRO interferes at every juncture with this framework established by the NLRA. At the threshold, it contradicts the "basic principle of federal labor law" recognized in *Howard Johnson* that a new employer has the right not to hire its predecessor's employees. *St. Gabriel's Hosp.*, 871 F. Supp. at 342. LAANE asserts that federal labor law does not actually protect this right but only does not itself mandate that a purchaser hire its predecessor's employees. LAANE Br. 12 n.10. Whether or not that is true outside the union organization and collective bargaining context, however, it is not true in the circumstances here. Imposing a hiring obligation here has the effect, not simply of taking away a company's right to select its own employees, but (for the reasons that follow) of giving unions a significant advantage against the employer in organizing the employees and imposing a collective bargaining requirement. It was precisely to avoid such an outcome that the United States Supreme Court held that the NLRA gives employers the right to not hire their predecessor's employees. *See Howard Johnson*, 417 U.S. at 253-54 (union sought to bind the successor to the terms of the collective bargaining agreement with the predecessor); *Burns,* 406 U.S. at 287-88 (same).

The GWRO increases the union's economic power in at least four ways. First, by mandating that the purchaser fill all of its non-managerial hiring needs from the existing workforce, the GWRO makes it much more likely, if not certain, that the purchaser will be found to be a successor employer and therefore obligated to recognize and collectively bargain with the employees' union. Under the NLRA's "successorship doctrine," an

employer must recognize and bargain with the union that had been the bargaining representative of the employees under a predecessor employer if "there is 'substantial continuity' between the enterprises." *Fall River Dyeing & Finishing Corp. v. NLRB* (1987) 482 U.S. 27, 43. This duty to bargain is proper when "the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor." *Id.* at 41. The successorship determination is made on a case-by-case basis by the NLRB. The primary factor in determining successorship is whether the new company hires a majority of its predecessor's employees, the so called "majority test." *Id.* at 41-43, 47; *Burns*, 406 U.S. at 281.

By mandating that a purchaser hire, not just a majority, but all of its non-managerial employees from the predecessor's workforce, the GWRO ensures that this primary factor will be satisfied and thus that the purchaser likely will be found to be a successor. Indeed, applying this successorship doctrine, NLRB administrative law judges have twice ruled that an employer that was mandated to hire its predecessor's employees by a local retention ordinance of the kind at issue here was a successor obligated to recognize and bargain with the union of the predecessor's employees. *M&M Parkside Towers LLC* (NLRB Div. of Judges Jan. 30, 2007) No. 29-CA-27720, 2007 WL 313429; *United States Servs. Indus., Inc.* (NLRB Div. of Judges Dec. 13, 1995) No. 5-CA-24575, 1995 NLRB Lexis 1151. In both cases, the judge rejected the employer's argument that it should not be

found to be a successor because it did not voluntarily retain the employees but was compelled by the retention ordinance to do so.[11]

Second, even apart from successorship obligations, the GWRO alters the balance of economic power by obligating the purchaser to hire employees who are already represented by a union at the same workplace. The composition of this workforce gives the union a distinct advantage in a campaign to certify the union as the bargaining representative of the newly constituted workforce. In essence, the GWRO stacks the deck against the new employer by obligating it to hire from a pool of union employees who are more likely to support union representation going forward. Of course, an employer may not decline to hire an applicant for employment on the ground that it perceives the applicant to be pro-union. But in the normal marketplace, unaffected by the GWRO, neither would the employer be obligated to hire only union employees. The employer would instead be permitted to hire on the basis of its needs and the merits of the applicants, without regard to their union status. By intruding in this area and skewing the playing field in favor of continued union representation, the GWRO invades an area that the NLRA dictates be left to the operation of market forces.

Third, the GWRO increases the union's power by putting the employer at significant risk of being charged with an unfair labor practice if

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[11] These decisions, and the underlying union conduct that inspired them, refute LAANE's suggestion (LAANE Br. 8-9) that the threat of successorship is merely speculative because grocery unions might not demand recognition, or because employees might not want to continue being unionized.

it elects not to retain any significant number of the employees the GWRO forced it to hire. Although the GWRO nominally requires only that the employer "consider" retaining the employees and may discharge them after ninety days, unions can be expected to claim that any discharge of employees that the union formerly represented was on account of such representation. *See* 29 U.S.C. § 158(a)(3) (unlawful labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"). Such charges would be particularly likely in the event the predecessor employees' union seeks to organize the employees and be elected their representative before the ninety days expire.[12]

Moreover, if the union were certified within that ninety-day period, the employer could be obligated to bargain with the union even if the employer lawfully replaced the employees as nominally permitted by the GWRO after the expiration of ninety days. In general, absent unusual circumstances, a certified union's majority status must be honored for one year, even if there is large turnover in the existing employees. *See Brooks v. NLRB* (1954) 348 U.S. 96, 98-99; *Sahara-Tahoe Hotel* (1979) 241

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[12] To be certified, the union must file a petition with the NLRB supported by at least 30% of the affected employees. NLRB RULES & REGULATIONS §§ 101.17, 101.18(a) (2002). The NLRB typically processes a petition and holds elections within fifty days of the date a petition is filed. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPARTMENT OF LABOR & U.S. DEPARTMENT OF COMMERCE, REPORT AND RECOMMENDATIONS 68 (1994).

NLRB 106, 111; *S. Prawer & Co.* (1977) 232 NLRB 495, 496; *Kustom Elecs., Inc.* (1977) 230 NLRB 1037, 1038.

Finally, the GWRO imposes terms and conditions of employment favorable to the union that the union would otherwise have to win at the bargaining table. The obligation to hire, a ninety-day period during which the employees may not be discharged except for cause, and a required performance evaluation at ninety days are all mandatory subjects of bargaining under the NLRA. *See Somers v. Minneapolis* (8th Cir. 2001) 245 F.3d 782, 787 (employer's right to terminate without cause); *Saginaw Control & Eng'g, Inc.* (2003) 339 NLRB 541, 583 (merit evaluation system); *Teamsters Local 917* (1992) 307 NLRB 1419, 1419 (successor's obligation to hire). The GWRO thus permits unions to circumvent the bargaining process, which fundamental NLRA principles protect from any state or local interference. That the GWRO permits the parties to supersede these requirements by a collective bargaining agreement does not avoid this conflict. By unilaterally granting these rights to the employees, the ordinance gives the employees leverage they would not otherwise have in negotiating any such agreement and thereby skews the bargaining process in their favor. *See Thunderbird Mining Co.*, 138 F. Supp. 2d at 1199 (finding preempted a state statute that gave "the Union a thumb to put on the economic scale" and that thereby "distorted [the collective bargaining] process").

In short, the GWRO gives unions a potent weapon in seeking to entrench themselves for collective bargaining purposes. It makes it much more likely, if not certain, that the purchaser will be found to be a

successor. And even absent successorship, the GWRO dramatically increases the union's leverage by forcing the employer to hire solely from a unionized workforce, by creating a circumstance in which the employer is effectively handcuffed in replacing that workforce, and by unilaterally imposing terms over which the unions would otherwise be required to bargain.

It is thus no surprise that unions were prominent and vigorous supporters of the ordinance before the City Council. *See* 2 AA 221-224 (testimony of President of United Food and Commercial Workers Union ("UFCW") Local 770); 2 AA 267-268 (testimony of counsel of UFCW Local 770); 2 AA 270 (testimony of representative from International Union of Painters and Allied Trades, AFL-CIO, District Council 36). Indeed, LAANE announced at the time that it "worked with allies representing grocery workers to win passage" of the GWRO, which it asserted was a "response" to a trend in the grocery industry of "a low wage, nonunion" chain buying unionized supermarkets. RT 154:3-6, 156:23-26.

The federal courts have repeatedly struck down as preempted state laws that seek to directly impose collective bargaining agreements or bargaining obligations on successor employers. For example, *United Steelworkers of America v. St. Gabriel's Hospital* (D. Minn. 1994) 871 F. Supp. 335, found that a state statute requiring that purchasers honor any collective bargaining agreement signed by the predecessor employees – so long as the agreement contained a successor clause – was preempted under *Machinists*. Despite the legislature's "good intentions to protect job security," the statute was preempted because it prohibited employers from

exercising their "well-established right" "to not hire any of the employees of its predecessor," *id.* at 342, 343 (citing *Howard Johnson*, 417 U.S. at 262), and impermissibly "entered 'into the substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Id.* at 343 (quoting *Machinists*, 427 U.S. at 149).

The court in *Commonwealth Edison Co. v. International Brotherhood of Electrical Workers* (N.D. Ill. 1997) 961 F. Supp. 1169, reached an identical result, invalidating a similar successor statute because it prohibited "a new employer from exercising its well-established rights." *Id.* at 1184. The court noted that whether to hire any predecessor employees is a matter "left to the relative economic strength of the parties." *Id.* "Because the Illinois successor statute regulates areas that have been left 'to be controlled by the free play of economic forces,' it is preempted under *Machinists*." *Id.* (citations omitted).

Although not as blatant or direct as these successor statutes in favoring unions and binding subsequent employers to a unionized workforce, the GWRO is no less invalid. As the Supreme Court recently explained, "[i]n NLRA pre-emption cases, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Brown*, 128 S. Ct. at 2414 (internal quotation and citation omitted). A state may not accomplish indirectly what it is forbidden to accomplish directly. *Id.* at 2415.

C. The GWRO's Interference With the Balance Between Labor and Management is Certain.

Petitioners rely on *Washington Service Contractors Coalition v. District of Columbia* (D.C. Cir. 1995) 54 F.3d 811.[13] The majority in that case concluded that D.C.'s retention ordinance did not intrude on the collective bargaining process because it was not certain that the NLRB would find the new employer to be a successor. In the majority's view, if the NLRB found that the employer was not a successor (and thus not obligated to bargain), there would be no conflict between the ordinance and federal policy. *See* 54 F.3d at 817. On the other hand, if the NLRB found successor status, that would amount (according to the majority) to a ruling that such status is consistent with federal policy. *Id.*

This analysis was both incomplete and flawed. It was incomplete because the court addressed only one aspect of a retention ordinance's effect – the risk it creates of the purchaser being found to be a successor. The court did not analyze the other ways, even apart from successorship, in which a retention ordinance like the GWRO impermissibly increases the union's economic leverage. Thus, the court did not consider the advantage a retention ordinance gives the union by forcing the purchasers to hire from a pool of unionized employees. Nor did it evaluate the risk the employer faces of an unfair labor charge if it does not retain the existing workforce even after the ninety-day period expires – and thus the undue pressure the

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[13] *Alcantara v. Allied Properties, LLC* (E.D.N.Y. 2004) 334 F. Supp. 2d 336, 343, followed *Washington Service* without independent analysis, and is flawed for the same reasons.

employer faces of retaining the workforce and the concomitant increased likelihood of that workforce becoming unionized. For these reasons alone, *Washington Service* does not provide meaningful guidance for resolving the issue in this case.

The D.C. Circuit's analysis was flawed as to the one point it did address – successorship obligations – because the majority erroneously assumed that the NLRB's decision would represent the NLRB's desired outcome as a matter of federal policy uninfluenced by the operation of state law. In fact, however, whichever way the NLRB decides the successorship issue, the NLRB's hand is forced by the *fait accompli* imposed by the GWRO. If the NLRB determines that no successorship obligation is proper, it will be sacrificing the interests of the employees (recognized by the federal successorship doctrine) in continuing to be represented by their chosen collective bargaining representative when the same workforce that voted for union representation continues working together in the same workplace. *See Fall River*, 482 U.S. at 43-44 (holding that employees are entitled to continued representation when they "understandably view their job situations as essentially unaltered") (quotation and citation omitted). That sacrifice may not represent the NLRB's view of the optimal federal policy in the absence of the GWRO, but rather simply the NLRB's determination that it has no other option, given what the GWRO has mandated of the employer and the need to protect the employees' interest in continuing to be represented by the union they previously elected.

Similarly, if, to accommodate the interests of the employees, the NLRB determines that the employer is bound as a successor, that

determination will be in derogation of the general federal policy against imposing successor obligations when the employer did not voluntarily hire a majority of the employees. Again, contrary to the D.C. Circuit majority's mistaken assumption, that determination would not establish that the result was "congruent with the aims of the NLRA." *Wash. Serv. Contractors*, 54 F.3d at 817. Instead, it may reflect only that the NLRB, confronted by the effect of the GWRO, was selecting one of two necessary evils.

Moreover, as the *Washington Service* dissent recognized, LAANE's contention that courts should wait and see how the NLRB treats successorship when retention is compelled adopts the kind of "case-by-case approach" that the Supreme Court has rejected for evaluating NLRA preemption. *See Wash. Serv. Contractors*, 54 F.3d at 819 (Sentelle, J., dissenting). Under that approach, a grocery buyer is forced to risk its capital and complete the purchase of a store, without knowing whether the NLRB would later find that compliance with the GWRO makes the buyer a "successor" for labor law purposes. The result will be not only to discourage such purchases, but to unfairly expose the purchaser to the risk of litigation and liability under the labor laws for not collectively bargaining with the predecessor's employees. *New Breed Leasing Corp. v. NLRB* (9th Cir. 1997) 111 F.3d 1460, 1467 (ordering reinstatement and awarding back pay against employer found to be a successor).

In short, the GWRO is preempted because it necessarily affects the balance that federal law strikes between the competing interests of employees and employers. Preemption exists when federal and local regulation "cannot move freely within the orbit of their respective purposes

without infringing upon one another." *Hill v. Florida* (1945) 325 U.S. 538, 543 (internal quotation and citation omitted). That is the circumstance here. The GWRO impinges upon the operation of federal law in determining when employers must collectively bargain.

D. The GWRO Does Not Merely Establish Minimum Labor Standards.

LAANE also argues that the GWRO is not preempted because it is a permissible "minimum labor standard." LAANE Br. 10-16. The NLRA does not preempt a state law that "establishes a minimum labor standard that does not intrude upon the collective-bargaining process." *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 7. The GWRO, however, does not qualify as a "minimum labor standard" as that term has been defined by the Supreme Court.

In *Metropolitan Life Insurance Co. v. Massachusetts* (1985) 471 U.S. 724, the Supreme Court explained that true minimum labor standards "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.* at 755. The Court added that minimum labor standards have only "the most indirect effect on the right of self-organization established in the Act . . . [and] are not laws designed to encourage or discourage employees in the promotion of their interests collectively." *Id.*

Metropolitan Life upheld a state statute that required all general health insurance polices or employee health care plans that covered hospital and surgical expenses to also include minimum mental health care benefits. *Id.* at 727. The statute provided individual employees with greater

substantive protections than they would otherwise receive, but had no impact on the "collective bargaining protected by the NLRA." *Id.* at 758. Thereafter in *Fort Halifax*, the Court upheld a Maine statute that required employers to provide a one-time severance payment to employees in the event of a plant closing. 482 U.S. at 4-5. That statute was also unconcerned with the "bargaining process," and regulated only "the substantive terms that may emerge from such bargaining." *Id.* at 20.

The GWRO does not qualify under this standard. First, unlike the statutes challenged in *Metropolitan Life* and *Fort Halifax*, the GWRO does not provide merely substantive benefits to individual employees. Rather, the ordinance intrudes into the collective bargaining process and "encourage[s] . . . employees in the promotion of their interests collectively," *Metropolitan Life*, 471 U.S. at 755-56, by increasing the power of unions to force grocery store purchasers to collectively bargain. Neither the statute in *Metropolitan Life* nor the one in *Fort Halifax* had a similar effect on the bargaining process. The GWRO is not one that is "unrelated in any way to processes of bargaining or self-organization." *Metropolitan Life*, 471 U.S. at 756.[14]

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[14] LAANE's citation to *St. Thomas-St. John Hotel & Tourism Association, Inc. v. Government of U.S. Virgin Islands* (3d Cir. 2000) 218 F.3d 232, is inapposite for the same reason. LAANE Br. 13. That case involved a classic minimum labor standard – a law limiting the grounds for terminating employees – which protects employees on an individual basis alone, and "neither regulates the process of bargaining nor upsets the balance of power of management on one side and labor on the other that is established by the NLRA." *Id.* at 244.

Second, the GWRO is not a law "of general application." *Id.* at 753. Federal courts have found alleged employment standards preempted where, as here, the law at issue "targets particular workers in a particular industry" for special protection as to rights that would normally be the subject of collective bargaining. *Chamber of Commerce of U.S. v. Bragdon* (9th Cir. 1995) 64 F.3d 497, 504 (finding preempted a county "prevailing wage" ordinance that applied to private industrial contract projects with a cost of over $500,000); *Shannon*, 549 F.3d at 1124 (finding preempted a state statute that required hotel owners in Cook County, Illinois to provide extended meal and rest breaks to hotel room attendants).

"*Metropolitan Life* and *Fort Halifax* both involved laws of general application and the Supreme Court has characterized 'minimum labor standards' as laws of general application." *Shannon*, 520 F.3d at 1132. But when a local ordinance is carefully crafted to benefit particular workers in a particular industry, it "is more properly characterized as an example of an interest group deal in public-interest clothing." *Bragdon*, 64 F.3d at 503 (internal quotation and citation omitted). When such interest group deals are successfully passed, they encourage other special interest groups to focus on lobbying state and local legislatures "instead of negotiating at the bargaining table," thereby "substitut[ing] the free-play of political forces for the free play of economic forces that was intended by the NLRA." *Shannon*, 549 F.3d at 1132-33 (quoting *Bragdon*, 64 F.3d at 504).

Precisely such interest group lobbying was at issue here – and would certainly be encouraged if the GWRO were to be upheld. As noted (*supra*, p. 36), unions were prominent and vigorous supporters of the ordinance

before the City Council, seeking and obtaining advantages in the organization and bargaining process that the NLRA prohibits state and local governments from bestowing.

III. THE GWRO OFFENDS EQUAL PROTECTION PRINCIPLES.

The court of appeal did not address the superior court's ruling that the GWRO is invalid under the federal and state equal protection clauses. The superior court's ruling was correct and provides a third reason why the GWRO must be invalidated.[15]

A. Rational Basis Standard of Review Does Not Provide Carte Blanche to Enact Arbitrary Economic Regulations.

As an economic regulation, the GWRO is evaluated using the rational basis standard of review. *See Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 16. Under that standard, the Court first "identif[ies] the goals or ends sought to be achieved or furthered by the Act in the area of present concern." *Hays v. Wood* (1979) 25 Cal. 3d 772, 788. Next, the Court must conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." *Newland v. Bd. of Governors* (1977) 19 Cal. 3d 705, 711 (quotation and citation omitted). To be valid, the classifications must "rest upon some ground of difference between the differentiated classes which bears a fair and reasonable relationship" to the ordinance's objectives. *Hays*, 25 Cal. 3d at 788.

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[15] Contrary to the City's characterization, CGA's equal protection argument does not rise or fall with the state preemption argument. City Br. 20 n.5. Whether the GWRO attempts to regulate health and safety in grocery stores or something else, the ordinance draws classifications that are not reasonably related to *any* of its purported objectives.

A wide variety of regulations have been found to violate equal protection under rational basis review, including economic regulations affecting only business interests.[16] As these cases illustrate, courts do not simply rubber-stamp proposed economic regulations, but give searching review to the rationality of the legislature's classifications.

The GWRO draws at least two arbitrary classifications that are not rationally related to any of the goals the City has offered up for the ordinance. The ordinance invalidly distinguishes between: (1) grocery stores and superstores on the one hand and membership clubs on the other; and (2) grocery establishments more than 15,000 square feet in size and those less than 15,000 square feet.

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[16] *See, e.g., Craigmiles v. Giles* (6th Cir. 2002) 312 F.3d 220 (invalidating state prohibition on sale of caskets by anyone not licensed as funeral director); *Cornwell v. Hamilton* (S.D. Cal. 1999) 80 F. Supp. 2d 1101 (granting summary judgment to African hair stylist on ground that cosmetology licensing requirements for hairbraiders were not rationally related to objective of limiting practice to qualified persons); *Santos v. Houston* (S.D. Tex. 1994) 852 F. Supp. 601 (striking down antijitney ordinance); *Brown v. Barry* (D.D.C. 1989) 710 F. Supp. 352 (holding that prohibition against vending permit for bootblack stand on public place violated equal protection); *Racing Ass'n of Central Iowa v. Fitzgerald* (Iowa 2004) 675 N.W.2d 1 (invalidating state statute imposing up to thirty-six percent tax on slot machines at racetracks but only twenty percent tax on riverboat slot machines); *Longchamps Elec., Inc. v. New Hampshire State Apprenticeship Council* (N.H. 2000) 764 A.2d 921 (invalidating a state law that required, purportedly for safety reasons, that larger employers hire more journeymen than their smaller counterparts); *Verzi v. Baltimore County* (Md. Ct. App. 1994) 635 A.2d 967 (striking down county code's requirement that licensed tow operator have place of business within the county before that operator could be called by police to tow vehicles that had been disabled by accident).

B. The Classification Between Grocery Stores/Superstores and Membership Clubs is Not Rationally Related to the GWRO's Objectives.

The GWRO applies to "Grocery Establishments" as well as "Superstores," as that term is defined by Los Angeles Municipal Code section 12.24(U)(14)(a). *See* L.A.M.C. § 181.01(E). The ordinance does not apply, however, to superstores that charge membership dues, which are expressly excluded from section 12.24's "Superstore" definition. *See* RT 108:18-21.

This distinction between grocery stores that charge membership dues and those that do not is irrational. Two large warehouse retail stores that are identical in size, total food sales, number of employees, and all other important features are treated differently under the GWRO solely because one charges a club membership fee and one does not. The GWRO's stated purpose of protecting food health and safety certainly does not support any such distinction. Membership clubs excluded from the ordinance have grocery sections (RT 24:3-10, 104:7), and would face identical food security risks during a change of ownership as would any other large store that sells food.

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

Nor can the distinction be justified on the notion that membership stores do not change ownership. The testimony at trial was uncontradicted

that membership clubs buy and sell other membership clubs within the City of Los Angeles. *See* RT 112:19-113:12.

Far from resting on any rational basis, it appears that the distinction between membership stores and other stores rests simply on the fact that the City imported into the GWRO the definition of "Superstore" from a different ordinance. The definition comes from an ordinance that imposed extra permitting requirements on "big box" stores. *See* L.A.M.C. § 12.24(U)(14)(d). Whether or not it makes sense to exclude membership clubs in the context of that permitting ordinance, however, the City has failed to explain how that classification has any rational purpose in the context of the GWRO.

The City agued below that legislatures may "approach a perceived problem incrementally." *RUI One Corp. v. Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1155. That principle does not assist the City here, however, because even a decision to proceed "in less than comprehensive fashion by striking the evil where it is felt most . . . must have a rational basis in light of the legislative objectives." *Hays*, 25 Cal. 3d at 791 (internal quotations and citation omitted).

Applying this rule, this Court in *Brown v. Merlo* (1973) 8 Cal. 3d 855, 877, struck down as fatally underinclusive a statute that prohibited an injured automobile guest from recovering for the negligent driving of his host, except in certain narrow circumstances. *Id.* at 858-59. The defendant argued that the law promoted hospitality by insulating generous drivers from lawsuits. *Id.* at 859, 864. The Court, however, held that there was no realistic state purpose that justified discriminating between automobile

guests and "other guests or, indeed, all other recipients of hospitality or generosity." *Id.*

Likewise, in *Hays*, this Court invalidated a law that treated public officials who were attorneys or brokers differently from other public officials with respect to income disclosure. 25 Cal. 3d at 772. The state sought to justify the statute as a protection against self-serving bias on the part of public officials, arguing that attorneys and brokers receive greater profit from their business endeavors than other persons. *Id.* at 788-89. The Court found the state's justification inadequate because it was underinclusive. The Court could see no reasonable explanation for "the selection of but two of the several professions having relatively high profit margins for . . . special treatment." *Id.* at 789. The Court emphasized that, when the legislature regulates in less than comprehensive fashion by striking the evil where it is felt most, it "may not do so wholly at its whim." *Id.* at 790. The GWRO's classification fails that standard.

C. The Classification Between Grocery Stores Over 15,000 Square Feet and Grocery Stores Under 15,000 Square Feet is Not Rationally Related to the GWRO's Objectives.

The GWRO applies only to grocery establishments over 15,000 square feet in size. As the superior court correctly held, this distinction cannot be justified by reference to the City's food safety objective. Grocery stores of all sizes are "engaged in the same activities in relation to food," and therefore all grocery stores present safety risks. 3 AA 557. If anything, the natural conclusion would be that smaller grocery stores are less likely than larger stores to have institutional systems designed to

prevent food contamination. *See* 2 AA 339 (stores under 15,000 square feet "can be just as damaging to consumers as any other size store").

The City argued below that the size distinction is defensible because the City Council could have reasonably concluded that the GWRO would not hinder the sale of large grocery chains, but might negatively impact small grocery stores. But there is no rational basis for concluding that the size of the grocery store has any connection at all to the size of the purchaser of that store or its ability to bear the economic burden of having to retain unwanted employees. To the contrary, the evidence at trial demonstrated that small grocery stores are operated by such significant business entities as Whole Foods, Trader Joe's, Smart & Final and Tesco (the latter being the third largest supermarket owner in the world). RT 184:2-12.[17] On the other hand, larger stores are owned not only by large chains but by smaller independent grocers. The stores owned by Superior Stores, a privately owned regional company with only twenty-eight stores,[18] average about 55,000 square feet, with the smallest store around 30,000 square feet. RT 59:5-10, 60:11-21, 61:15-19. Other small grocery companies similarly own stores that are predominantly larger than 15,000 feet. *See* RT 140:17-22 (Rio Ranch stores range up to 33,000

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[17] "[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational." *Minn. v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464.

[18] By contrast, at the time of trial, Albertsons had 300 stores in Southern California alone and 600 in the western United States. RT 137:17-21.

square feet); RT 121:16-25 (average size of Bristol Farms stores is 30,000 square feet).

Moreover, even if store size and the size of the store's owner were related, there is no rational basis for concluding that the size of the owner has any relationship to whether the GWRO will hinder sales. The evidence at trial showed that GWRO has halted sales of grocery stores over 15,000 square feet because larger stores, just like smaller stores, cannot operate a new store profitably if required to hire a predecessor's workforce wholesale. *Supra*, pp. 8-9.

LAANE offered up a different rationale – that larger stores employ more workers and thus the economic impact of those workers losing their jobs in a change of control would be greater. At best, however, this is a rationale for *including* larger stores within the GWRO. It does not provide any rational basis for *excluding* smaller stores.[19]

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[19] The GWRO also irrationally regulates grocery stores but not other retail food establishments, such as restaurants. If anything, restaurants are generally more likely to present health and safety risks than grocery stores. And there is no basis for concluding that job security is of greater concern in grocery stores than other food establishments.

Nor is there any rational basis for the GWRO's classification between purchasers that enter into a collective bargaining agreement and those that do not. The collective bargaining exception obviously has no relationship to the GWRO's stated health and safety purpose. Nor does it have any connection to any job protection purpose, as it does not require that the collective bargaining agreement contain any provision regarding retention of any specified number of employees.

CONCLUSION

The court of appeal's judgment should be affirmed.

Dated: February 25, 2010

Respectfully submitted,

Jones Day

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CALIFORNIA GROCERS
ASSOCIATION

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(b)(1) and 8.204(c), I certify that the foregoing brief contains 13,751 words.

Richard Ruben (WPG)

Richard S. Ruben

Attorney for Respondent
CALIFORNIA GROCERS
ASSOCIATION

PROOF OF SERVICE

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

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

On February 25, 2010, I served the attached document described as **ANSWER BRIEF ON THE MERITS** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in San Francisco, California, addressed as follows:

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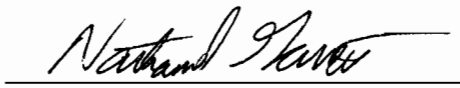
I, Nathaniel P. Garrett, declare under penalty of perjury that the foregoing is true and correct.

Executed on February 25, 2010, at San Francisco, California.

By: 

Nathaniel P. Garrett