ORIGINAL

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.

FILED WITH PERMISSION

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

SUPREME COURT
FILED

APR 29 2011

Frederick K. Ohlrich Clerk

CF
Deputy

RESPONDENT'S ANSWER TO SUPPLEMENTAL BRIEF ON NEW AUTHORITY OF LOS ANGELES ALLIANCE FOR A NEW ECONOMY

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Respondent California Grocers Association ("CGA") submits this brief to respond to the Los Angeles Alliance for a New Economy's recent brief on *Rhode Island Hospitality Assn. v. City of Providence* (D.R.I. March 31, 2011) __ F. Supp. 2d. __, 2011 WL 1238715, 2011 U.S. Dist. LEXIS 34821. LAANE argues that this district court decision supports petitioners' position that the GWRO is not preempted by the National Labor Relations Act. In fact, however, the district court ***rejected*** the primary argument petitioners and their amici advance to sustain the GWRO—*i.e.*, that a worker retention requirement is a permissible "minimum labor standard." And the district court's further ruling that the ordinance was nonetheless valid was based on an incomplete analysis that is inconsistent with governing NLRA preemption principles.

As do petitioners here, the City of Providence sought to sustain its worker retention ordinance on the ground that it is a "minimum labor standard" of the kind upheld in *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724 and *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1. The district court rejected that argument. It recognized that true minimum labor standards "neither encourage[] nor discourage[] the collective bargaining processes that are the subject of the NLRA." (2011 U.S. Dist. LEXIS at *41 [citing *Metropolitan Life, supra,* 471 U.S. at p. 755]). The court concluded that the Providence retention ordinance failed that standard because it "carries with it the potential for additional and continuing obligations to new employers, *e.g.*, to engage in collective bargaining." *(Id.)*. The same is equally true in this case, as CGA has

shown in its earlier briefs. (CGA Answer Br. 41-44; CGA Consol. Answer to Amicus Briefs 2-6).

Describing it as a "close case," the district court went on to rule that the ordinance was nonetheless valid because its intrusion into the collective bargaining process was, in the court's view, not "significant." (2011 U.S. Dist. LEXIS at *42). The court reasoned that the new employer could avoid being found to be a successor (and thus avoid any collective bargaining obligation) simply by terminating the new employees at the end of the 90-day retention period mandated by the ordinance.

This reasoning was mistaken for at least two reasons. First, a retention requirement skews the economic playing field even apart from the risk that the new employer will be found to be a successor. As CGA has demonstrated (CGA Answer Br. 33-35), forcing an employer to hire its predecessor's unionized workforce strengthens the union's hand in organizing and bargaining by, among other things, (1) mandating that the new employer hire exclusively from an already-unionized workforce that is more likely to support union representation, (2) putting the employer at risk of an unfair labor practice charge if it does not retain the employees after the 90-day period, and (3) imposing terms and conditions of employment favorable to the union. By focusing only on the successorship question, the district court ignored these other respects in which the retention requirement impermissibly "alters the balance of power between" the union and the new employer. (*Metropolitan Life*, *supra*, 471 U.S. at p. 751).

Contrary to the district court's blithe suggestion, it is no answer to say the new employer may terminate its entire workforce after 90 days. As

just discussed, no matter what the actual motivation, such wholesale termination of a unionized workforce after the workers have already been employed for 90 days would put the employer at risk of an unfair labor practice charge. Moreover, an across-the-board, mid-stream change in employees would be costly and disruptive to ongoing business operations, particularly given the multi-million dollar expense involved in acquiring the store and getting it open for business. (See CGA Answer Br. 9 [trial evidence that acquiring and operating a store in its first year can cost $8 million or more]). Thus, as a practical matter, the employer will face significant pressure to retain the workers, which will strengthen the union's hand in organizing the workforce and imposing a collective bargaining obligation. Indeed, the entire premise of worker retention ordinances is that the employer will ***not*** terminate the recently hired workers. And the GWRO—including its requirement that the employer make a written evaluation of each employee and consider retaining those employees whose performance was satisfactory (L.A.M.C. § 181.03(D))—is designed to compel that very result. Petitioners should not be permitted to sustain the GWRO on the theory that it will not work in its intended fashion.

Second, even with respect to formal successorship, the district court was incorrect in assuming that terminating the workers after 90 days would protect the employer from being found to be a successor. In *United States Serv. Indus., Inc.* (1995) 5-CA-24575, 1995 NLRB LEXIS 1151, the administrative law judge found the employer to be a successor simply on the basis that it hired a majority of its workforce from the prior employer, without any determination that the employer had retained those workers

beyond the required retention period. Moreover, as CGA has demonstrated (CGA Answer Br. 39-40), even if the NLRB were to rule that no successorship obligation attaches because the hiring was not voluntary until 90 days elapsed, that determination may not reflect the NLRB's view of optimal federal labor policy but rather may be only an attempt to select the lesser of two evils in a circumstance improperly influenced by local regulation. LAANE itself argues (pp. 4-5) that the primary question in determining successorship is the expectation of the employees and whether there is continuity of employment. If LAANE is correct, refusing to find successorship because the employer acted involuntarily would frustrate that federal interest.

Finally, LAANE's argument (p. 2) that the NLRB "has not found [retention ordinances] to be at odds with any of the purposes of the NLRA" (p. 2) reflects a misunderstanding of what was before the administrative law judges. Those judges were not presented with a preemption claim, but only with a union claim to enforce collective bargaining—a claim that the union was able to make only because of the existence of the retention ordinance and the manner in which it skewed the playing field in the union's favor. The NLRB has never ruled on the underlying question whether retention ordinances are preempted. That is the question before this Court, which should affirm the court of appeal's judgment that federal law precludes this intrusion into the area of union organizing and collective bargaining.

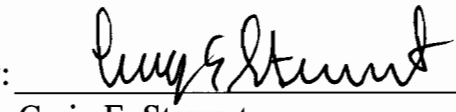
CONCLUSION

The court of appeal's judgment should be affirmed.

Dated: April 28, 2011

Respectfully submitted,

Jones Day

By: 

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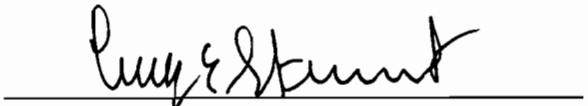
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(d)(2), I certify that the foregoing brief contains 1,079 words.



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SFI-684534v1

PROOF OF SERVICE

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

I, Margaret Landsborough, 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 April 26, 2011, I served the attached document described as RESPONDENT'S ANSWER TO SUPPLEMENTAL BRIEF ON NEW AUTHORITY OF LOS ANGELES ALLIANCE FOR A NEW ECONOMY 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 declare under penalty of perjury that the foregoing is true and correct.

Executed on April 28, 2011, at San Francisco, California.

M Landsborough

Margaret Landsborough