Supreme Court Docket No. S176099
Court Of Appeal, Second Appellate District,
Division Five, Docket No. B206750
Los Angeles Superior Court Case No. BC351831

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA GROCERS ASSOCIATION,
Plaintiff and Respondent,

vs.

CITY OF LOS ANGELES,
Defendant and Appellant,

and

LOS ANGELES ALLIANCE FOR A NEW ECONOMY,
Intervenor and Appellant.

After A Decision By The Court Of Appeal Of California,
Second Appellate District, Division Five

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The California Grocers Association argues in its answer to the City's and LAANE's Petitions for Review that there is nothing worthy of review in the Court of Appeal's decision. Its own arguments prove the opposite.

First, CGA's answer demonstrates the need for review in order to settle an important question of law. CGA's brief, like the Court of Appeal's decision, rests heavily on the dissenting opinion of a single judge in the Washington Service Contractors Coalition v. District of Columbia (D.C. Cir. 1995) 54 F.3d 811 case. That dissent has yet to attract a single judicial decision that agreed with it—other than the Court of Appeal's decision in this case.

The Court of Appeal's decision, if allowed to stand, could be used to challenge a wide range of state laws on the theory that, since federal labor law did not regulate the topic, the states could not do so either. That radical expansion of federal labor law preemption principles would create precisely the sort of "artificial . . . no-law area" that the United States Supreme Court warned against in Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 756-57, 105 S.Ct. 2380, 85 L.Ed.2d 72. Review is necessary to prevent the Court of Appeal from taking the lower courts in that direction.

Review is also necessary in order to secure uniformity of decision in this area. The Court of Appeal's decision is not only at odds with those cases that have followed the majority opinion in Washington Service Contractors and the Supreme Court precedents on which the majority relied, but also with prior California decisions that have rejected similar preemption arguments. The majority's decision in this case cannot be squared with cases such as Southern California Edison Co. v. Public Utilities Commission (State Building & Construction Trades Council of California) (2006) 140 Cal.App.4th 1085, 1103-04, 45 Cal.Rptr.3d 485.

These same considerations call for review of the Court of Appeal's decision that the California Retail Food Code preempts the Ordinance. The Court of Appeal's approach, which treats the substantive terms of the Ordinance as if they

were only a secondary consideration, and relies instead on a purely semantic overlap between the Ordinance and the CRFC to find that the two laws are meant to regulate the same field, is contrary to this Court's decision in Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1152, 45 Cal.Rptr.3d 21, 136 P.3d 821 and appellate decisions such as Harrahill v. City of Monrovia (2002) 104 Cal.App.4th 761, 128 Cal.Rptr.2d 552.

Finally, CGA's request to add its equal protection arguments to those issues to be reviewed underscores the necessity for review of the Court of Appeal's decision. While CGA's equal protection claims lack merit, for all the reasons laid out in Justice Mosk's dissenting opinion in this case, CGA's persistence in raising them demonstrates the need to address those issues.

ARGUMENT

A. THE COURT OF APPEAL'S DECISION ON FEDERAL LABOR LAW PREEMPTION PUTS CALIFORNIA AT ODDS WITH FEDERAL LAW ON THIS ISSUE

CGA's defense of the Court of Appeal's decision proceeds as follows:

- requiring an employer that is taking over a unionized employer's business to offer employment to the prior employer's workforce is tantamount to requiring that employer to recognize the union that represented those employees (Answer at 25);
- requiring the new employer to recognize the union that represented those employees is essentially the same as requiring it to adopt the predecessor's union contract (Answer at 24);
- which triggers application of the Machinists doctrine, since the NLRA not only does not require the new employer to hire the predecessor employer's employees, but bars any state law that would require it to do so. (Answer at 23)

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As LAANE has noted in its Petition, each of these claims is incorrect. The Court of Appeal's decision puts California's courts on a collision course with the federal labor law preemption principles developed over the past twenty-five years. Metropolitan Life, *supra*; Fort Halifax Packing Co., Inc. v. Coyne (1987) 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1.

CGA dismisses these challenges to the Court of Appeal's decision by arguing that, even if the Court's decision is incorrect, that is not enough to create an important issue of law worthy of review. CGA could not be more wrong.

If CGA were correct, and the fact that the NLRA does not, as a general rule, require an employer to hire the employees of its predecessor were enough to bar the states from regulating in this area, then the limits on federal labor law preemption laid down in cases such as Metropolitan Life and Fort Halifax would be largely erased. A familiar example illustrates the point: since the NLRA does not, with limited exceptions, require an employer to allow non-employee union representatives onto its property to speak to employees or present the union's message, *see*, Hudgins v. NLRB (1976) 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196, then a court could interpret that silence to mean that Congress also intended to preempt any state law that allows that sort of access to private property for expressive purposes.

That is not the law. *See,* PruneYard Shopping Center v. Robins (1980) 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; Fashion Valley Mall, LLC v. NLRB (2007) 42 Cal.4th 850, 69 Cal.Rptr.3d 288, 172 P.3d 742. On the contrary, as the United States Supreme Court has stressed for more than a half century, preemption is a powerful weapon that must be applied sparingly, and only when the state or local law in question poses an actual conflict with federal law. Day-Brite Lighting, Inc. v. Missouri (1952) 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469. Federal law does not preempt state property law in this area, simply because the NLRA is silent.

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Similarly, no case—prior to the Court of Appeal's decision in this case—has held that a statute that requires a new owner to offer temporary employment to its predecessor's employees is preempted on that basis; on the contrary, the case law is unanimous that federal labor law does not preempt such laws. Washington Service Contractors Coalition, *supra*; Alcantara v. Allied Properties, LLC (E.D.N.Y. 2004) 334 F.Supp.2d 336, 344-45. The fact that the NLRA does not require the new employer to hire the employees of the previous employer does not mean that it thereby creates a federally protected right to refuse to hire those employees. Washington Service Contractors, 54 F.3d at 817.

The Court of Appeal's decision, however, throws that straightforward proposition into doubt, at least in California's courts. If allowed to stand it could also undermine state laws in any number of employment law issues in which state law operates, but the NLRA is silent. This case raises important issues of law that should be reviewed by this Court.

B. THE COURT OF APPEAL'S DECISION ON FEDERAL LABOR LAW PREEMPTION IS IN CONFLICT WITH OTHER APPELLATE DECISIONS ON THIS ISSUE

The Court of Appeal's decision in this case is also in conflict with the decision of another panel of the Second District Court of Appeal in Southern California Edison Co. v. Public Utilities Commission (State Building & Construction Trades Council of California) (2006) 140 Cal.App.4th 1085, 45 Cal.Rptr.3d 485. Southern California Edison recognizes the distinction that Metropolitan Edison and Fort Halifax draw—and that the Court of Appeal in this case ignored—between a state law that regulates labor conditions that may be the subject of collective bargaining and those that seek to impose a collective bargaining agreement on the parties. Id., 140 Cal.App.4th at 1101-04.

CGA attempts, in its defense of the majority's decision in this case, to blur that distinction by claiming that requiring the new owner to offer employment to

the predecessor's employees will automatically make it a successor, and that this will somehow require it to adopt the predecessor's collective bargaining agreement. (Answer at 24) Its own authorities, starting with Howard Johnson Co. v. Hotel Employees (1974) 417 U.S. 249, 262, 264, 94 S.Ct. 2236, 41 L.Ed.2d 46 show how flimsy this argument is.

The Court of Appeal in Southern California Edison had no difficulty recognizing this distinction and rejecting authorities, such as Chamber of Commerce of U.S. v. Bragdon (9th Cir. 1995) 64 F.3d 497, on which CGA urges this Court to rely.[1] Review should be granted to settle this conflict in applying federal labor law preemption principles to California law.

C. THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS ON THE APPROPRIATE FRAMEWORK FOR DETERMINING WHETHER LOCAL ORDINANCES ARE PREEMPTED BY STATE LAW

This case puts the issue of the proper application of state law preemption principles in the clearest terms: if a local ordinance and state statute regulate different fields, then does the fact that the ordinance might have an incidental connection to the field regulated by the statute support the preemption of the local ordinance?

This Court's decision in Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1152, 45 Cal.Rptr.3d 21, 136 P.3d 821 tells us that it does not. The Court of Appeal, however, chose to recast the issue so that, rather than basing its decision on the substantive terms of the Ordinance, the Court relied instead on language in the preamble to turn an employment regulation into a health and safety standard.

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[1] As the Court in Southern California Edison noted, the Ninth Circuit itself has disavowed Bragdon. Southern California Edison, 140 Cal.App.4th at 1103.

This sort of opportunistic approach to preemption, which ignores the substantive terms of the two laws in question, threatens to turn state law preemption into the same sort of standardless, unpredictable tool for undoing local laws as the Court of Appeal's misreading of federal labor law preemption. Review is appropriate to address the state law preemption issues raised by LAANE's and the City's Petitions for Review.

CONCLUSION

For all the reasons set out above, Los Angeles Alliance for a New Economy urges that this Court grant review of the Court of Appeal's decision in this matter.

Dated: October 7, 2009

Respectfully submitted,

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By 

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

I, HENRY M. WILLIS, declare that:

I am a partner in the law firm of Schwartz, Steinsapir, Dohrmann & Sommers LLP, counsel of record for Petitioners in the above-captioned cases.

I certify that the foregoing memorandum of points and authorities contains 1660 words, not including tables and this certificate, as counted by the Word program used to generate this brief.

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

Executed on October 7, 2009 at Los Angeles, California.

HENRY M. WILLIS

PROOF OF SERVICE BY MAIL

City of Los Angeles, L.A. Alliance for A New Economy
vs.
California Grocers Association
Superior Case No: BC351831
Appeal Case No: B206750

JOANNA RIVERA certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268.

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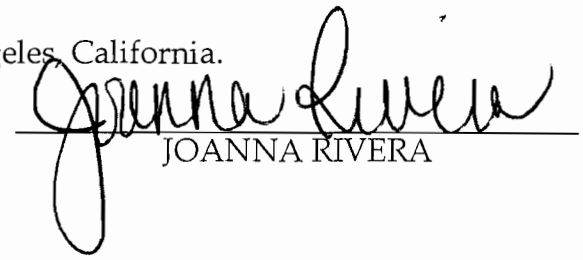

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