B206750

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CALIFORNIA GROCERS ASSOCIATION,

Plaintiff-Respondent,

v.

CITY OF LOS ANGELES,

Defendant-Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,

Intervenor-Appellant.

Appeal from the Los Angeles Superior Court
Case No. BC351831
Honorable Ralph W. Dau, Judge

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(d)(1), respondent California Grocers Association ("CGA"), by and through its undersigned counsel, certifies that:

CGA is a California non-profit mutual benefit corporation with no ownership interests as described in Rule 8.208(e)(1). CGA represents national, statewide and independent companies in the grocery industry throughout California ranging from the largest supermarkets to the smallest convenience stores as well as grocery supplier companies.

Dated: December 23, 2008 JONES DAY

By: _____
Richard S. Ruben

Attorney for Respondent
CALIFORNIA GROCERS ASSOCIATION

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INTRODUCTION

The superior court properly ruled that the Grocery Worker Retention Ordinance ("GWRO") is constitutionally invalid. The GWRO was adopted to promote health and safety at grocery stores in Los Angeles by mandating retention of employees with knowledge of sanitation standards following a change in ownership. As a practical matter, the GWRO is misguided and counterproductive. Rather than promoting health and safety or otherwise protecting the public welfare, its effect has only been to drive out of the market purchasers who might otherwise save failing grocery stores. As a legal matter, the GWRO is invalid because it violates three different constitutional principles: state preemption, equal protection and federal preemption.

First, the GWRO is preempted by the California Retail Food Code ("CRFC"), a state statute that comprehensively regulates food health and safety at grocery stores and that contains a broad preemption provision stating the Legislature's intent to "occupy the whole field of health and sanitation standards for retail food facilities." The GWRO's own express statement of purpose, which proclaims the Los Angeles City Council's intention to regulate health and safety in grocery establishments, by itself confirms that the City is impermissibly attempting to regulate within this preempted field. Given this purpose, it is irrelevant that individual council members—or even the City Council as a whole—assertedly had additional purposes beyond just regulating health and safety. And, even aside from this statement of purpose, the GWRO is preempted because it imposes employee retention standards that not only cover the same subject matter as

the CRFC, but do so in a manner that is more onerous than the state standards.

Second, the GWRO violates equal protection by drawing classifications that are not rationally related to any of the purposes the City advances for the ordinance. The ordinance covers large stores with grocery sections such as Wal-Mart but excludes membership warehouses that are in all material respects identical except that they charge a membership fee and Wal-Mart does not. Charging a membership fee has no legitimate connection to the GWRO's stated food safety objective, nor to the worker protection interest appellants now advance. Similarly irrational are the ordinance's distinctions between stores over 15,000 square feet and those under, or between grocery stores and other retail food establishments. While a legislature may "strike an evil" incrementally, appellants fail to explain—as they must—why the City's decision to "strike" in the selective and discriminatory manner it did is rational in light of the City's objectives.

Finally, the ordinance is preempted by federal labor law. A state statute or municipal ordinance cannot obligate employers and unions to bargain without running afoul of *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). By forcing a grocery store purchaser to hire a majority of its predecessor's employees, the GWRO effectively compels successors to bargain with unionized employees in violation of this principle. That the GWRO operates indirectly is of no moment; the government may not accomplish indirectly what it is forbidden to accomplish directly.

STATEMENT OF FACTS

A. The Grocery Worker Retention Ordinance

The Los Angeles City Council adopted the GWRO on December 21, 2005, with an effective date of February 16, 2006. *See* 2 Appellant's Appendix ("AA") 170-75. The ordinance 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 AA 171.

The ordinance also applies to "Superstores" as that term is defined in section 12.24(U)(14)(a) of the Los Angeles Municipal Code. That section defines "Superstore" as "a Major Development Project that sells from the premises goods and merchandise, primarily for personal and household use, and whose total Sales Floor Area exceeds 100,000 square feet and which devote more than 10% of sales floor area to the sale of Non-Taxable Merchandise."[1] The definition, however, excludes "wholesale clubs or other establishments selling primarily bulk merchandise and charging membership dues or otherwise restricting merchandise sales to customers paying a periodic assessment fee."

Hence, the ordinance covers grocery stores over 15,000 square feet and Superstores, but not restaurants, fast food establishments, convenience

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[1] "Non-taxable merchandise" "generally refers to food items." Los Angeles City Planning Department, Recommendation Report (2004), *available at* http://www.lacity.org/pln/Code_Studies/other/superstores.pdf (last visited Dec. 7, 2008).

stores, grocery stores under 15,000 square feet, or membership clubs with large grocery sections.

The City Council set forth its objective in enacting the GWRO in the ordinance's Statement of Purpose:

> 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.

See id. § 181.00, 2 AA 170. The ordinance seeks to ensure retention of employee knowledge by requiring that, whenever a "change in control" occurs of a grocery store or its owner, the new owner 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), 2 AA 172. If the successor employer requires fewer than all of the predecessor's employees, it must hire workers according to their "seniority within each job classification to the extent that comparable job classifications exist or pursuant to the terms of a relevant collective bargaining agreement." *Id.* § 181.03(B), 2 AA 172.

Grocery establishments must retain workers hired pursuant to the ordinance's terms for ninety days, during which time the employee may be

terminated only for cause. *See id.* § 181.03(A), (C), 2 AA 172. At the end of the ninety-day period, the employer must provide a written performance evaluation for each employee. If the worker's performance was satisfactory, the employer must "consider" offering the worker continued employment. *See id.* § 181.03(D), 2 AA 172. The ordinance provides a cause of action for workers to sue their employer for violations of the ordinance, in which action the worker may seek reinstatement, front and back pay, value of lost benefits and attorney's fees. *Id.* § 181.05, 2 AA 173.

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, 2 AA 174.

B. <u>The Ordinance's Legislative History</u>

The GWRO was originally proposed by Council Member Alex Padilla in a motion the City Council adopted on July 22, 2005. The motion recited 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. The motion therefore 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 to the City Council on December 9, 2005. In his accompanying report, the City Attorney noted that, unlike other worker retention ordinances passed by the City, the proposed GWRO applied to *all* grocery employers, rather than only those employers that contract with the City. *See* 2 AA 197. As a result, the City could not justify the GWRO as an exercise of the City's power as a market participant, but only as an exercise of the City's "police powers." *See* 2 AA 199. The City Attorney concluded, however, 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 the 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.

The City Council held a hearing on the proposed ordinance on December 14, 2005. Following the public testimony, the council chairperson invited the City Attorney's office to describe the "the substance of what is before us, the legal grounds of what is before us." 2 AA 266. In response, the City Attorney's representative again explained (in contradiction of the same City Attorney's position in this case on appeal that some other purpose existed) that the ordinance was an exercise of the

City's 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. *Id.*

Not only were these statements regarding the purpose of the ordinance consistent with the express statement of purpose in the ordinance itself and with the original motion proposing the ordinance, they were not disputed by any council member. No council member asserted that food health and safety was not the purpose of the ordinance or sought to disavow the statement of purpose in the ordinance as not reflecting the council's intent. To the contrary, Council Member Padilla, who originally proposed that the City Attorney prepare the ordinance, similarly described the ordinance in food safety terms. 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, some of the public witnesses and a few of the council members who spoke at the hearing offered their view that the proposed ordinance would assist in providing job security for grocery workers. In response to such comments, the City Attorney's representative again clarified that the ordinance was proposed as a food safety measure. In particular, he noted that the ninety-day transition period was designed specifically "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 by a council member to identify the "rational basis" for the ordinance should it be challenged on equal protection grounds. 2 AA 305. 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.

This same theme was continued at the final legislative hearing on the ordinance, held on December 21, 2005. In introductory remarks, Council Member Padilla cautioned that 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 policy-makers 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. Likewise, Council Member Rosendahl expressed his support for the ordinance as a worker retention tool, but acknowledged that the ordinance was being considered from a "health and safety" perspective. 2 AA 371.

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.

C. Procedural History

Respondent California Grocers Association ("CGA") brought suit on May 4, 2006 to enjoin enforcement of the GWRO, alleging that the ordinance is preempted by the National Labor Relations Act ("NLRA"), the California Health & Safety Code, and California Labor Laws, and also

violates equal protection. *See* 1 AA 8-15; *see also* 1 AA 28-31 (amended complaint).

The superior court conducted a two-day bench trial in August 2007. CGA called nine witnesses, including officers of local and regional grocery companies. For their part, the City and intervenor LAANE offered no witnesses and no documentary evidence in support of the City's ordinance.

As described below (*see, e.g., infra*, pp. 33-41), CGA's witnesses provided the requisite background evidence to show that the GWRO impermissibly invades the state's regulatory authority, treats similarly situated grocers differently in violation of the equal protection clause, and is preempted by federal law.

CGA's witnesses also described the devastating effect these constitutional violations have on their ability to purchase and operate grocery stores in Los Angeles. Kevin Edmund Davis, Chairman and CEO of Bristol Farms, testified that his company has elected not to purchase any grocery stores in Los Angeles since the ordinance went into effect. Reporter's Trial Transcript of Proceedings ("RT") 117:16-118:12. Similarly, Jay McCormack, President and Owner of Rio Rancho Markets, testified that his company does not "consider [purchasing] stores in Los Angeles any more because of the ordinance." RT 142:13-14; *see also* RT 147:6-10 ("We don't look at all at the opportunities in Los Angeles due to the ordinance."). And William Cote, Chief Financial Officer of Super Center Concepts—a regional grocery company—testified that his company declined to purchase a Gigante supermarket in the City of Los Angeles because "the ordinance would be of such a nature that it would cause us to

not be profitable, it would be detrimental to our business to own that store based on [the retention] ordinance." RT 68:11-14.

The ordinance has this detrimental effect because it divests employers of the freedom to hire or not hire the predecessor's employees. The successor's ability to choose its 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 (emphasis added). 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 typically spends $5.5 to $6 million up front 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 particular niche, and the ordinance prevents grocery companies from hiring workers suited to the grocery company's business plan. For example, because Rio Rancho Markets is "focused toward the Latino population," the company requires "specialized things" of prospective employees, "like we ask the people be bilingual for our type of markets." RT 140:28, 142:27-28. Bristol Farms, unlike many other grocery companies, focuses predominantly on preparing fresh foods; 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 ordinance, of course, takes no account of an

employer's hiring needs, or of the employer's preference for using existing 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.

According to the owner of Rio Rancho Markets, the impact of the ordinance is not lessened by its ninety-day period of operation since the first ninety days is "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. At the same time, Phil Lawrence, Senior Vice President of Operations at Superior Warehouse Grocers, testified that there is no greater danger of health and safety problems in the ninety days following an acquisition of a new store. RT 97:20-98:6. As a result, the ordinance does not, in fact, promote health and safety. RT 99:6-21. Appellants presented no contrary evidence.

Following post-trial briefing, the court issued a tentative decision on October 25, 2007, holding that the GWRO is preempted by state law, and contravenes equal protection principles. *See* 3 AA 455-71. The City and LAANE filed objections to the tentative decision, and CGA filed a response. *See* 3 AA 472, 483, 503. On February 11, 2008, the court issued a Statement of Decision reaffirming its conclusion that the GWRO is preempted and unconstitutional. *See* 3 AA 541.

ARGUMENT

I. STANDARD OF REVIEW

Whether the GWRO is preempted is a question of law reviewed *de novo*. *See In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1089 n.10 (2008) (federal preemption); *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895, 904 (2008) (state preemption). In construing the statutes and ordinance at issue, the Court is not limited by the trial court's interpretation or to the evidence presented in the trial court. *See Cal. Teachers Ass'n v. San Diego Cmty. College Dist.*, 28 Cal. 3d 692, 699 (1981).

Whether the GWRO offends equal protection principles is also a question of law reviewed *de novo*. *See People v. Health Labs. of N. Am., Inc.*, 87 Cal. App. 4th 442, 445 (2001).

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

A. State Law Expressly Occupies the 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. City of Rancho Mirage*, 16 Cal. App. 4th 383, 412-13 (1993). The California Legislature left little doubt as to the CRFC's preemptive effect, providing:

> 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,[2] 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.[3]

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 purpose of the CRFC 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.

Consistent with the Legislature's intent to comprehensively regulate the subject of health and safety at retail food facilities, the CRFC regulates everything from the receipt of food (*id.* § 114039.2), to food storage (*id.*

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[2] 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 60-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.

[3] The California Retail Food Code repealed and replaced the California Uniform Retail Food Facilities Law on July 1, 2007. Because the provisions relevant to this suit do not materially differ between the two statutes, the Court should evaluate CGA's preemption challenge under the now-governing CRFC. *See Bravo Vending*, 16 Cal. App. 4th at 393.

§ 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. titl. 17, § 30730 (2008).

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. Thus, chapter 3 of the CRFC establishes comprehensive standards for "Management and Personnel," which regulate employee health, handwashing, personal cleanliness, hygienic practices and employee knowledge. *See* Health & Safety Code §§ 113945-113978.

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

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 not more than $100 for each day of operation in violation. *Id.* § 113947.6.

Importantly, the CRFC also addresses the very issue that the GWRO seeks to address: the requirements for maintaining employee food safety knowledge in the transition period following a change in ownership. Anticipating the disruption that occurs during a change in ownership, the Legislature granted owners of successor food facilities 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.

Under article XI, section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws." Local legislation that conflicts with state law is preempted and void. A conflict exists if the local legislation duplicates or contradicts state law, "or if the local legislation attempts to enter an area fully occupied

by general law." *Tosi v. County of Fresno*, 161 Cal. App. 4th 799, 804 (2008).

Because the California Legislature expressly manifested its intent to occupy the whole field of health and sanitation standards for retail food facilities, this case concerns "field preemption." *See Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 240 n.7 (2006) (characterizing section 113705's language as the "type of language accepted as expressly preempting all local power over a given topic"). 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*, 39 Cal. 2d 708, 712 (1952). Field preemption is so powerful that it prohibits local governments from imposing *any* requirements within a preempted field, regardless of whether such requirements could otherwise be reconciled with state law. *See City of Watsonville v. State Dep't of Health Servs.*, 133 Cal. App. 4th 875, 885-86 (2005). All that is necessary to establish preemption is that the local measure "***purports to regulate*** an area that is fully occupied by express provisions of the state law." *Id.* at 885 (emphasis added).[4]

Of course, a municipality's attempt to regulate within a preempted field is all the more offensive when the local law imposes more onerous requirements than those established by state law. In that circumstance, the

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[4] *See also Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997) (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").

local regulation is additionally invalid on the ground of an actual conflict. Thus, in *American Financial Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239 (2005), the California Supreme Court struck down Oakland's anti-predatory lending ordinance as preempted by California legislation that impliedly occupied the field of regulation of predatory practices in home mortgage lending. The Court concluded that the ordinance, in imposing more rigorous requirements than state law, improperly upset the balance that the Legislature sought to achieve. *Id.* at 1257-58; *see also Wilson v. Beville*, 47 Cal. 2d 852, 856 (1957) (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); *Eastlick v. City of Los Angeles*, 29 Cal. 2d 661, 665-67 (1947) (upholding personal injury judgment rendered in favor of plaintiff whose claim was concededly complete under state law that occupied field of tort claims against municipalities for defective sidewalks, but deficient under city charter).

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 declared its intent to occupy 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 adopting such prohibited regulation is precisely what the City Council did 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 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.

The City and LAANE advance two arguments to try to save the GWRO from preemption: (1) that the GWRO's express statement of purpose, contained in the ordinance itself, should be disregarded, and (2) that, once shorn of its statement of purpose, the GWRO has nothing to do with food safety in grocery stores and does not invade the occupied field. Neither assertion withstands scrutiny.

1. <u>The City's own express statement of its purpose establishes that its ordinance invades the preempted field of state authority</u>.

Appellants cite no authority suggesting that a court may disregard a legislative body's express statement of its purpose when evaluating whether its enactment invades a preempted field. The law is directly to the contrary. The City's own principal case holds 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. Likewise, in evaluating federal law preemption of state occupational health and safety standards, the United States Supreme Court 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, 505 U.S. 88, 105 (1992); *see also English v. Gen'l Elec. Co.*, 496 U.S. 72, 84 (1990) (recognizing that "part of the pre-empted field is defined by reference to the purpose of the state law" that is challenged as preempted).

This examination of the legislative body's own stated purpose is consistent with the general principle that, in ascertaining legislative intent, "[a] 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.*, 229 Cal. App. 3d 1130, 1135 (1991). "[W]here the Legislature has expressly declared its intent, we must accept the declaration." *Tyrone v. Kelley*, 9 Cal. 3d 1, 11 (1973). Thus, in observing that the superior court found preemption only after "tak[ing] the City's legislative body at its word" (City Br. at 25), the City proffers a ringing endorsement—not a stinging critique—of the trial court's holding.

Relying on *Bravo Vending*, the City contends that the superior court could not depend solely on the City's statement of purpose but was obligated to engage in a "more extensive analysis." City Br. at 25. *Bravo Vending*, however, did not disregard the city's purpose. To the contrary, as noted, the court held that it was ***required*** to consider that purpose. The basis for the court's finding of no preemption was therefore not that the city's purpose could be ignored, but that the city's ordinance did not invade the area of exclusive state authority. The state statute there made it a crime to sell cigarettes to minors and it preempted local ordinances of this same "subject matter." 16 Cal. App. 4th at 395-96. The court construed this statute as precluding only local ordinances that regulate the "penal aspects

of sales of cigarettes to minors." *Id.* at 412. The statute thus did not preclude cities from adopting ordinances that seek only to "discourage the activity proscribed by state law" without attempting to "expand or reduce the degree to which the particular activity regulated by state law is criminally proscribed." *Id.* Examining both the purpose and text of the city's ordinance there, the court found that it fell within this limited permissible sphere of local authority.

By contrast, this case 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.

The City argues that the City's statement of purpose should be disregarded because it is supposedly "entirely disconnected" from the GWRO's substantive provisions. City Br. at 27. But no such disconnect exists. As the City itself stated in the ordinance, and as its council members and attorney repeatedly emphasized at the hearings, the GWRO's substantive worker retention requirements were adopted to ensure that "[e]xperienced grocery workers with knowledge of proper sanitation procedures [and] health regulations" would continue to be employed when a change of control occurs. 2 AA 170. Although courts will disregard legislative declarations, such as statements of purpose, that are in irremediable conflict with substantive provisions of a statute (*Citizens for Responsible Gov't v. City of Albany*, 56 Cal. App. 4th 1199, 1209 n.1 (1997)), that is not the circumstance here.

LAANE is similarly not assisted by its assertion that "legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole." LAANE Br. at 16 (quoting *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1118 (1999) (citing *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1048 (1997)). That principle is of no value here because reviewing the "statute as a whole" leads to precisely the same result. The statement of purpose describes the City's intent to protect food health and safety by retaining workers, and the rest of the ordinance implements this purpose by prescribing the manner in which workers must be retained.

Nor is there any merit to LAANE's assertion that the Court should disregard the ordinance's express statement of purpose in favor of statements of individual city council members. LAANE Br. at 20-21. The Supreme Court has made clear that courts "do not consider the motives or understandings of an individual legislator even if he or she authored the statute." *Grupe Dev. Co. v. Super. Ct.*, 4 Cal. 4th 911, 922 (1993) (internal quotation marks omitted). Put simply, "[t]he intent of individual city council members is irrelevant." *City of L.A. v. Super. Ct.*, 170 Cal. App. 3d 744, 753 (1985). The "court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation," not what may have motivated individual legislators. *Quintano v. Mercury Cas. Co.*, 11 Cal. 4th 1049, 1062 (1995); *Myers v. Philip Morris Cos.*, 28 Cal. 4th 828, 845 (2002) ("we have repeatedly declined to discern legislative intent from comments by a bill's author because they reflect only the views of a single legislator instead of those of the Legislature as a whole"). LAANE's

counsel at trial made precisely this same point, arguing that the "law is quite clear" that "the motives of proponents of legislat[ion]" and what is said "at hearings simply doesn't factor—isn't relevant to any of the . . . claims that we have here." RT 150:16-151:6.

Indeed, appellants' argument that the Court should look first to individual council member's statements and ignore the ordinance's own statement of purpose has it exactly backwards. The courts' task is "to effectuate the purpose of the law." *Catholic Mut. Relief Soc. v. Super. Ct.*, 42 Cal. 4th 358, 369 (2007). And the starting place for doing so is the "statutory language." *Id.* "If the language [of a statute] is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . . ." *Id.* The language of the ordinance here is unambiguous that the City Council adopted the GWRO to "ensur[e] the welfare of the residents of these communities through the maintenance of health and safety standards in grocery establishments." L.A.M.C. § 181.00.[5]

Even if it were appropriate to go beyond the text of the ordinance itself (including its express statement of purpose), the legislative history

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[5] In *Bravo Vending*, the court looked to legislative history to discern the legislature's intent, but did so only because the ordinance included no statement of purpose. *See id.* at 408 ("Chapter 5.24 as presently constituted is the result of two separate ordinances. . . . In neither ordinance did the City include an express statement of purpose or finding of necessity. *Accordingly*, we examine the text and legislative history of both ordinances to determine their respective purpose.") (emphasis added). *Bravo Vending*'s approach is of no weight where, as here, the relevant ordinance does include a statement of purpose.

undercuts the City's contention that the ordinance does not pertain to food health and safety matters. The City Attorney's office, which drafted the ordinance, repeatedly reaffirmed that the ordinance was an exercise of the City's police power to promote health and safety. *See supra*, pp. 6-9. Individual council members—including Council Members Padilla and Rosendahl—likewise framed the GWRO as a sanitation safeguard. *See supra*, pp. 5, 7, 8-9. Appellants cannot discount that legislative history now merely because they wish it were not so.[6]

LAANE cites *Guillen v. Schwarzenegger*, 147 Cal. App. 4th 929, 948 (2007), for the proposition that the City Attorney's analysis is irrelevant. That case, however, addressed after-the-fact statements about legislation from the Governor and the Legislative Analyst's Office. By contrast, the City Attorney's analysis was the express basis upon which the City Council acted and was incorporated into the GWRO itself in the statement of purpose.

That various council members additionally expressed the view that the GWRO would provide job security for grocery workers is irrelevant. A local ordinance that regulates in a subject matter 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.

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[6] It is particularly inappropriate for 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—to now file a brief on behalf of the City arguing that some other purpose existed.

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. Appellants cite no authority for such a result.[7]

For the same reason, it is irrelevant that one council member was skeptical that the GWRO would in fact accomplish its express food safety and health objective. Even if that were the view of the entire council, ineffective statutes are just as much subject to preemption as effective ones. Indeed, if anything, the need for preemption is enhanced when a local government enacts ordinances that will not even serve their own intended purpose. Similarly, contrary to LAANE's assertion (LAANE Br. at 12), it is of no moment that one council member viewed "health and safety" as a "term of art" often used to refer to regulating commerce. Not only is there

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[7] In its equal protection argument, LAANE relies on *Hernandez v. City of Hanford*, 41 Cal. 4th 279 (2007), to argue that the GWRO is valid so long as it serves any purpose the City "had or might have had." LAANE Br. at 3. That is not the standard for evaluating preemption, however. Even if it were true that the City had an additional or dual purpose beyond ensuring food health and safety, the GWRO is preempted by the CRFC because the City was expressly acting to protect food health and safety and (as discussed below) because the GWRO intrudes into the sphere preempted by the CRFC even aside from its statement of purpose.

Nor does *Hernandez* assist appellants on the equal protection claim. As shown below (at 33-41), unlike the ordinance at issue in that case, the distinctions drawn by the GWRO are not rationally related to any proper purpose of the GWRO, either actually articulated in the ordinance or otherwise offered now.

no indication that any other council member shared that view, but there is no question that protecting food sanitation is a core "health and safety" concern whether or not it also encompasses broader commercial issues.

Nor is it relevant that the City Council patterned the GWRO after its earlier Service Contractors Workers Retention Ordinance ("SCWRO"). The issue here is the purpose and effect of the GWRO, not of an earlier ordinance—and the purpose of the GWRO is unambiguously stated in the ordinance itself. Moreover, to the extent the SCWRO's purpose is relevant, it only confirms that the GWRO is preempted. The SCWRO states that it was adopted to ensure that companies that contract with the City retain incumbent workers because they have "useful knowledge about the workplace," and "invaluable knowledge and experience with the work schedules, practices and clients." Los Angeles Administrative Code, § 10.36. This is consistent with the GWRO's stated purpose of retaining food service employees because of their knowledge of food safety practices. However, while an intent to retain employee knowledge may be permissible in the general context of City contractors, it falls squarely within the preemptive scope of the CRFC when the requirement is imposed in the context of retail food establishments that are governed by the CRFC.

No doubt recognizing the impropriety (and unhelpfulness here) of relying on purported statements of individual council member intent, LAANE reverts back the GWRO's express statement of purpose to suggest that that statement evidences "three purposes"—to maintain health and safety, preserve quality of service, and ensure workforce stability. LAANE Br. at 4-5. The statement itself, however, belies that contention. It makes

clear that preserving quality of service and retaining employees are not ends unto themselves, but are rather the means of achieving the City's stated interest in "ensuring the welfare of the residents of these communities through the maintenance of health and safety standards in grocery establishments." L.A.M.C. § 181.00. Moreover, as noted above, even if the City Council had been motivated by additional purposes beyond health and safety, that would still not save the GWRO from preemption, because it is indisputable that at least one purpose was to regulate health and safety and because (as shown in the following section) the ordinance itself intrudes into a preempted area of health and safety regulation.

Because the language of the ordinance itself conclusively establishes that the City Council intended to regulate the field of health and sanitation standards for retail food establishments, the GWRO is preempted and the superior court's judgment must be affirmed.

2. Even absent its express statement of purpose, the GWRO would be preempted.

Although the GWRO's express statement of purpose is by itself a sufficient basis for finding the GWRO preempted, the ordinance would be invalid even without it. An ordinance with substantive provisions that enter a field preempted by state law is invalid, even if the legislature's stated purpose is permissible. *See Stephenson v. City of Palm Springs*, 52 Cal. 2d 407, 410 (1959) (holding that municipal "right-to-work" ordinance impermissibly invaded field occupied by state, despite announced intention of ordinance to prohibit only agreements neither prohibited nor authorized by state laws).

The GWRO's substantive provisions invade the preempted sphere because they address the requirements for retaining experienced grocery employees. LAANE argues that such employee retention requirements do not qualify as a "health and sanitation standard" within the meaning of the CRFC. LAANE Br. at 14-15. 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.[8] Most importantly, the Legislature specified that grocery stores are not required to maintain any certified employees upon a change of control for a sixty-day grace period. *Id.* § 113947.1(e) ("A food facility that . . . changes ownership . . . shall have 60 days to comply with this subdivision."). By these provisions, the Legislature made clear that requirements relating to retention of trained and experienced food service employees—particularly in connection with a change in control of the store—are in fact "health and sanitation standards" over which the state has reserved exclusive control.

The City argues that the ordinance's substantive provisions are nonetheless not preempted because they supposedly do not contradict the

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[8] 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." *Id.* §§ 113781, 113788.

CRFC's employee knowledge requirements, as it is possible for a successor employer to comply with both. *See* City Br. at 27. In so arguing, the City conflates field preemption with conflict preemption. Conflict preemption requires that the party challenging an ordinance prove that the ordinance contradicts or "stands as an obstacle to the accomplishment and execution" of a state statute. *English*, 496 U.S. at 79. Under field preemption, however, the GWRO is void—even if it merely is "supplementary or complementary" to the CRFC—so long as it intrudes into the field of health and sanitation standards. *Tily B., Inc. v. City of Newport Beach*, 69 Cal. App. 4th 1, 19 (1998).

In fact, however, even if conflict preemption were the test, the GWRO would still be invalid because the GWRO not only attempts to regulate in the preempted field, it does so in a different way. The GWRO treats *all* employees as being required to have food health and safety expertise and thus mandates retention of all grocery employees upon a change in ownership. By contrast, the CRFC (1) requires that only certain employees be trained in food safety, (2) requires that only one employee per store be certified in food safety, (3) does not require that even the certified employee be retained when the store is purchased, and (4) gives a full sixty days for the new owner to come into compliance with the certification requirement. In drafting the CRFC's employee knowledge provisions, the 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 upset that careful balance, thereby obstructing the full purpose of the CRFC.

It is no answer to argue, as appellants do, that the GWRO does not ***specifically*** and ***expressly*** mandate retention of the certified food specialist employee. Whether or not it results in retention of the certified employee, the ordinance mandates retention of existing employees, in contradiction of the CRFC, which does not require retention of any employee and gives sixty days for employing a certified employee. The CRFC reflects the Legislature's judgment that retention of all employees is not necessary or required to maintain food health and safety.

III. THE GWRO OFFENDS EQUAL PROTECTION PRINCIPLES.

The superior court also correctly held that the GWRO is invalid under the federal and state equal protection clauses because the ordinance draws classifications that are not reasonably related to its objectives.

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

As the superior court recognized, the GWRO is evaluated under the equal protection clause using the rational basis standard of review. *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16 (1971). To determine whether the ordinance satisfies the rational basis test, 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*¸ 25 Cal. 3d 772, 788 (1979). 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, 19 Cal. 3d 705, 711 (1977) (citation omitted) (emphasis added). 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.

Appellants attempt to create the impression that rational basis review is so toothless that no regulation ever fails it. In fact, a wide variety of regulations have been found to violate equal protection under that standard, including economic regulations affecting only business interests.[9] In

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[9] *See, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (invalidating state prohibition on sale of caskets by anyone not licensed as funeral director); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (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. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (striking down antijitney ordinance); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (holding that prohibition against vending permit for bootblack stand on public place violated equal protection); *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (invalidating state statute imposing up to 36 percent tax on slot machines at racetracks but only 20 percent tax on riverboat slot machines); *Longchamps Elec., Inc. v. New Hampshire State Apprenticeship Council*, 764 A.2d 921 (N.H. 2000) (holding that state-mandated hiring ratios, which distinguished between employers of different sizes so that the smaller the employer the more generous the hiring ratio, violated the equal protection clause); *Verzi v. Baltimore County*, 333 Md. 411 (1994) (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).

The United States Supreme Court has also applied rational basis scrutiny to several statutes and found them lacking. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating city ordinance that required certain group homes, including homes occupied by mentally retarded citizens, to obtain a special use permit); *Hooper v.*

(continued)

Longchamps Electric, for instance, the plaintiff challenged a state law regulating apprenticeship programs in various trades and industries. The plaintiff argued that the law's hiring ratios, which required that larger employers hire more journeymen than their smaller counterparts before they could hire an additional apprentice, unconstitutionally discriminated against employers based on size. *See Longchamps Elec.*, 764 A.2d at 923. New Hampshire argued that the classification promoted safety and proper supervision, but the court found that, if smaller employers could give proper supervision with a lower ratio of journeymen to apprentices, there was no reason larger employers could not do the same. *See id.* at 924. As this and similar cases illustrate, in applying rational basis review, courts do not simply rubber-stamp proposed economic regulations, but must give searching review to the rationality of the legislature's classifications.

The GWRO draws four 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; (2) grocery establishments more than 15,000 square feet in size and those

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Bernalillo County Assessor, 472 U.S. 612 (1985) (striking down statute that provided a state tax exemption for Vietnam veterans who resided in the state before a certain date); *Williams v. Vermont*, 472 U.S. 14 (1985) (invalidating automobile registration tax scheme that exempted cars purchased and on which sales tax was paid in Vermont); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (striking down gross premiums tax scheme that favored domestic insurance companies over out-of-state firms); *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Alaska's dividend distribution scheme that based amount of dividend on length of state residency).

less than 15,000 square feet in size; (3) grocery establishments and other food retailers; and (4) stores whose employees enter a collective bargaining agreement with the new owner and those that do not.

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), 2 AA 171. 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 not rationally related to any valid purpose behind the GWRO. 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 24:7-10, 104:7), and would face identical food security risks during a change of ownership as would any other large store that sells food. Thus, to the extent there is any need to have experienced workers for the first ninety days after the sale, that need exists equally for membership clubs as it does for any other store.

Nor does any purpose to provide for worker job security supply a valid basis for distinguishing membership stores from the stores covered by the GWRO. 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. Before a superstore can build within select "Economic Assistance Areas," the relevant permitting agency must be satisfied that the superstore will not adversely impact other businesses, low-cost housing, green space, or local jobs. *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, the City has failed to explain how that classification has any rational purpose in the context of the GWRO.

The City counters that its classifications are valid because legislatures may "approach a perceived problem incrementally." City Br. at 18 (quoting *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004)). To be sure, a legislature is permitted to take "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Kasler v. Lockyer*, 23 Cal. 4th 472, 488 (2000) (internal citation and quotation omitted). Yet "when the legislative body proposes to

address an area of concern in less than comprehensive fashion by striking the evil where it is felt most, its decision as to where to strike must have a rational basis in light of the legislative objectives." *Hays*, 25 Cal. 3d at 791 (internal quotations and citation omitted).

Thus, the legislature's right to proceed incrementally does not justify the enactment of legislation that relies on grossly underinclusive or overinclusive classifications. *See Brown v. Merlo*, 8 Cal. 3d 855, 877 (1973). In *Brown*, the California Supreme Court 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 maintained that the law promoted hospitality by insulating generous drivers from lawsuits. *Id.* at 859, 864. The Supreme 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.* at 859, 864 n.4.

Likewise, in *Hays*, the California Supreme 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 Supreme Court found the state's justification inadequate because it was underinclusive. The Supreme 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 chooses to address a particular area of concern in less than comprehensive fashion by merely 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.[10]

The superior court declined to rule in CGA's favor on this issue on the asserted ground that "[n]o evidence was introduced at trial concerning the nature of membership warehouses or club stores . . . or whether they do or do not come within the ordinance's definition of 'grocery establishment.'" 3 AA 556. This portion of the superior court's ruling was mistaken. As noted, there ***was*** evidence at trial establishing that membership stores are similarly situated to other grocery stores. Moreover, there is no question that the GWRO excludes such stores from its reach. On its face, the GWRO—and its incorporated definition of "Superstore"—provides that "wholesale clubs or other establishments selling primarily bulk merchandise and charging membership dues or otherwise restricting merchandise sales to customers paying a periodic assessment fee" are not covered. No further evidence is required to conclude that the GWRO

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[10] *RUI One Corp.* only proves the point. In that case, Berkeley enacted a "living wage ordinance" that applied to businesses located in the city's Marina but not to other similar businesses elsewhere in the city. The Ninth Circuit upheld the ordinance against an equal protection challenge on the ground that the businesses in the Marina benefited from the city's investments in improving the Marina, from the city-imposed development moratorium in the Marina and from being allowed to operate on lands held in the public trust. 371 F.3d at 1154-65. The City here offers no similar justifications for the distinctions it draws among grocery stores in Los Angeles.

impermissibly treats membership grocery stores and non-membership stores differently.

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 the same safety risks. 3 AA 557. If anything, the natural conclusion would be that smaller grocery stores are less likely to have institutional systems designed to prevent food contamination.

The City argues that the size distinction is defensible because "[t]he City Council could have reasonably concluded that the Retention Ordinance would not hinder the sale of large grocery chains, but may have a negative impact on the sale of small grocery stores." City Br. at 19. 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.[11] 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 28 stores,[12] 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 Rancho stores range up to 33,000 square feet); RT 121:16-25 (average size of Bristol Farms stores is 30,000 square feet).

Moreover, even if there were any connection between store size and the size of the store's owner, 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 just as much as smaller stores because larger stores, just like smaller stores, cannot operate a new store profitably if required to hire a predecessor's workforce wholesale. *See supra,* pp. 10-11.

LAANE offers 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. LAANE Br. at 25. At best,

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[11] "[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.*, 449 U.S. 456, 464 (1981).

[12] 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.

however, this is a rationale for ***including*** larger stores within the GWRO. It does not provide any rational basis for ***excluding*** smaller stores. LAANE does not assert that no impact would result from a smaller number of employees losing their jobs. Nor does it offer up any other reason for not including the smaller stores within the reach of the GWRO. Thus, the only effect of the 15,000 square foot limitation is to disadvantage the larger stores in their ability to compete for customers.

D. The Classification Between Grocery Stores and Other Retail Food Establishments is Not Rationally Related to the GWRO's Objectives.

The GWRO also distinguishes between grocery stores and other retail food businesses, including restaurants, fast-food establishments, and convenience stores. This distinction also bears no relationship to any valid legislative purpose. To the extent any food safety risks exist during a change in ownership, they are no less likely to exist at restaurants and fast-food establishments than at grocery stores. Indeed, sanitary breaches are more likely to result in foodborne illness when noncompliant businesses are in the primary business of selling food for direct consumption rather than for home preparation.

Nor is there any basis for thinking that job security is of greater concern in grocery stores than in restaurants or fast-food establishments. Even if it were otherwise a permissible purpose for the ordinance, the City cannot justify the distinction on the ground that extra legal protection is needed for grocery workers because fewer of them are protected by collective bargaining agreements. The U.S. Department of Labor Bureau of Labor Statistics reports that "[t]wenty percent of all employees in grocery

stores belong to a union or are covered by union contracts," well above the thirteen-percent unionization rate of all industries. U.S. Department of Labor, Career Guide to Industries, 2008-09 Edition (2008), *available at* http://www.bls.gov/oco/cg/ cgs024.htm (last visited Dec. 7, 2008). By contrast, just one percent of all workers employed by restaurants and fast-food establishments are unionized. *See id.*, *available at* http://www.bls.gov/oco/cg/cgs023.htm (last visited Dec. 7, 2008).[13] If, as the City contends, workers covered by collective bargaining agreements have greater power to ensure favorable terms of employment than workers with individual employment agreements in the event of a change in ownership (*see* City Br. at 20), then it makes even less sense to apply the ordinance to grocery stores than to their counterparts.

Nor can the City justify the distinction on the ground that, like the hotels covered by SCWRO that benefit from contracts with the City, grocery stores receive some unique governmental benefit not shared by other food establishments. Nor can it be said that grocery stores play a more vital economic role in their community in terms of the number of workers they employ. The fact is that no rational basis exists for singling out grocery stores alone for the special obligations the GWRO imposes.

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[13] CGA requests that the Court take judicial notice of these statistical facts as reported by the Department of Labor. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666 (2006) (taking judicial notice, in voting rights case, of racial data compiled by U.S. Census Bureau); *see also Kaiser v. Kaiser*, 186 N.W. 2d 678, 684 n.4 (Minn. 1971) (taking judicial notice of statistics published by U.S. Bureau of Labor Statistics).

The GWRO imposes the very kind of selective and arbitrary burden that the equal protection clause was intended to prevent.

E. The Distinction Between Purchasers That Enter A Collective Bargaining Agreement and Those That Do Not is Not Rationally Related to the GWRO's Objectives.

As the superior court recognized, the GWRO also irrationally excludes from its coverage new employers that enter into a collective bargaining agreement with the employees of the former owner. This 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. Its only apparent purpose is to promote unionization, which the City does not advance as one of the GWRO's objectives.

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

In addition to the reasons relied on by the superior court, the GWRO should be invalidated because, by effectively forcing employers to collectively bargain with the unionized employees of its predecessor, it impermissibly trespasses on an area of bargaining conduct that Congress intended to be left to the free play of economic forces.[14]

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[14] This Court may affirm the judgment on any basis supported by the record, whether or not accepted by the trial court. *In Re Marriage of Burgess v. Burgess*, 13 Cal. 4th 25, 32 (1996) ("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. City of Hermosa* (continued)

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

The supremacy clause of the United States Constitution provides that "the laws of the United States which shall be made in pursuance [of the Constitution] . . . shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The supremacy clause invalidates all laws that conflict or interfere with an act of Congress, and gives Congress the power to preempt state and local law. *See Rose v. Ark. State Police*, 479 U.S. 1, 3 (1986).

Although the NLRA itself contains no express preemption provision, the Supreme Court has held that Congress implicitly mandated two types of preemption as necessary to implement federal labor policy. One form of preemption—known as *Machinists* preemption—"forbids both the National Labor Relations Board ("NLRB") and States to regulate conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408, 2412 (2008) (quoting *Machinists*, 427 U.S. at 140).

Beach, 86 Cal. App. 4th 534, 548 n.8 (2001) ("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 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.*, 41 Cal. App. 4th 1270, 1275 (1996) ("[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).

In *Machinists*, 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 (citation omitted). "*Machinists* indicates that the States are not free, entirely and always, directly to enhance the self-help capability of one of the parties to such a dispute so as to result in a significant shift in the balance of bargaining power struck by Congress." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 548-49 (1979) (Blackmun, J., concurring).[15]

B. The GWRO Tips the Scales by Compelling Bargaining between a Successor Employer and the Predecessor Employees' Union.

In contravention of the principles set forth in *Machinists*, the GWRO dramatically tips the bargaining scales by effectively forcing grocery store purchasers to recognize and bargain with the union of its predecessor's employees. The ordinance does so by having the effect of turning employers into "successors" for NLRA purposes, with all the accompanying obligations.

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[15] The other form of preemption is known as *Garmon* preemption and 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*, 359 U.S. 236, 244 (1959). *Garmon* preemption also extends to conduct that is "arguably" prohibited or protected under the NLRA. *Id.* Because *Machinists* preemption clearly applies, the Court need not reach the question of *Garmon* preemption. But *Garmon* preemption also supports affirmance of the judgment here because, for the reasons discussed below, the NLRA protects the right of employers to not become bound to collectively bargain as a result of hiring their predecessor's employees.

Under the "successorship doctrine," which "arises [out of the] operation of the [NLRA]," *Maintenance, Inc.*, 148 N.L.R.B. 1299, 1301 (1964), an employer must recognize and bargain with the union that had been named 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*, 482 U.S. 27, 43 (1987). The "substantial continuity" approach is primarily factual in nature and requires the NLRB to consider "the totality of the circumstances of a given situation." *Id.* The NLRB, which has the exclusive jurisdiction to make the sucessorship determination, has, for thirty years, made it clear that 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. Recognizing the essential nexus between retention and successorship, the Supreme Court has held that a successor's bargaining obligations are justifiable where "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. Imposing successorship obligations "makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor." *Id.*

The Supreme Court has held that whether to hire a majority—or even any—of the predecessor's employees is a matter that the NLRA left to the prerogative of the successor and the free play of market forces. In *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 281 n.5 (1972), 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." The Court went further in *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249 (1974), holding that a successor employer "ha[s] the right not to hire any of the former [predecessor] employees, if it so desire[s]." *Id.* at 262. In that case, Howard Johnson agreed to purchase a restaurant and motor lodge from a family that had entered into collective bargaining agreements with the union covering employees at the two establishments. Howard Johnson retained just 9 of the 53 predecessor employees, and hired new employees to fill the other positions. *Id.* at 252. In concluding that the NLRA does not oblige a successor to hire its predecessor's employees, 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).

Burns and *Howard Johnson* establish that where an employer purchases the assets of another business and hires its predecessor's employees, the NLRA imposes a successorship obligation of bargaining; however, where the successorship doctrine does not apply, Congress intentionally left the area of successorship obligations to be controlled by the free play of market forces. The GWRO alters this "process[] of bargaining," *Metro. Life Ins. Co. v. Commonwealth of Mass.*, 471 U.S. 724, 756 (1985), by mandating, in virtually all circumstances, that employers become successors for NLRA purposes. Even if a successor employer

would prefer to make changes to the composition of the labor force, the GWRO will often require that the employer hire a majority of its predecessor's employees and thereby obligate the employer to bargain with the representative union. Put simply, a state statute or municipal ordinance cannot obligate parties to bargain or negotiate without running afoul of *Machinists*. *Cf. Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994) (finding state statute requiring that cemeteries and gravediggers negotiate as to a specific condition preempted by *Machinists*).

United Steelworkers of America v. St. Gabriel's Hospital, 871 F. Supp. 335 (D. Minn. 1994), is instructive. In that case, the district court found that a state statute requiring that purchasers honor any collective bargaining agreement ("CBA") signed by the predecessor employees—so long as the CBA contained a successor clause—was preempted under *Machinists*. Minnesota passed the successor statute after concluding that unions could not adequately protect job security under federal successorship law. *See id.* at 341. Despite the legislature's "good intentions to protect job security," the court found that the statute was unconstitutional 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). The court concluded that "[b]ecause the statute forbids actions which federal labor law clearly permits, it is contrary to federal labor law and is preempted." *Id.* at 343 (internal quotation and citation omitted). By giving employees greater protection than they could achieve through the collective bargaining process, the state had impermissibly "entered 'into the

substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Id.* (quoting *Machinists*, 427 U.S. at 149).

The court in *Commonwealth Edison Co. v. Int'l Bhd. of Elec. Workers*, 961 F. Supp. 1169 (N.D. Ill. 1997), reached a similar 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.* (internal citations omitted).

Contrary to the view of the court below, these cases cannot be dismissed on the ground that they involved a successor statute rather than a worker retention ordinance. In both instances, the challenged legislation is unconstitutional because it requires conduct that Congress intentionally left to the free play of market forces. The GWRO gives unionized employees greater rights to collective bargaining than they would otherwise have in the free market, and for that reason the City Council has entered into the bargaining process in the manner that *Machinists* prohibits.

It is true that the retention ordinance operates indirectly, whereas the Minnesota and Illinois successor statutes directly bound successors to the CBA. However, a state may not accomplish indirectly what it is forbidden to accomplish directly. *See Brown*, 128 S. Ct. at 2414-15. The state has no authority to introduce its own standard of "properly balanced bargaining power," whether the introduction of that standard occurs explicitly or

implicitly. *Thunderbird Mining Co. v. Ventura*, 138 F. Supp. 2d 1193, 1199 (D. Minn. 2001) (quoting *St. Gabriel's*, 871 F. Supp. at 344).[16]

C. The Reasoning of *Washington Service Contractors Coalition* is Not Persuasive.

Appellants relied in the court below on the divided decision of the D.C. Circuit in *Wash. Serv. Contractors Coal. v. Dist. of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), which upheld a worker retention ordinance against a *Machinists* challenge. The majority's reasoning was flawed, however, and should not be followed.

The majority concluded that the 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, given that the

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[16] The GWRO's intrusion on the collective bargaining process cannot be justified on the ground that the City is permitted to enact a generally applicable "minimum employment standard that does not intrude upon the collective-bargaining process." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987). The GWRO does not simply mandate minimum substantive terms of employment but rather alters the bargaining process itself by effectively compelling grocery store purchasers to collectively bargain with the predecessor's employees.

Moreover, even aside from its intrusion on the collective bargaining process itself, the GWRO does not qualify as a permissible "minimum employment standard." The courts have found NLRA preemption as to alleged employment standards where, as here, the law at issue is not one of general applicability but "targets particular workers in a particular industry" for special protection as to rights that would normally be the subject of collective bargaining. *See Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995) (finding preempted a county "prevailing wage" ordinance that applied to private industrial contract projects with a cost of over $500,000); *520 South Michigan Ave. Assocs., Ltd. v. Shannon*, __ F.3d ___, 2008 WL 5205813 (7th Cir. Dec. 15, 2008) (finding preempted a state statute that required hotel owners in Cook County to provide extended meal and rest breaks to hotel room attendants).

employer was required by the ordinance to retain the employees rather than doing so voluntarily. 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 id.* at 817. On the other hand, if the NLRB found successor status, then (according to the majority) that would amount to a ruling that such status is consistent with federal policy. *Id.*

This analysis was mistaken. It erroneously assumes 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 will have been 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 they continue working in the same workplace. That sacrifice may not represent the NLRB's view of the optimal federal policy in the absence of GWRO, but rather simply the NLRB's determination that it has no other option, given what the GWRO has mandated of the employer.

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 choosing between the lesser of two evils.

In short, the GWRO is preempted because the GWRO necessarily affects the balance that federal law would strike 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 impinging upon one another." *Hill v. Florida*, 325 U.S. 538, 543 (1945) (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.

Moreover, as the dissent recognized, the D.C. Circuit majority's decision 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 the majority's 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 companies from making 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.

The majority also concluded that, even if the NLRB's application of its successorship doctrine engenders conflict between retention ordinances

and the NLRA, that would not be a "preemptive" conflict within the meaning of *Machinists* because there is no "freedom implicitly left to employers by the NLRA that would be compromised were the NLRB to require employers to recognize the union of [retention] hires." *Wash. Serv. Contractors*, 54 F.3d at 817. This alternate justification is befuddling. While the court was certainly correct that "the NLRA contains no implicit right of an employer to refuse to hire employees on the basis of union membership," *id.*, there can be no dispute that the NLRA ***does*** contain the right to refuse to hire employees for other, lawful reasons. As *Howard Johnson* illustrated, an employer may refuse to hire its predecessor's employees because the employer prefers to hire candidates who speak the language of the store's customers, who live in the community, or who have worked for the company before. *See* RT 74:28-75:2, 76:15-20, 142:18-22. The GWRO refuses to recognize these valid rationales and thereby infringes upon a freedom implicitly left to employers by the NLRA. As a result, *Machinists* preemption applies.

CONCLUSION

The superior court's judgment should be affirmed.

Dated: December 23, 2008

Respectfully submitted,

JONES DAY

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