SUPREME COURT COPY

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

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

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ARGUMENT

A. THE *MACHINISTS* DOCTRINE DOES NOT PREEMPT THE ORDINANCE

California Grocers Association claims that the Grocery Worker Retention Ordinance is preempted by federal labor law because it obligates an employer that purchases a grocery store of a certain size to do something that the National Labor Relations Act does not require—to retain some of the employees of the previous employer for up to ninety days. According to the CGA, that violates the "right" of the second employer to refuse to hire the first employer's workforce and therefore, so the argument goes, triggers federal preemption under Machinists v. Wisconsin Employment Relations Commission (1975) 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 and Chamber of Commerce v. Brown (2008) 554 U.S. ___, 128 S.Ct. 2408, 2412, 171 L.Ed.2d 26.

CGA's argument starts unraveling as soon as it concludes. In order to bring the Ordinance within the reach of the *Machinists* doctrine CGA must show that the Ordinance regulates in an area that Congress intended to leave unregulated, either implicitly, as in the case of the parties' use of economic weapons, Fort Halifax Packing Co., Inc. v. Coyne (1987) 482 U.S. 1, 20, 107 S.Ct. 2211, 96 L.Ed.2d 1, or explicitly, as in the case of employer's noncoercive speech opposing unionization. Brown, 128 S.Ct. at 2414. CGA cannot make either showing.

Unlike Brown, in which the Supreme Court relied on the express provisions of Section 9(c) of the Act, 29 U.S.C. § 129(c), to hold that Sections 16645.2 and 16645.7 of the Government Code are preempted, there is no language in the NLRA itself that suggests that Congress intended to bar any state regulation of an employer's hiring of a previous employer's employees when taking over a business. The NLRA is, in fact, completely silent on this issue: it neither requires a new employer to hire the employees who worked for the previous owner nor bars it from doing so. Howard Johnson Co. v. Hotel Employees (1974) 417 U.S. 249, 261, 264, 94 S.Ct. 2236, 41 L.Ed.2d 46.

Nor have the Board and the courts created any such "regulation-free zone" by implication. As the Supreme Court emphasized in both Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 72 and Fort Halifax, state law provides the backdrop to every obligation an employer might have towards its employees, whether it is giving it the right to run the workplace as it wishes or modifying that right by legislation or common law. Fort Halifax, 482 U.S. at 21. Congress never intended the NLRA to serve as a federal labor code, regulating all aspects of the employer-employee relationship and displacing state laws in this area. Fort Halifax, 482 U.S. at 21-22.

CGA's preemption argument would do just that, however, by treating the NLRA's silence on whether a new employer is obligated to retain any of the employees of the previous owner as if that made an employer's negative state law "right" not to hire the employees vested and immutable.[1] Federal labor law may address the consequences of an employer's retention of its predecessor's workforce when those employees were represented by a union, but it does not go beyond that to also prohibit or require the employer to retain them or to prevent the states from requiring it to do so.

CGA insists, however, that the Ordinance must be preempted because it upsets the balance of power in negotiations by increasing the likelihood that the new employer will also be a successor employer for purposes of the Act if the previous employer's workforce was unionized. Here again, both the premise and the conclusion are wrong.

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[1] As in the case of federal law, referring to a supposed state law "right" of employers not to hire an employee of the previous employer is potentially misleading; it would be more accurate to say that state law does not, as a general rule, require the new employer to hire employees of the previous owner, just as state law allows an employer to treat employees as at will, without creating any affirmative "right" on the employer's part to do so. For simplicity's sake, however, we use the term "right" as shorthand for that more nuanced concept.

First of all, federal labor law does not create any such "balance" between the rights of employers and employees in this area. On the contrary, the NLRA takes no position on whether the new employer should or should not retain any of the employees of the previous employer.

Nor does the NLRA's silence create the sort of regulation-free zone that the *Machinists* doctrine creates in the case of those weapons of economic warfare, such as slowdowns, that the NLRA neither prohibits nor protects. The contrast between the federal law of successorship and the NLRA's treatment of unprotected strikes illustrates the limits of the *Machinists* doctrine.

The Supreme Court only adopted the *Machinists* doctrine after years of doctrinal development under the NLRA, in which the NLRB and the courts first developed the notion of an "unprotected" strike, *see, e.g.,* NLRB v. Rockaway News Supply Co., Inc. (1953) 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832, then extended that principle to hold that federal labor did not allow the NLRB to prohibit such unprotected strikes as an unfair labor practice, NLRB v. Insurance Agents (1960) 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454, and finally broadened that principle to a more general federal law prohibition against any attempts by the NLRB to regulate the timing or manner in which employees undertook economic action. American Ship Building Co. v. NLRB (1965) 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855. In other words, by the time that the Supreme Court decided the Machinists case and overruled UAW v. Wisconsin Employment Relations Board (1949) 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651, it had held that federal law ***barred*** any regulation in this area by the NLRB—and, *a fortiori*, by the states.

CGA is asking this Court to make the same leap in this case by holding that federal labor law bars any regulation of a new employer's decision either to hire or not hire the employees of the previous employer by the states. But this Court simply does not have the power to make law on that point, since neither the NLRB nor the courts have found any such prohibition implicit in federal law. Its *Machinists* preemption argument must be rejected.

B. THE ORDINANCE DOES NOT REQUIRE THE NEW EMPLOYER TO RECOGNIZE OR BARGAIN WITH ANY UNION OR TO ADOPT ANY OTHER EMPLOYER'S COLLECTIVE BARGAINING AGREEMENTS

CGA claims, on the other hand, that the Ordinance interferes with both the NLRB's role in determining whether an employer is a successor and the process of collective bargaining, citing two cases in which state statutes that required the new employer to adopt the collective bargaining agreement of its predecessor were held to be preempted. Commonwealth Edison Co. v. International Brotherhood of Electrical Workers Local 15 (N.D. Ill. 1996) 961 F.Supp. 1169); United Steelworkers v. St. Gabriel's Hospital (D. Minn. 1994) 871 F.Supp. 335. Those cases distinguish themselves.

Imposing a collective bargaining agreement on the parties does not merely interfere in the collective bargaining process, it overrides it. The State in that case would not only be usurping the Board's role in determining whether the employer had any duty to bargain with the union that had represented the employees of the predecessor, but would be stripping the parties of the power to engage in collective bargaining. That is plainly inconsistent with the stated purpose of the NLRA to "encourag[e] the practice . . . of collective bargaining," 29 U.S.C. § 151, and the federal case law allowing the successor employer the freedom to set the initial terms and conditions of employment and to bargain from that point. NLRB v. Burns International Security Services, Inc. (1972) 406 U.S. 272, 281-82, 92 S.Ct. 1571, 32 L.Ed.2d 61.

The Ordinance does neither of those things. Like the District of Columbia's Displaced Workers Protection Act and the City of New York's Displaced Building Service Workers Protection Act, the Ordinance does not compel any employer to recognize or bargain with any union, but leaves it to the NLRB to decide whether the new employer is a successor 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; Alcantara v. Allied Properties, LLC (E.D.N.Y. 2004) 334 F.Supp.2d 336. Successorship is not automatic, even if the new employer retains all of the previous employer's workforce.[2] Far from helping CGA's case, Commonwealth Edison and St. Gabriel's Hospital only point up its weaknesses.

CGA goes on, however, to raise the same arguments that the Supreme Court considered and rejected in both Metropolitan Life and Fort Halifax. The employers in those cases likewise argued that the states were interfering with the collective bargaining process by requiring them, as a matter of state law, to provide benefits that would otherwise be subjects of collective bargaining.

CGA repeats those arguments here, perhaps in the hope that this Court will reverse the United States Supreme Court on that point. But that hope is even more far-fetched than that, since its preemption arguments are even weaker than the

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[2] CGA has, in fact, cited an NLRB Administrative Law Judge's decision, M&M Parkside Towers LLC (NLRB Division of Judges 2007) Case No. 29-CA-27720, 2007 WL 3134329, that demonstrates both points in very concrete terms. In that case the new employer claimed that it was not a successor because it had been compelled to retain the predecessor employer's workforce pursuant to the City of New York's Displaced Building Service Workers Protection Act ("the DBSWPA").

While the Administrative Law Judge did not accept that argument, he agreed with the General Counsel for the NLRB that (1) these employees were only contingent employees until such time as the new employer chose to offer them employment beyond the ninety days required by the DBSWPA and (2) that the new employer had no duty to bargain with the union that represented these employees as long as they remained merely contingent employees. If the new employer had not offered permanent employment to these retained employees after the expiration of the statutory retention period it would never have been a successor at all.

It is not necessary to resolve whether the Administrative Law Judge was right or wrong in reaching that conclusion—that is, after all, an issue of Board law for the NLRB, not this Court, to decide. It is enough to point out that the fact that the new employer retained all of the predecessor's employees was not enough, in and of itself, to make the new employer a successor.

employers' arguments in Metropolitan Life and Fort Halifax. Those employers could at least point to terms that were imposed by state law; in this case the most that CGA can say is that an employer might be required to bargain if most of its bargaining unit employees come from the previous employer's unionized workforce.

But the possibility that an employer might be required to bargain hardly interferes with the process of collective bargaining, particularly since (1) only the NLRB can determine whether it is, in fact, required to bargain and (2) if it does enter into collective bargaining, the Ordinance does not have any bearing on what terms, if any, the bargaining parties agree to. CGA's preemption arguments are without merit as a matter of law under Metropolitan Life and Fort Halifax.

C. THE ORDINANCE SETS "MINIMUM LABOR STANDARDS" WITHIN THE MEANING OF *METROPOLITAN LIFE* AND *FORT HALIFAX*

CGA attempts to distinguish Metropolitan Life and Fort Halifax, arguing that the Ordinance is not a minimum labor standard because (1) it applies to a single industry and (2) was supported by unions who represent employees in that industry. CGA relies heavily on the Ninth Circuit's decision in Chamber of Commerce v. Bragdon (9th Cir. 1995) 64 F.3d 497 and the Seventh Circuit's decision in 520 South Michigan Avenue Associates, Ltd. v. Shannon (7th Cir. 2008) 549 F.3d 1119. Neither case can save CGA's preemption claims.

Bragdon involved a local prevailing wage ordinance that used the State's prevailing wage determinations to set the wages and benefits that construction employers had to pay their employees on private construction projects. The Court held that this attempt to set wages and benefits intruded too far into the process of collective bargaining. 64 F.3d at 503.

Bragdon is no longer good law to the extent that it attempts to restrict the scope of minimum labor standards. The Ninth Circuit has limited Bragdon to its

facts while rejecting its limits on the sort of minimum labor standards that state and local bodies have the power to enact. Associated Builders & Contractors of Southern California v. Nunn (9th Cir. 2004) 356 F.3d 979, 990 ("state substantive labor standards . . . are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market"); *accord* Dillingham Construction N.A. v. County of Sonoma (9th Cir. 1999) 190 F.3d 1034, 1039; Viceroy Gold Corp. v. Aubry (9th Cir. 1996) 75 F.3d 482, 489-90; National Broadcasting Co., Inc. v. Bradshaw (9th Cir. 1995) 70 F.3d 69, 71-72.

Other Circuits have been just as skeptical. Rondout Electric, Inc. v. New York State Department of Labor (2d Cir. 2003) 335 F.3d 162, 169 (questioning whether Bragdon was correctly decided); St. Thomas-St. John Hotel & Tourism Association, Inc. v. Government of U.S. Virgin Islands (3d Cir. 2000) 218 F.3d 232, 244 (questioning, distinguishing Bragdon). Finally, the Court of Appeal in Southern California Edison Co. v. Public Utilities Commission (State Building & Construction Trades Council of California) (2006) 140 Cal.App.4th 1085, 1103-04, 45 Cal.Rptr.3d 485 definitively rejected both Bragdon and Southern California Edison's challenge to a prevailing wage requirement imposed by the Public Utilities Commission.

The facts in Bragdon are, moreover, wholly distinguishable from those in this case. Unlike the ordinance in Bragdon or the statutes in Commonwealth Edison and St. Gabriel's Hospital, the GWRO does not attempt to dictate what terms a union and employer might agree to ***if*** the employer were to be required to bargain ***if*** the NLRB were to find that the employer was a successor. On the contrary, at the risk of repeating what has been said before, the Ordinance allows the parties to agree on whatever terms suit them; it does not interfere with their ability to engage in meaningful collective bargaining.

CGA complains, on the other hand, that the Ordinance imposes temporary limits on employers' ability to fire or lay off employees during the ninety-day transitional period. This is a weaker version of the Metropolitan Life and Fort

Halifax argument, since these restrictions are limited in both scope and duration.[3] Metropolitan Life and Fort Halifax bar this claim.

520 South Michigan Avenue follows Bragdon. It has not drawn the same criticism from other Circuits—which reflects the fact that it was decided much more recently. It is just as wrong and just as distinguishable.

Finally, CGA complains that the Ordinance cannot qualify as a "minimum labor standard" because it has the practical effect of increasing the likelihood that a new employer that takes over the business of a unionized grocery employer would be a successor for purposes of the NLRA. This is a watered down version of CGA's argument that the Ordinance usurps the Board's role in deciding whether the new employer is a successor—an argument that CGA's own authorities refute. If that argument fails, then this weaker version must as well.

The Ordinance is not preempted by federal law. Washington Service Contractors, 54 F.3d at 817. The decision below should be reversed.

D. THE *GARMON* DOCTRINE DOES NOT PREEMPT THE GROCERY WORKERS RETENTION ORDINANCE

CGA suggests that the Ordinance is preempted under San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 because it contravenes Section 8(d) of the NLRA, 29 U.S.C. § 158(d), by "compelling successor grocery stores to honor, against their will, the collective bargaining unit of the predecessor's employees." (Opposition Brief at 28-29, n. 10). This argument is close to nonsensical.

Section 8(d), which provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," applies

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[3] In the case of the Ordinance's layoff provisions, CGA's argument is weaker still, since the Ordinance allows the parties to apply the layoff provisions of teir collective bargaining agreement rather than the seniority provisions of the Ordinance. The Supreme Court approved the same sort of contractual override provision in the Fort Halifax case. 482 U.S. at 21-22.

to the give and take between bargaining parties in collective bargaining negotiations. It does not apply to the NLRB's determination whether a unit limited to the employees at the store being acquired remains an appropriate unit for bargaining after the change in ownership[4] for the simple reason that the NLRB is not engaged in collective bargaining with the new employer.

Furthermore nothing "compels" the new employer to accept the continued appropriateness of the unit after the transition. If it chooses to challenge the appropriateness of the unit, the NLRB—and only the NLRB—will decide the issue.

If CGA's argument had merit, then Section 8(d) would negate all of the successorship principles developed by the NLRB and the courts over the past thirty-five years. CGA does not cite any authority for that astonishing proposition.[5]

E. THE CALIFORNIA RETAIL FOOD CODE DOES NOT PREEMPT THE ORDINANCE

The starting point for any determination of legislative intent is the language of the statute, ordinance, proposition or other enactment. Dyna-Med, Inc. v. Fair Employment & Housing Commission (1987) 43 Cal.3d 1379, 1386-87, 241 Cal.Rptr. 67, 743 P.2d 1323. In this case any review of the purpose of the Ordinance leaves only one possible interpretation of it: it was intended to protect

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[4] As LAANE has noted in its Opening Brief, the NLRB must find that the union has majority support in an appropriate unit as a precondition to finding that the new employer is a successor. Burns, 406 U.S. at 280; Banknote Corp. v. NLRB (2d Cir. 1996) 84 F.3d 637, 649.

[5] CGA's argument would have to be rejected even if it were not so obviously illogical, since the Ordinance does not require the new employer to bargain, much less define the bargaining unit in which it must bargain. CGA's citation of St. Gabriel's Hospital is likewise misleading, since that case concerned an ordinance that required the new employer to adopt the collective bargaining agreement; the Ordinance does not.

the job security of grocery workers facing job loss when their stores changed hands and to give advance notice of any proposed sale or transfer of those stores to the communities they serve.

CGA treats the operative language of the Ordinance as if it were an afterthought in order to focus exclusively on the language of the preamble. This attempt to first isolate and then elevate the preamble over the actual terms of the Ordinance is contrary to both common sense and the principles of statutory construction. Flannery v. Prentice (2001) 26 Cal.4th 572, 578, 110 Cal.Rptr.2d 809, 28 P.3d 860.

CGA insists, however, that it is enough if only one of the declared purposes of the Ordinance was to promote health and safety, no matter what the substantive terms of the Ordinance actually provide, citing Gade v. National Solid Waste Management Association, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), a federal preemption decision. This Court has never adopted that mechanistic an approach to preemption of local ordinances; on the contrary, the Court has drawn careful distinctions between different fields to reject preemption when that was not what the Legislature intended. Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1152, 45 Cal.Rptr.3d 21, 136 P.3d 821. Applying those principles in this case requires rejection of CGA's state law preemption claim.

F. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

1. The Ordinance Is Rationally Related To The Goals Set Out In The Ordinance And Identified By The City Council

In order to sustain an equal protection challenge to the Ordinance CGA must show that "there is no reasonably conceivable state of facts that could provide a rational basis for the Ordinance." Kasler v. Lockyer (2000) 23 Cal.4th 472, 481-82, 97 Cal.Rptr.2d 334, 2 P.3d 581, *quoting* Warden v. State Bar (1999) 21 Cal.4th 628, 640-641, 88 Cal.Rptr.2d 283, 982 P.2d 154. As the Court in

Kasler went on to note, "[w]here there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'"

There is a very powerful reason why the rational basis test is one of the most exacting standards applied to any governmental action: our Constitution puts the responsibility for law-making, both in the setting of public purposes and the drawing of distinctions necessary to achieve those purposes, on the elected representatives of the people, not on reviewing courts. As this Court held in Hale v. Morgan (1978) 22 Cal.3d 388, 398, 149 Cal.Rptr. 375, 584 P.2d 512, "[t]he wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute."

CGA has the burden, moreover, of negating "every conceivable basis which might support [the Ordinance]." FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211; Hernandez v. City of Hanford (2007) 41 Cal.4th 279, 298-99, 59 Cal.Rptr.3d 442, 159 P.3d 33. That means in this case that CGA must show that the Ordinance does not have a rational relationship to any of the purposes that the Ordinance is intended to serve. CGA cannot possibly carry that burden.

The City sought to address at least three separate concerns in enacting the Ordinance: (1) the effect of employee turnover on the quality of service provided to customers and the neighborhoods they serve, (2) the effect of employee turnover on health and safety conditions inside the stores and (3) the effect of employee turnover on the employees themselves. The Ordinance's statement of purpose identified each of these interests:

> 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.

CGA must show that the terms of the Ordinance do not have a rational relationship to any of these purposes. Hernandez, 41 Cal.4th at 301-02.

CGA cannot possibly make this showing, since the terms of the Ordinance self-evidently advance the stated interest of protecting grocery workers' job security and to protect them from the dislocation that losing their jobs produces. Those measures are obviously rationally related to the goal of providing employees with greater job security in these circumstances. CGA has not proven otherwise.

2. The Ordinance Is Not Unconstitutional Merely Because It Does Not Apply To All Retail Establishments

CGA also argues that the Ordinance is unconstitutional because it does not apply to all retail businesses in the City of Los Angeles, but only to grocery stores larger than 15,000 square feet, excluding those smaller than 15,000 square feet and certain "superstores." CGA's argument is at odds with seventy years of jurisprudence on this point.

This Court set out the governing principles in Kasler:

> "Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of

> risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. (*See, e.g.,* American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, 371, 204 Cal.Rptr. 671, 683 P.2d 670; Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 ['Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'].)"

23 Cal.4th at 482, *quoting* Warden, 21 Cal.4th at 644-45. The United States Supreme Court made the same point in Beach:

> These restraints on judicial review have added force "where the legislature must necessarily engage in a process of line-drawing." Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—"inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." . . . Such scope-of-coverage provisions are unavoidable components of most economic or social legislation. In establishing the franchise requirement, Congress had to draw the line somewhere; it had to choose which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.

508 U.S. 315-16 (citations omitted).

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This case illustrates the principle: unless the City was going to regulate every commercial entity within the City limits, it had to draw lines somewhere. The Courts have no more business second-guessing the City's choice of where to draw the line than to question the objectives that the City seeks to advance.

As the Ordinance's preamble shows, the City Council considered grocery stores to be a significant anchor for communities and believed that the problems affecting grocery workers were particularly acute and their interests deserving of protection. Whether the Council was right or wrong is not for this Court to decide; it is enough that the City had grounds for taking its first, limited steps to protect workers' livelihood and job security in this area, rather than attempting to do so across-the-board.

CGA also complains that the Ordinance is underinclusive because it borrows the definition of "superstores" found in another ordinance when including superstores within the coverage of the Ordinance. That definition excludes membership superstores. It is CGA's burden to show that there is no conceivable basis for this exclusion.

CGA has not carried that burden. While it may be able to show that it would be rational to include membership superstores within the scope of the Ordinance, it has not shown that it was irrational to exclude them. It has not shown that there are any significant number of membership superstores within the City of Los Angeles, that these membership superstores change ownership as frequently as grocery stores do, or that their exclusion undermines the purposes of the Ordinance. That is simply not enough to overturn the Ordinance. Hernandez, 41 Cal.4th at 298-99.

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: March 17, 2010

Respectfully submitted,

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

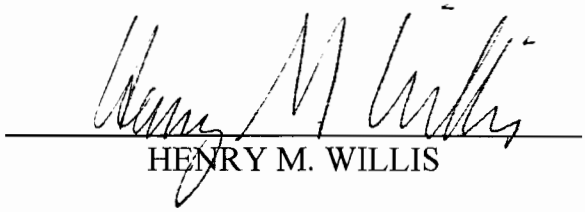
I, HENRY M. WILLIS, declare that:

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 Reply Brief on the Merits contains 4189 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 March 17, 2010 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

JOANNA RIVERA 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 March 18, 2010, I caused the foregoing document(s) described as

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

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

Executed on March 18, 2010, at Los Angeles, California.

JOANNA RIVERA