Case No. S176099
Second Appellate District, Case No. B206750
Los Angeles Superior Court, Case No. BC351831

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION,
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,
Defendant and Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,
Intervener-Appellant.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Court of Appeal Case No. B206750

BRIEF *AMICI CURIAE* BY EMPLOYERS GROUP AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF POSITION OF RESPONDENT CALIFORNIA GROCERS ASSOCIATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important opportunity for the Employer Amici and their members to address one of the essential issues that guide employers in the management of their businesses and their labor and employment relationships – the scope of preemption under the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 151-169.

Congress enacted the NLRA to establish fundamental fairness between labor and management in their treatment of one another, in their collective bargaining negotiations, and in their use of economic forces to their own advantage without political processes favoring one side over the other. Because of the dangers associated with state and local governments bowing to political pressures and seeking to interfere with labor-management relations, as recently as last year, the United States Supreme Court has emphasized the broad and powerful scope of NLRA preemption. *Chamber of Commerce v. Brown*, __ U.S. __, 128 S. Ct. 2408, 171 L.Ed.2d 264 (2008). It is well established that a state or local law that interferes with the labor-management relationship is preempted by the NLRA pursuant to the Supremacy Clause of Article VI of the United States Constitution.

Here, the City of Los Angeles' Grocery Workers Retention Ordinance ("GWRO") (City of Los Angeles Municipal Code Chapter XVIII, §§ 181.00-181.08) impermissibly interferes with labor-management relations, tipping the delicate balance set by Congress in favor of labor unions. Unless this Court affirms the ruling by the court of appeal that the GWRO is preempted by the NLRA, other municipalities may wrongly believe that their police powers likewise justify inserting themselves into labor-management relations. The Employer Amici submit this Brief *Amici Curiae* to assist the Court in determining that (1) a city, such as the City of

Los Angeles, does not have the authority to adopt an ordinance like the GWRO that significantly interferes with labor-management relations (and, therefore, is subject to NLRA preemption under the *Machinists* doctrine) and (2) a city, such as the City of Los Angeles, may not compel an employer to assume the mantle of a successor and set the obligations of a buyer towards a seller's employees without triggering *Garmon* preemption.

SCOPE OF REVIEW

The issue of NLRA preemption is properly before this Court. As the court of appeal below properly held, any ground that results in affirming the judgment for Respondent California Grocers Association ("Respondent" or "CGA") is suitable to address on appeal. *See, e.g., Mike Davidov Co. v. Issod* (2000) 78 Cal. App. 4th 597, 610 ("If the decision of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the lower court reached its conclusion.").

The trial court invalidated the GWRO on two constitutional grounds: the conflict with California's Health and Safety Code and the violation of the equal protection guarantee. The court of appeal affirmed the trial court's ruling (without reaching the equal protection argument) and further found that NLRA preemption presented an additional reason to invalidate the GWRO. The Employer Amici urge this Court to affirm the court of appeal's ruling on NLRA preemption. The guidance that the Court provides in this case will serve other state courts in analyzing and understanding NLRA preemption and in protecting against impermissible intrusion by state and local government into areas of labor-management relations.

ARGUMENT

I. THE NLRA PREEMPTS THE GWRO UNDER THE *MACHINISTS* DOCTRINE BECAUSE THE GWRO IMPERMISSIBLY INTERFERES IN THE AREA OF LABOR-MANAGEMENT RELATIONS THAT CONGRESS INTENDED TO LEAVE UNREGULATED.

A. The GWRO Triggers NLRA Preemption Under the *Machinists* Doctrine.

When it passed the GWRO, the City fundamentally disrupted the balance of labor-management relations, interfered with the collective bargaining process, and impermissibly intruded into areas that Congress reserved for free market forces. At its core, the GWRO represents a local government's politically motivated entanglement in labor-management relations.

The United States Supreme Court has long recognized that the NLRA prevents a state or local government from regulating the economic strengths and tools implicated by labor-management relations. *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L.Ed.2d 396 (1976) (state could not regulate employees' concerted refusal to work overtime without interfering in use of economic forces for labor relations purposes as envisioned by Congress under the NLRA); *Livadas v. Bradshaw*, 512 U.S. 107, 120, 114 S. Ct. 2068, 129 L.Ed.2d 93 (1994) (holding that no state or local law may stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress in enacting the NLRA).

Further, just last year, in a case involving a challenge to another California law brought by the U.S. Chamber, the Supreme Court in *Chamber of Commerce v. Brown*, __ U.S. __, 128 S. Ct. 2408, 171 L.Ed.2d 264 (2008), explained that "*Machinists* preemption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Brown*, 128 S. Ct. at 2412 (internal quotations omitted).[1] Where Congress intended to let the free play of economic forces prevail, state and local governments are not allowed to regulate under the *Machinists* preemption doctrine. *Id.*

In the late 1980's, after the economic dislocations created by takeovers and dismantling of companies, several states tried to prevent further mass layoffs by enacting statutes that required buyers to be bound by the predecessor collective bargaining agreements. The courts invalidated these statutes as preempted under the NLRA, since the states intruded upon the choice of buyers whether to adhere to the terms and conditions of the collective bargaining agreement that applied to the seller's employees. *See, e.g., United Steelworkers of America v. St. Gabriel's Hospital*, 871 F. Supp. 335, 338 n.3 (D. Minn. 1994); *Commonwealth Edison Co. v. International Brotherhood of Electrical Workers Local Union No. 15*, 961 F. Supp. 1169 (N.D. Ill. 1997).

The GWRO seeks to accomplish the same result as the successorship statutes at issue in those cases through indirect methods that are just as

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1 *Brown* concerned a California statute that prohibited a recipient of state funds from promoting or deterring union activity. 128 S. Ct. at 2410-2411. The Supreme Court found NLRA preemption without specific evidence of any particular union activity or organizational drive at issue. *Id.* at 2417. The scope of the statute was sufficiently intrusive into labor-management relations as to require NLRA preemption. *Id.*

impermissible. Rather than imposing an express "successorship" clause, as Illinois and Minnesota tried in those cases, the GWRO requires a buyer to employ a seller's employees for 90 days, making it extremely likely, if not totally certain, that a buyer will be deemed a successor since substantial continuity of employment is a key factor in the successorship analysis. *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249, 264, 94 S. Ct. 2236, 41 L.Ed.2d 46 (1974) (no successorship where there was no substantial continuity of identity in the work force hired by Howard Johnson).

The Petitioners rely heavily on the flawed reasoning of *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), which declined to find that *Machinists* preemption applied to a contractor retention statute entitled the Displaced Workers Protection Act ("DWPA"). In *Washington Service Contractors Coalition*, the court speculated that the compulsory retention requirements on new contractors under the DWPA did not automatically lead to successorship status because the NLRB might exclude the period of compulsory retention of the previous contractor's employees required by the DWPA from its determination that the new contractor was a successor. 54 F.3d at 817. It then leaped to the conclusion that if the NLRB did not exclude the DWPA's compulsory retention period from its determination, and the NLRB found successorship status, the DWPA did not conflict with the aims of the NLRA. *Id.* The court embraced a sort of no-harm, no-foul rule without realizing that the DWPA set the terms of the game in the first instance.

What the court in that case failed to appreciate were the dangerous and intrusive consequences that occur if retention ordinances such as the GWRO or DWPA are allowed. They may compel successorship status even where the buyer has no intent and has taken no action to be a

successor and otherwise would not be a successor under the NLRA. Such a result is contrary to the Supreme Court's justification for imposing successorship status where the buyer ***voluntarily elects*** to hire a majority of the seller's employees. *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249, 264, 94 S. Ct. 2236, 41 L.Ed.2d 46 (1974) (discussing successorship doctrine as the result of reconciling the "protection afforded employee interests in a change of ownership" with "the new employer's right to operate the enterprise with his own independent labor force").

In this case, the court of appeal below recognized these inconsistencies in *Washington Service Contractors Coalition* and found the majority's opinion in that matter incorrect. Instead, the court of appeal based its ruling on the long line of decisions by the Supreme Court regarding successorship obligations under the NLRA.

The Supreme Court has long recognized the scope of NLRA preemption under the *Machinists* doctrine to protect the decisions of all employers, including buyers of a business, as to which employees to hire and under what terms, without interference from any state or local political process. Beginning with its decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549, 84 S. Ct. 909, 914, 11 L.Ed.2d 898 (1964), the Supreme Court has expressly and consistently recognized "the rightful prerogative of owners independently to rearrange their businesses...."

Further, in *National Labor Relations Board v. Burns International Security Services*, 406 U.S. 272, 92 S. Ct. 1571, 32 L.Ed.2d 61 (1972), the Court recognized that there had never been a holding that the NLRA "requires that an employer who submits the winning bid for a service contract ... [is] obligated to hire all of the employees of the predecessor...." *Id.* at 280 n.5. And in *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249, 262, 94 S. Ct. 2236, 41 L.Ed.2d 46 (1974), the Court cited *Burns*

as establishing that a "successor" employer "ha[s] the right not to hire any of the former [predecessor] employees, if it so desire[s]." 417 U.S. at 262.

The GWRO expressly interferes with these well-established rights. Under the GWRO, a buyer is not free to determine whether it wants to hire any of the seller's employees (or utilize only its existing employees) —it must hire from the seller's employees by seniority to fill its labor needs. Under the GWRO, a buyer is not free to determine the length of employment for new hires—it must employ the seller's employees for at least 90 days (absent "cause"). Under the GWRO, a buyer is not free to determine the discharge standard—it must adhere to a "just cause" standard for the seller's employees, even if the seller's employees were previously employed "at-will" and even if the "relevant" applicable collective bargaining agreement does not contain any "just cause" provision. Under the GWRO, the buyer is not fee to determine whether and when to conduct a performance appraisal—it must conduct a performance appraisal of the seller's employees at the end of the 90-day required retention period.

The GWRO's serious intrusion into labor-management relations is highlighted in a scenario where the triggering "Change in Control" event (Los Angeles Municipal Code § 181.01) is merely a transfer of a controlling interest in the ownership of a large grocery store with all employees continuing employment under the terms of the same collective bargaining agreement. Under this scenario, the GWRO could require an immediate change in the terms of a collective bargaining agreement, such that, for example, the employer could no longer avail itself of any contractual right to discharge employees "at will." The GWRO's provisions about whom to hire, for how long and under what terms, smack of just the kind of labor-management intrusion that the Supreme Court has sought to protect against with the *Machinists* preemption doctrine.

In fact, the GWRO intrudes even farther into the labor-management relationship than other laws courts have struck down as preempted by the NLRA. After a strike by a union of gravediggers, the State of Illinois enacted the Illinois Burial Rights Act to require cemeteries and gravediggers to agree on a pool of workers to perform burials during a labor dispute. *Cannon v. Edgar*, 33 F.3d 880 (7th Cir. 1994). The Seventh Circuit held that the Burial Rights Act intruded on the collective bargaining process by ordering the parties to negotiate as to a specific substantive condition—that of a pool of workers—or face sanctions for a failure to do so. *Id.* at 885. Because the Burial Rights Act directly interfered with the ability of the cemeteries and gravediggers to negotiate an agreement unfettered by the restrictions of state law, the *Cannon* court did not hesitate to find NLRA preemption.

Petitioners seek to justify the GWRO by arguing that because it applies equally to union and nonunion employers, it does not require an employer to recognize or bargain with any union. This factor is of no significance in the preemption analysis. In *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), the Ninth Circuit determined that the NLRA preempted a prevailing wage ordinance applicable to all employers on certain types of large, private industrial construction projects. To reach its decision, the Ninth Circuit did not analyze a specific collective bargaining agreement or specific collective bargaining negotiations, but rather examined what effect the ordinance was likely to have on the collective bargaining process to determine that the *Machinists* doctrine applied.

The Ninth Circuit explained that a state or local government's imposition of substantive requirements do affect the bargaining process and, if so restrictive, could "virtually dictate the results of the contract." *Id.* at 502. It recognized that "[t]he objective of allowing the bargaining

process 'to be controlled by the free-play of economic forces" can be frustrated by the imposition of substantive requirements, as well as by the interference with the use of economic weapons.'" *Bragdon*, 64 F.3d at 502, *citing Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991).

The Seventh Circuit similarly found that facially neutral meal and rest period requirements were subject to NLRA preemption in *520 South Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008). The Seventh Circuit reasoned that the substantive requirements in that case affected mostly (although not entirely) unionized workplaces and created an unequal balance in the collective bargaining process by requiring the imposition of meal and rest period standards that otherwise would be left to the collective bargaining process. *Id.* at 1133. To reach its holding, the Seventh Circuit relied heavily on the fundamental principles set forth by the Supreme Court in *Machinists* that left labor and management free to take economic action to advance their bargaining positions without any interference from the government. *Id.* at 1126.

Petitioners further contend that the GWRO is not preempted because it does not govern the use of "economic weapons" such as strikes, slowdowns, picketing, lockouts, boycotts, etc. The *Machinists* doctrine is not so narrowly limited:

> While initially, *Machinists* preemption sought "to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation, [i]t has been used more recently to determine the validity of state rules of general application that affect the right to bargain or to self-organization."

520 South Michigan Ave. Assocs., Ltd., 549 F.3d at 1126., *quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 n.27, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985).

It is exactly this free play of economic forces protected by the *Machinists* doctrine that employers have relied on for years to operate their businesses within the legal framework of the NLRA. This Court should continue protecting those economic freedoms envisioned by Congress by invalidating the GWRO on the basis of *Machinists* preemption.

B. The GWRO Is Not A "Minimum Labor Standard" To Escape NLRA Preemption Under the *Machinists* Doctrine.

Minimum labor standards adopted by state or local governments may fall outside of NLRA preemption if they have indirect effects on the collective bargaining process. However, the GWRO is not a "minimum labor standard."

The hallmark of a minimum labor standard is that it applies generally and sets forth a basic expectation of employers. Examples of valid minimum labor standards include broadly applicable minimum wage requirements, basic payroll practices on the timing of wage payments or the form of paystubs, and various anti-discrimination provisions under state and local law that apply to most, if not all, employers and set minimum expectations. *See, e.g., Metropolitan Life Ins. Co.*, 471 U.S. at 750 (holding NLRA did not preempt state law requiring all insurance policies to provide mental health coverage); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22, 107 S. Ct. 2211, 96 L.Ed.2d 1 (1987) (holding NLRA and ERISA did not prevent state statute that required all employers to provide one-time severance payment to employees in the event of a plant closing).

Simply because a state or local law effects union and nonunion employers equally does not mean that the law represents a minimum labor standard. The law must indeed be a minimum labor standard, and it may not be inconsistent with the general legislative goals of the NLRA.

Metropolitan Life, 471 U.S. at 751. The Supreme Court in *Metropolitan Life* explained that minimum state labor standards must "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act." 471 U.S. at 755.

The GWRO neither satisfies the spirit nor the letter of the "minimum labor standard" exception to NLRA preemption. Unlike ordinances that have been recognized as "minimum labor standards," the GWRO is not a regulation of general applicability: it targets a certain industry (grocery), certain types of employers within that industry (non-membership), in a certain locale (Los Angeles) and only certain sized operations of those employers (over 15,000 square feet). The City Council knew very well that such grocery stores were more likely to be unionized in light of the grocery workers strike that preceded the adoption of the GWRO. *See* Appendix of Intervenor-Appellant Los Angeles Alliance for a New Economy ("IAX __, at __"), IAX 6, at 164-65 and 167-68.

Furthermore, the sanctions for violating the GWRO fall far afield from any minimal legal requirements. Instead of damages of back pay at a regular rate that the worker would have received if employed by the buyer, the GWRO imposes an exponential back pay penalty calculated at the higher of the average regular rate of pay received by the grocery worker during the last three years of his or her employment in the same occupation or classification with the seller or other previous employer. Thus, a worker who during the first two years of the three year period had worked for a company at a rate of pay double to what was subsequently received while working for the seller, would receive a significantly inflated recovery under the GWRO as a result. Where a state or local law seeks to impose greater damages than warranted under the circumstances, such as the GWRO does, the law is not a legitimate "minimum labor standard." *520 South Michigan*

Ave. Assocs., Ltd, 549 F.3d at 1135 (no minimum labor standard where statute imposed treble normal back pay and payment of attorneys fees and costs).

Even where state or local laws have had much broader impact than the GRWO, the courts have rejected their exemption from NLRA preemption as minimum labor standards. For example, the Ninth Circuit held that a state law establishing a minimum wage scale for apprentices was not a minimum labor standard protected from NLRA preemption, in part because "a set wage for apprentices would have required higher pay for all levels in the trade in order to maintain the graded wage scale," and, therefore, had a distorting effect on the bargaining process. *Bechtel Const., Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220, 1226 (9th Cir. 1987).

Similarly, in *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995), the Ninth Circuit held that an ordinance establishing a prevailing wage for certain types of private industrial construction projects costing over $500,000 was not a minimum labor standard outside the scope of NLRA preemption. The *Bragdon* court reasoned:

> "This is also not the type of regulation of general application that assures that certain coverage provisions be included in all health insurance contracts, such as in *Metropolitan Life*; nor is it the type of regulation seeking to alleviate a particular hardship such as plant closings that affect the employees and the community. This Ordinance, by contrast, sets detailed minimum wage and benefit packages, distinct for each craft involved in certain limited construction projects. The minimum varies from time-to-time as new averages are calculated. The district court noted that unlike the law upheld in *Metropolitan Life*, the Ordinance is more properly characterized as an example of an interest group in public-interest clothing." 64 F.3d at 503.

Contrary to the arguments made by Intervenor-Appellant Los Angeles Alliance for a New Economy ("LAANE") in its Reply Brief, the *Bragdon* decision remains good law. Though the Ninth Circuit has limited *Bragdon,* holding that the narrow scope of an ordinance alone is not a sufficient basis upon which to invalidate an ordinance, *see Associated Builders & Contractors of Southern California v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004), it continues to be the law that when the narrow scope of an ordinance potentially dictates the results of the collective bargaining process and "equates more to a benefit for a bargaining unit than an individual protection," the ordinance is not a minimum labor standard exempted from preemption. *520 South Michigan Ave. Assocs.*, 549 F.3d at 1133 (relying on the holding in *Bragdon* while recognizing the subsequent limitations on the decision). Courts continue to recognize that an ordinance should be invalidated when it is nothing more than "an interest group deal in public-interest clothing." *Fortuna Enters., L.P. v. City of L.A.*, 673 F. Supp. 2d 1000, 1010 (9th Cir. 2008).

The GWRO is much more invasive than the broader laws held preempted by the NLRA in *Bechtel* and *Bragdon.* It is also a far cry from the general application statutes approved in *Metropolitan Life* and *Fort Halifax*. On this point, Petitioners again urge that the GWRO is akin to the DWPA that a court found to be not preempted in *Washington Service Contractors Coalition.* The statute at issue in that case is materially different from the GWRO. Implicit in the court's holding in *Washington Service Contractors Coalition* was its belief that the DWPA represents "employee protective legislation" that may or may not have an effect on bargaining. The same cannot be said of the GWRO.

Unlike the GWRO, the DWPA was not limited to particular employers within a particular industry; rather, it applied broadly to a wide range of contractors performing relatively unskilled and interchangeable

labor in the "food, janitorial, maintenance, or nonprofessional health care services." 54 F.3d at 814. Additionally, the DWPA applied to contractors who take over the same contracts as the predecessor had serviced, and, presumably, have less of an interest in determining who performs the work than the fee to be paid to perform the same work. The GWRO, in contrast, applies to all buyers regardless of their intention in operating the business (e.g., whether they will close for remodeling, whether the new store will adopt a new brand or a new service requiring different expertise or specialized knowledge in various groceries, wines, organic foods and the like). Because grocery companies (either the seller or the buyer) may elect to comply with the GWRO in a variety of different ways (e.g., seller terminating all employees, buyer closing store for months to renovate and seller's employees unemployed, and buyer retaining and then terminating all of the seller's employees after the cessation of the 90-day period), the GWRO does not provide the universality expected of an appropriate minimum legal standard.

Another test to determine whether a state or local law sets forth a minimum labor standard is to evaluate how closely the law accomplishes its stated goals. *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 503 (9th Cir. 1995) (finding no minimum labor standard in prevailing wage ordinance where the public purpose justification was tenuous). Under the GWRO, the buyer may decide to offer different types of produce or other food products or install different machinery or refrigeration equipment or make other changes that are not within the experience of the seller's employees such that their retention will have no effect on the maintenance of health and safety standards. Additionally, small grocers, large membership clubs, and other businesses selling food goods are no different in terms of their purported health and safety risks than the grocery stores over 15,000 square feet that are the target of the GWRO.

Even if the GWRO had been adopted for the purpose of protecting jobs apart from health and safety, there are numerous other businesses (healthcare providers, gas stations, restaurants, banks, pharmacies, drug stores, and the like, not to mention other grocery stores membership clubs) with those same attributes that the City did not include within the scope of the GWRO.

Further, the terms of the GWRO are not likely to improve the stability of the large grocery store workforce. If large grocery stores looking to exit the market are unable to find buyers to take over the store because of the onerous requirements of the GWRO, they will stop operating. No new buyer will enter the marketplace. All of the grocery store's employees will be laid off and no new jobs will be created as economic development is curtailed as a result of the City's interference in the marketplace. Several witnesses testified during the trial of this action that this is exactly what is happening: grocery companies are ***not*** purchasing stores because of the obligations imposed by the GWRO. *See* Reporter's Trial Transcript of Proceedings, 68:11-14, 117:16-118:12; 147:6-10.

In other situations, some buyers may shut down stores for an extensive period of time to renovate and implement other improvements – that long of a delay will lead to the seller's employees needing to find other work.

The GWRO also may incentivize a seller to terminate its employees prior to the sale in order to obviate the otherwise oppressive burden on the buyer to hire those employees for 90 days. Even in those situations where a buyer complies with the GWRO, the result may lead to a mere postponement of the eventual layoff of the seller's employees after the expiration of the 90 day period.

Under all of these scenarios, the GWRO offers nothing to improve the stability of the workforce of grocery store workers. While a city may adopt an ordinance that sets a minimum labor standard that does not run afoul of the *Machinists* doctrine, no exception to the broad scope of NLRA preemption applies to the GWRO which is not a minimum labor standard.

C. The Political Process Should Not Be Used As A Means To Favor Labor (or Management) And Interfere With the Collective Bargaining Process.

The result of an ordinance like the GWRO is to encourage unions to lobby for political solutions to their bargaining disputes. The political process becomes a substitute for the collective bargaining process. Indeed, when it adopted the GWRO, the City fell prey to political pressures and effectively (and impermissibly) substituted itself as the bargaining representative for the Eligible Grocery Workers.

Several City Council Members made comments indicative of their intent to assist the unionized grocery workers by adopting the GWRO. IAX 6, at 167-68 (Councilman Bill Rosendahl: "I will never forget the strike a little bit ago, when I went into my Vons, which I didn't go into when the strike was on. When the strike was over . . . there were a lot of temporary workers in there, that were pushing out the rank and file workers that were there. A lot of good people were hurt, and I don't want to see more good people hurt by any of these mergers and acquisitions."); IAX 6, at 164-65 (Council Member Zine supported the ordinance because of concern that Vons exercised its right to employ temporary workers after the strike); *see also* Request for Judicial Notice, Los Angeles Times, "L.A. Council Acts to Save Grocery Jobs," Mcgreevy, P. and Goldman, A., at C-1

(December 22, 2005) (reporting that Council Member Zine supported the GWRO based on his underlying concern that new owners are buying unionized stores and bringing in nonunion employees).

Congress recognized the danger of the local political process interfering with collective bargaining when it enacted the NLRA. As the Ninth Circuit explained in *Bragdon*, 64 F.3d 497 (9th Cir. 1995):

> "A precedent allowing this interference with the free play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies. This could invoke the defensive action by employers seeking to obtain caps on wages in various businesses or industries. This could be justified as an exercise of police power on community welfare grounds of lowering construction costs to attract business to the area or lowering costs to consumers so as to make products or services more available to the general public. This substitutes the free-play of political forces for the free play of economic forces that was intended by the NLRA." *Id.* at 504.

It is likely that other unions and cities are carefully watching this case to see if they may use their political power to insert themselves in situations to adjust the relative dynamic that has resulted from the legitimate exercise of economic force in the context of protected labor-management relations. This Court must send a firm message that Congress never intended to allow state and local governments the ability to regulate any aspect of labor-management relations. Affirming the trial court's judgment on NLRA preemption grounds under the *Machinists* doctrine will further Congress's intent and protect the labor-management arena from political interference.

II. THE GWRO IS PREEMPTED UNDER THE *GARMON* DOCTRINE BECAUSE IT REGULATES CONDUCT EXPRESSLY GOVERNED BY THE NLRA.

The *Garmon* preemption doctrine prohibits a state or local law from regulating conduct that is either prohibited or protected, or arguably prohibited or protected by the NLRA, and, thus, subject to the primary jurisdiction of the NLRB.[2] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959) (NLRA preempts state lawsuit based on peaceful picketing). The *Garmon* doctrine seeks to prevent conflicts between state and local regulation and Congress's integrated scheme of regulation embodied in Sections 7 and 8 of the NLRA. *Cannon v. Edgar,* 33 F.3d at 884. The Supreme Court recognized the importance of leaving certain issues to the primary jurisdiction of the NLRB. *Garmon*, 359 U.S. at 248.

At issue here is the NLRA's Section 8(d) which sets forth the obligation of parties to bargain collectively and "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

Contrary to Section 8(d)'s protections of the collective bargaining process, the GWRO imposes restraints on the ability of a buyer to bargain freely with its employees by requiring certain terms and conditions of employment (90-day retention of seller's employees, performance appraisals, "just cause" discharge standard) and by requiring the buyer to retain the seller's employees, thereby fulfilling the major indicia of

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[2] The court of appeal did not need to analyze whether the GWRO is preempted under the *Garmon* doctrine because it ruled that *Machinists* preemption applied. Nonetheless, the GWRO is also preempted under the *Garmon* doctrine for the reasons set forth herein.

successorship status. Although the GWRO allows parties to negotiate their own terms in a collective bargaining agreement, the GWRO compels a buyer to provide at least the guarantees that the ordinance requires as a practical matter. There is no realistic possibility that a union would concede the unprecedented job protections mandated by the GWRO.

By its requirements on buyers, the GWRO leaves no freedom in the collective bargaining process that is otherwise protected by Section 8(d) of the NLRA. *United Steelworkers of America v. St. Gabriel's Hospital*, 871 F. Supp. at 341; *see also Burns*, 409 U.S. at 287 ("This bargaining freedom [under Section 8(d)] means that both parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will.").

Under similar circumstances the Seventh Circuit applied *Garmon* preemption (in addition to *Machinists* preemption) to invalidate the Burial Rights Act which required the parties to agree on a pool of workers (as discussed above). *Cannon v. Edgar*, 33 F.3d 880, 884-5 (7th Cir. 1994). In reaching its decision, the Seventh Circuit explained:

> "The NLRA does not tolerate this kind of invasion by a state into the collective bargaining process. As *Garmon* requires, the collective bargaining process is regulated by the NLRA. 29 U.S.C. §§ 157 & 158. And, as we have explained, the NLRA leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process." 33 F.3d at 884-5.

Bargaining over the selection of employees for the pool of workers was central to the conduct that is governed by Section 8(d) of the NLRA, and, thus, the Seventh Circuit invalidated the Burial Rights Act on *Garmon* preemption grounds. *Id.* at 885. The GWRO's requirements about the selection of employees and the terms and conditions of their employment

are also central to the collective bargaining process protected by the NLRA, and, likewise, are subject to *Garmon* preemption.

In certain instances, the courts have exempted some state and local laws from *Garmon* preemption if "the regulated activity is (1) merely of peripheral concern to federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility." *Cannon*, 33 F.3d at 884, *citing Belknap, Inc. v. Hale,* 463 U.S. 491, 498, 103 S. Ct. 3172, 3177, 77 L.Ed.2d 798 (1983). But those exceptions to *Garmon* preemption have usually been general state laws, such as criminal and tort laws. *See, e.g., Farmer v. United Bhd. of Carpenters and Joiners*, 430 U.S. 290, 97 S. Ct. 1056, 51 L.Ed.2d 338 (1977) (union member could sue his union for a state tort of intentional infliction of emotional distress that was unrelated to the bargaining process); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 S. Ct. 1745, 56 L.Ed.2d 209 (1978) (NLRA does not preempt state law trespass action).

The GWRO does not fall within any exception to *Garmon* preemption. It squarely addresses the terms and conditions of employment to be applied to the retention of a seller's employees (otherwise analyzed under the successorship doctrine before the NLRB) such that its impact is much more than a "peripheral concern to federal labor law."

Moreover, nothing about the GWRO stems from a deep-rooted local interest. The GWRO grew out of a reaction to the aftermath of the grocery workers strike and the possibility of a sale and layoff of employees from a large chain of grocery stores. This presents a common issue of all employers and all employees throughout the nation that some mergers and acquisitions may impact on the long-term employment status of employees. It does not demonstrate some unique circumstance of certain large grocery store workers in the City of Los Angeles. *Cannon*, 33 F.3d at 885 (no exemption from *Garmon* preemption existed to save the Illinois Burial

Rights Act which did not arise from deep local issues since every community faces burials).

The NLRA expressly governs the collective bargaining process, and the GWRO may not impose any interference. Accordingly, in addition to NLRA preemption under the *Machinists* doctrine discussed above, *Garmon* preemption justifies invalidating the GRWO.

CONCLUSION

For the reasons set forth herein, Employer Amici respectfully ask the Court to affirm the judgment in favor of Respondent California Grocers Association.

DATED: April 22, 2010

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that the enclosed brief contains 6088 words. I have relied on the word count of the computer program used to prepare this brief.

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 .

On **April 22, 2010**, I served a copy of the foregoing document(s) described as ***BRIEF AMICI CURIAE BY EMPLOYERS GROUP AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF POSITION OF RESPONDENT CALIFORNIA GROCERS ASSOCIATION*** on the interested parties in this action at their last known address as set forth below by taking the action described below.

See Attached Service List

☒ BY PLACING FOR COLLECTION AND MAILING: I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

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

Executed on **April 22, 2010**, at Los Angeles, California.

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