

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S176099

CALIFORNIA GROCERS ASSOCIATION,
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,
Defendant and Appellant,

and

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

After an Opinion by the Court of Appeal,
Second Appellate District, Division Five
(Case No. B206750)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC351831, Honorable Ralph Dau, Judge)

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFF AND RESPONDENT**

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 3 |
| I. THE RATIONAL BASIS TEST DOES NOT AUTHORIZE COURTS TO ABANDON MEANINGFUL SCRUTINY OF LEGISLATIVE ACTIONS | 3 |
| A. The Rational Basis Test Requires Some Genuine Connection Between the Distinctions Government Creates and a Legitimate Government Purpose | 3 |
| B. The Government May Not Satisfy the Rational Basis Test by Mere Assertion | 7 |
| II. THE RETENTION ORDINANCE DOES NOT PROTECT PUBLIC HEALTH AND SAFETY, BUT IS DESIGNED ONLY TO ECONOMICALLY BENEFIT LABOR UNIONS AND THEIR POLITICAL ALLIES | 9 |
| A. There Is No Rational Relationship Between the Retention Requirement and Public Health or General Economic Welfare | 10 |
| B. The Ordinance Imposes Union-Favoring Featherbedding Rules Which State and Federal Law Have Declared Contrary to Public Policy | 16 |
| CONCLUSION | 22 |
| CERTIFICATE OF COMPLIANCE | 23 |
| DECLARATION OF SERVICE BY MAIL | 24 |

TABLE OF AUTHORITIES

| | Page |
|---|----------------|
| Cases | |
| <i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995) | 3 |
| <i>Am. Newspaper Publishers Ass’n v. NLRB</i> , 345 U.S. 100 (1953) | 18 |
| <i>Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe Ry. Co.</i> , 768 F.2d 914 (7th Cir. 1985) | 16 |
| <i>Brown v. Barry</i> , 710 F. Supp. 352 (D.D.C. 1989) | 12 |
| <i>Burlington Northern & Sante Fe Ry. Co. v. Pub. Utilities Comm’n</i> , 112 Cal. App. 4th 881 (2003) | 9 |
| <i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985) | 4 |
| <i>Craigmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002) | 4, 6, 16 |
| <i>FCC v. Beach Commc’ns, Inc.</i> , 508 U.S. 307 (1993) | 3 |
| <i>H. K. Porter Co., Inc. v. NLRB</i> , 397 U.S. 99 (1970) | 21 |
| <i>Hernandez v. Hanford</i> , 41 Cal. 4th 279 (2007) | 4, 6 |
| <i>Hooper v. Bernalillo County Assessor</i> , 472 U.S. 612 (1985) | 5 |
| <i>Island Silver & Spice, Inc. v. Islamorada</i> , 542 F.3d 844 (11th Cir. 2008) | 1 |
| <i>Mathews v. Lucas</i> , 427 U.S. 495 (1976) | 2 |
| <i>Merrifield v. Lockyer</i> , 547 F.3d 978 (9th Cir. 2008) | 1, 4-7, 11, 14 |
| <i>Metro. Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985) | 5 |
| <i>Mutual Life Ins. Co. of N.Y. v. City of Los Angeles</i> , 50 Cal. 3d 402 (1990) | 13 |

| | Page |
|--|------------------|
| <i>Newland v. Bd. of Governors of the Cal. Cmty. Colls.</i> , 19 Cal. 3d 705 (1977) | 8 |
| <i>People v. Haynes</i> , 160 Cal. App. 3d 1122 (1984) | 13 |
| <i>Romer v. Evans</i> , 517 U.S. 620 (1996) | 1, 4-5, 8, 21-22 |
| <i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1975) | 13 |
| <i>Schware v. Bd. of Bar Exam'rs of the State of N.M.</i> , 353 U.S. 232 (1957) | 21 |
| <i>Scofield v. NLRB</i> , 394 U.S. 423 (1969) | 20 |
| <i>Silveira v. Lockyer</i> , 312 F.3d 1052 (9th Cir. 2002), <i>cert. denied</i> , 540 U.S. 1046 (2003) | 7 |
| <i>Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel</i> , 20 F.3d 1311 (4th Cir. 1994) | 6 |
| <i>Thunderbird Mining Co. v. Ventura</i> , 138 F. Supp. 2d 1193 (D. Minn. 2001) | 21 |
| <i>U.S. Dep't of Agric. v. Moreno</i> , 413 U.S. 528 (1973) | 21 |
| <i>United States R.R. Ret. Bd. v. Fritz</i> , 449 U.S. 166 (1980) | 8 |
| <i>United States v. Robinson</i> , 119 F.3d 1205 (5th Cir. 1997) | 8 |

United States Statute

| | |
|-----------------------------|----|
| 29 U.S.C. § 158(b)(6) | 18 |
|-----------------------------|----|

Miscellaneous

| | |
|--|----|
| Aaron, Benjamin, <i>Governmental Restraints on Featherbedding</i> , 5 Stan. L. Rev. 680 (1953) | 17 |
| Cox, Archibald, <i>Labor and the Antitrust Laws—A Preliminary Analysis</i> , 104 U. Pa. L. Rev. 252 (1955) | 17 |

| | Page |
|---|-------------|
| Heckman, James & Pagés-Serra, Carmen, <i>The Cost of Job Security Regulation: Evidence from Latin American Labor Markets</i> , 1 <i>Economía</i> 109 (2000) | 20 |
| LAANE Board of Directors, <i>available at</i> http://www.laane.org/about-us/who-we-are/board-of-directors (last visited Feb. 10, 2010) | 14 |
| LAANE website, <i>available at</i> http://laanenetwork.laane.org/laane/laanejobs.html (last visited Feb. 10, 2010) | 14 |
| Lazear, Edward P., <i>Job Security Provisions and Employment</i> , 105 <i>Q. J. of Econ.</i> 699 (1990) | 20 |
| Lindbeck, Assar & Snower, Dennis J., <i>Job Security, Work Incentives and Unemployment</i> , 90 <i>Scandinavian J. of Econ.</i> 453 (1988) | 19 |
| Mitchell, Stacy, Institute for Local Self-Reliance, <i>The Impact of Chain Stores on Community</i> , Speech Delivered at the Annual Conference of the American Planning Association (Apr. 2000) | 15 |
| Posner, Richard A., <i>Some Economics of Labor Law</i> , 51 <i>U. Chi. L. Rev.</i> 988 (1984) | 17 |
| Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/12/can_the_united.html (Dec. 28, 2008, 16:26 CST) | 19 |
| Scalia, Eugene, <i>Ending Our Anti-Union Federal Employment Policy</i> , 24 <i>Harv. J.L. & Pub. Pol’y</i> 489 (2001) | 19 |
| Schragger, Richard C., <i>The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940</i> , 90 <i>Iowa L. Rev.</i> 1011 (2005) | 15 |
| Schwartz, Mindy, <i>The American Federation of Musicians: An Unearned Encore for Featherbedding</i> , 47 <i>Wayne L. Rev.</i> 1339 (2002) | 18 |

| | Page |
|---|-------------|
| Simler, Norman J., <i>The Economics of Featherbedding</i> (1963), reprinted in Paul A. Weinstein, <i>Featherbedding and Technological Change</i> (1965) | 17 |
| Simpson, Steven M., <i>Judicial Abdication and the Rise of Special Interests</i> , 6 Chap. L. Rev. 173 (2003) | 12 |
| Sunstein, Cass R., <i>Naked Preferences and the Constitution</i> , 84 Colum. L. Rev. 1689 (1984) | 1, 7 |

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the court of appeal affirmed without reaching the Respondent's equal protection arguments, the Retention Ordinance challenged in this case also violates the Equal Protection Clause. This provides independent grounds for affirming the decision below even if, as the City and Intervenor argue, the Ordinance has no relationship to protecting public health and safety.

When a law treats groups or individuals differently, courts must ensure that this differential treatment is not simply a means toward political or economic favoritism. *See Romer v. Evans*, 517 U.S. 620, 632 (1996), *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008). This is because the Equal Protection Clause forbids the government from distributing “resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.” Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984).

Local governments often disguise economic protectionism by using the language of advancing the public good. *See, e.g., Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008) (local “historic preservation” ordinance was actually invalid protectionism). If courts accept local officials' assertions at face value, without applying meaningful scrutiny

to them, the result will be the practical abandonment of judicial review. The Supreme Court has made it clear that, while rational basis review is deferential, it does not call for the abdication of judicial review. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Economic regulations are therefore subject to limited but meaningful scrutiny to prevent unconstitutional acts of mere favoritism. Rational basis review does not allow courts to substitute their views about the *wisdom* of a law for the views of elected representatives, but courts must rule a law invalid when it exceeds the representatives' constitutional authority, and that is the case here. The Retention Ordinance is not only an unwise and unjust form of "featherbedding"; it also violates the Constitution by extending economic favors to a politically influential group at the expense of another, less-influential group, with no rational connection to public health, safety, and welfare. However wide the City's discretion may be, it may not use its power of protecting the public as a disguise for granting economic favors to those constituents it deems more worthy.

ARGUMENT

I

THE RATIONAL BASIS TEST DOES NOT AUTHORIZE COURTS TO ABANDON MEANINGFUL SCRUTINY OF LEGISLATIVE ACTIONS

A. The Rational Basis Test Requires Some Genuine Connection Between the Distinctions Government Creates and a Legitimate Government Purpose

All persons are entitled to be treated equally before the law. How that principle applies in particular cases differs with the context, and courts allow narrower or broader degrees of discretion to legislatures to act as necessary given the subjects on which they legislate. On matters in which government rarely has any legitimate role—such as distinguishing between citizens on the basis of race—legislators have exceedingly narrow discretion. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995) (citation omitted; plurality op.) (“[R]acial discriminations are in most circumstances irrelevant and therefore prohibited.”). On the other hand, with regard to economic matters, government has a broader range of discretion, because it has a broader range of legitimate activities, and courts recognize that elected officials must be free to respond to economic problems as they arise. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993).

Yet this broader discretion, characterized as rational basis scrutiny, does not give legislators free rein to act in whatever manner they wish. For a law

to satisfy rational basis scrutiny, it must have some serious, albeit loose, relationship to the protection of public health, safety, and welfare. The rational basis test does not allow government to deprive disfavored individuals of economic opportunities or property rights for the private benefit of specific interest groups. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.”); accord, *Hernandez v. Hanford*, 41 Cal. 4th 279, 297 (2007); *Merrifield*, 547 F.3d at 991 n.15. Nor may a legislative body excuse its favoritism merely by asserting without substantiation that its actions benefit the public in some general sense.

In *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), the Supreme Court invalidated a Texas city’s decision to prohibit the construction of a home for the mentally retarded, finding that although that decision was subject only to rational basis scrutiny, it was nevertheless invalid, because it was an attempt to exclude disfavored outsiders without any real connection to public health and safety. In *Romer*, 517 U.S. 620, the Court was even more explicit. Although the rational basis test is “most deferential,” it requires that there be a “relation between the classification adopted and the object to be attained.” *Id.* at 632. The reason there must be “some relation between the classification and the purpose it serve[s],” is to “ensure that

classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Id.* at 633.

The same principle applies to economic restrictions designed to confer benefits on favored insiders. In *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the Court invalidated an Alabama tax rule which discriminated against out-of-state insurance companies, describing it as “purely and completely discriminatory, designed only to favor domestic industry within the State.” *Id.* at 878. This was “the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.” *Id.* See also *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (“The State may not favor established residents over new residents based on the view that the State may take care of ‘its own,’ if such is defined by prior residence.”).

Employing rational basis analysis, the Ninth, Sixth, and Fourth Circuits have also struck down economic restrictions that favored insiders at the expense of outsiders without any realistic connection to public health, safety, and welfare. In *Merrifield*, 547 F.3d at 991, the court declared invalid an occupational licensing law that was “designed to favor economically certain constituents at the expense of others similarly situated,” without having any rational connection to protecting the general public from harm. “[M]ere economic protectionism,” the court noted, “regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate

governmental interest” and is therefore “irrational with respect to determining if a classification survives rational basis review.” *Id.* at 991 n.15. *See also Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (citation omitted) (Protectionist regulations must “advance[] a purpose, beyond . . . naked preference . . . [or] ‘parochial discrimination.’ ”); *Craigmiles*, 312 F.3d at 224 (“[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.”).

What these decisions make clear is that while cities have broad discretion to choose and implement economic policies, even where those policies incidentally disadvantage a particular group, they may not use health and safety concerns as a pretext for granting private benefits to particular political interest groups. As this Court recently declared, local governments may not use their authority for “the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual.” *Hernandez*, 41 Cal. 4th at 297.

Professor Sunstein has observed that the Constitution’s “hostility toward naked preferences” arose from

the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of

ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.

Sunstein, *supra*, at 1690. In short, government has broad discretion to act to protect the public, but it may not impose burdens or grant benefits merely on the grounds that officials would rather see wealth or opportunities distributed in a different way than they are. Instead, economic restrictions must have a plausible connection to protecting public health, safety, and welfare to survive rational basis scrutiny.

B. The Government May Not Satisfy the Rational Basis Test by Mere Assertion

The rule that legislatures may not impose burdens on politically disfavored groups in the guise of public safety necessarily requires courts to examine the plausibility of the asserted connection between the government's alleged interest and the classification devised to further that interest. In the words of the Ninth Circuit, “[a]lthough rational-basis review is undoubtedly deferential . . . it is nevertheless our duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal Rational-basis review, while deferential, is not ‘toothless.’” *Silveira v. Lockyer*, 312 F.3d 1052, 1088-89 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003) (citations omitted). *Accord, Merrifield*, 547 F.3d at 992. Courts using the rational basis test must “conduct ‘a serious and genuine judicial inquiry into the correspondence

between the classification and the legislative goals.’” *Newland v. Bd. of Governors of the Cal. Cmty. Colls.*, 19 Cal. 3d 705, 711 (1977) (emphasis added; citation omitted).

Thus, while the rational basis test accords elected officials deference to resolve certain public problems, courts using that test must still examine a law’s asserted public health and safety rationale and invalidate laws that lack meaningful relation to these ends. Genuine judicial review is crucial to ensuring that lawmakers do not abuse their authority by adopting arbitrary classifications under the pretext of protecting the general public. “[R]ational basis scrutiny is not tantamount to an abdication of the judiciary’s responsibility ‘to say what the law is.’” *United States v. Robinson*, 119 F.3d 1205, 1210 (5th Cir. 1997) (citation omitted). Courts “insist on knowing the relation between the classification adopted and the object to be attained” so as to exclude favoritism or naked preferences. *Romer*, 517 U.S. at 632.

It is certainly *not* the law that the government may withstand a constitutional challenge merely by asserting that the law has a rational basis. As Justice Stevens (the author of the *Romer* opinion) has pointed out, such a proposition would be tantamount to the total abandonment of judicial review: “[T]he Constitution requires something more than merely a ‘conceivable’ or a ‘plausible’ explanation for the unequal treatment.” *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment).

While the connection need not be exact between the government’s goals and the classifications it adopts, that connection must be rational—*i.e.*, it must be supportable by *plausible inferences from ascertainable facts*—and the government’s goal must be legitimate—*i.e.*, it must protect the general public, and not the private welfare of particular interest groups.

II

THE RETENTION ORDINANCE DOES NOT PROTECT PUBLIC HEALTH AND SAFETY, BUT IS DESIGNED ONLY TO ECONOMICALLY BENEFIT LABOR UNIONS AND THEIR POLITICAL ALLIES

For purposes of litigation, the City has disclaimed the Ordinance’s public health purpose, insisting that it is instead a job security ordinance. As the court of appeal observed, this argument conflicts with the Ordinance’s own language and the reasons given by the City when it enacted the Ordinance. But even if it is a regulation of the employer-employee relationship, the Ordinance lacks a rational connection to a legitimate state interest. This Ordinance is an obvious pretext for a practice known colloquially as “featherbedding,” *Burlington Northern & Sante Fe Ry. Co. v. Pub. Utilities Comm’n*, 112 Cal. App. 4th 881, 884 (2003)—that is, the imposition of inefficient and unnecessary employment on an unwilling employer as a means of transferring wealth from the employer to a labor union.

**A. There Is No Rational Relationship
Between the Retention Requirement and
Public Health or General Economic Welfare**

The Purpose section of the Retention Ordinance declares that, among other things, the Ordinance was meant to foster “the maintenance of health and safety standards in grocery establishments.” *See* Ordinance, Section 181.00. This purpose would be served by ensuring that “[e]xperienced grocery workers with knowledge of proper sanitation procedures [and] health regulations” would be kept in their jobs “result[ing] in preservation of health and safety standards.” *Id.* In short, incumbent workers must be retained so as to teach new grocery workers proper food handling procedures and thereby protect public safety. As the superior court observed, this was the rationale asserted by members of the City Council as well as by the City Attorney when the Ordinance was enacted. *See* Statement of Decision at 10, *California Grocers Ass’n v. City of Los Angeles*, No. BC351831 (L.A. County Super. Ct. Feb. 11, 2008), and it is the only reason cited in the Ordinance’s Purpose section.

The Ordinance’s terms have no plausible connection to that purpose. It requires the retention of employees who are *not* connected with handling or preparing food, while at the same time exempting “managerial” and “supervisory” employees—who *are* in a position to oversee and educate other workers about food safety procedures. *See* Ordinance, Section 181.01(C).

These exemptions demonstrate that the public health and safety justifications for the regulation are baseless.

A similar situation was present in *Merrifield*, 547 F.3d at 991, in which the Ninth Circuit Court of Appeals observed that while the state might have a legitimate reason to require pest control workers who did not use pesticides to nevertheless obtain training in pesticide use, the fact that the statute *also* established arbitrary *exemptions* from that requirement undermined the purported public safety justification. The court found that it could not “simultaneously uphold the licensing requirement under due process based on one rationale,” while also upholding an exemption from that requirement “based on a completely contradictory rationale.” *Id.* Likewise, here, the Court cannot uphold a purported food-safety ordinance on the grounds that it ensures proper education and training in food safety requirements—when the rule applies to non-food workers and does not apply to supervisory or managerial personnel. This is a “rationale so weak that it undercuts the principle of non-contradiction.” *Id.*

Evidently recognizing this irrationality, the City and the Intervenor disavow the language of the Ordinance’s Purpose section and of the City Council, and instead assert that the Ordinance is devised to ensure job security. Appellant’s Opening Brief (AOB) at 24. There is no evidence of this in the Ordinance, the Purpose section of which is devoted entirely to the

“preservation of health and safety standards.” Ordinance, Section 181.00. But the City and the Intervenor urge this Court to ignore the Ordinance’s unambiguous language. *See, e.g.*, AOB at 18-19, Intervenor’s Opening Brief (IOB) at 19-20.

This argument is an invitation to judicial lawmaking. Rational basis review, although deferential, “does not require the court to muse endlessly about this regulation’s conceivable objectives nor to ‘manufacture justifications’ for its continued existence.” *Brown v. Barry*, 710 F. Supp. 352, 356 (D.D.C. 1989). For the Court to devise its own justification for the Ordinance in direct contradiction to its language would be just as improper as if the Court imposed its own views in the guise of interpretation. If courts can rationalize a law by conjuring up reasons that were not contemplated by the lawmakers, and are even contradicted by that law’s own words, then the courts are not confined to the written language of the law, and are free to indulge in bias and favoritism toward the government. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 205 (2003) (“If courts are not going to limit the size of government, they must be prepared at the very least to limit its abuses. Yet they cannot discharge this vital responsibility if they refuse to judge.”). This is not what the rational basis test calls for. Under that test, courts must inquire “whether the challenged distinction rationally furthers some legitimate, *articulated* state purpose.”

People v. Haynes, 160 Cal. App. 3d 1122, 1133 (1984) (emphasis added). See also *Mutual Life Ins. Co. of N.Y. v. City of Los Angeles*, 50 Cal. 3d 402, 412 (1990) (“The courts may not speculate that the legislature meant something other than what it said.”); *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) (“we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification”).

Even if it were true that the purpose of the Ordinance was socio-economic, this purported rationale would not rescue the Ordinance. It does not require grocery stores of less than 15,000 square feet to retain unnecessary employees for three months, and convenience stores and club stores are also exempt. AOB at 2. In addition, it does not apply to grocery stores that have a collective bargaining agreement with a union. *Id.* at 4. The Ordinance is therefore designed to impose significant costs on non-unionized grocery stores—not *forcing* them to unionize, but cleverly burdening those that choose not to do business with labor unions.

The exemptions fatally undermine the Ordinance’s purported socio-economic goals. The Intervenor claims that the Ordinance was intended to (1) maintain health and safety standards—the rationale the City has now abandoned—(2) preserve the quality of service in grocery stores, and (3) “ensure the stability of the workforce upon change of ownership.” IOB at 4. Yet just as the Ordinance “does not attempt to regulate health and safety

conditions within grocery stores in any meaningful way,” *id.* at 21, neither does it impose any “quality of service” requirements. It simply forces stores to retain unnecessary employees on the payroll for three months. Nor is there any rational justification for exempting the employees of grocery stores of less than 15,000 square feet from the “stability” provided by the Ordinance. The Ordinance does not draw that line on the basis of the store’s net worth, or on the size of its workforce, or even the length of time it has served a community. Rather, it simply requires larger grocery stores to provide “stability” to employees, while exempting smaller grocery stores. As in *Merrifield*, 547 F.3d at 991, the exemptions reveal the Ordinance’s true purpose: to provide an economic benefit to a particular interest group that local officials have chosen to favor—namely, labor unions and their political advocates¹—at the expense of their competitors.

¹ Intervenor Los Angeles Alliance for a New Economy’s (LAANE) is a coalition of labor unions with the political goal of preventing non-union employers, such as Wal-Mart, from doing business in Southern California. *See, e.g.*, LAANE website, *available at* <http://laanenetwork.laane.org/laane/laanejobs.html> (last visited Feb. 10, 2010) (“LAANE is known as well for innovative strategies to combat the Wal-Mart business model.”). Its chairman is the Executive Secretary-Treasurer of the Los Angeles County Federation of Labor, an organization made up of over 300 labor unions. Other members of LAANE’s Board of Directors include leading representatives of the California Teachers Association, the Service Employees International Union, United Service Workers West, IBEW Local 11, Unite Here! Local 11, and the International Brotherhood of Teamsters. *See* LAANE Board of Directors, *available at* <http://www.laane.org/about-us/who-we-are/board-of-directors> (last visited Feb. 10, 2010).

In the court below, the Intervenor sought to justify the distinction by claiming that grocery stores of 15,000 square feet or larger “play a much more important role in the economic and social life of the communities they serve,” than do grocery stores of 14,999 square feet, or convenience stores, or club stores, all of which are exempted from the Ordinance’s mandates. Intervenor’s Opening Brief at 25, *California Grocers’ Ass’n v. City of Los Angeles*, No. B206750 (Cal. Ct. App. Sept. 2, 2008). On the contrary, the staff of small neighborhood stores are generally said to be *more* likely to develop personal connections with residents, and to play *more* important roles in the economic and social life of the community, than are the employees of large-scale retail giants. *See generally* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 Iowa L. Rev. 1011, 1088 (2005) (“Wal-Mart, argues critics, puts smaller competitors out of business . . . turns independent proprietors into sales clerks, destroying communities in the process . . . thus destroying the unique character of local communities.”); Stacy Mitchell, Institute for Local Self-Reliance, *The Impact of Chain Stores on Community*, Speech Delivered at the Annual Conference of the American Planning Association (Apr. 2000) (claiming that “local stores create a sense of place and community identity . . . reflect the local culture . . . [and] give neighborhoods their distinct flavor,” while “[c]hain stores . . . are sapping communities of their character and

individuality”). Yet the employees of small community stores are *not* subject to retention under the Ordinance. If the purpose of the Ordinance is to protect the interests of the community, the exception that allows termination of employees at smaller grocery stores, who are most likely to serve those interests, is irrational.

B. The Ordinance Imposes Union-Favoring Featherbedding Rules Which State and Federal Law Have Declared Contrary to Public Policy

Given the implausibility of the justifications offered by the City and the Intervenor, it is proper for the Court to examine “the more obvious illegitimate purpose” to which the legislation “is very well tailored.” *Craigmiles*, 312 F.3d at 228. A far more sensible explanation is that the Ordinance is an act of political favoritism designed to grant economic and political benefits to labor unions. The Ordinance creates a type of “featherbedding”: requiring an employer to retain employees whose labor is unnecessary, as a device to transfer wealth from the employer to the employee.

One classic example of featherbedding is the requirement, common in mid-20th century collective bargaining agreements with railroad companies, which required them to employ firemen (coal-shovelers) on *diesel* locomotives. *See, e.g., Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 917 (7th Cir. 1985). Featherbedding is economically wasteful and unjust; it rewards the unproductive, punishes the

productive, and deters employment of entry-level workers. As Solicitor General Archibald Cox observed, it “waste[s] skilled manpower, our most precious resource,” and “offend[s] moral sensibilities by compelling payment for work not done.” *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 273 (1955). *See also* Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 1001 (1984) (“[F]or every older worker whom job security encourages to share his know-how, casual observation suggests that there is at least one other older worker, and probably several, whom job security protects at the expense of a more efficient younger worker.”).

Featherbedding is contrary to public policy. *See generally* Benjamin Aaron, *Governmental Restraints on Featherbedding*, 5 Stan. L. Rev. 680, 686 (1953) (“It is generally agreed that union make-work rules are wasteful and self-defeating.”). It “is equivalent to a tax on the employer’s purchases of labor services,” which raises payroll costs for grocery stores without increasing their efficiency. Norman J. Simler, *The Economics of Featherbedding* (1963), *reprinted in* Paul A. Weinstein, *Featherbedding and Technological Change* 55, 64 (1965). This “tax” is “shifted partly forward to buyers of output insofar as product price is raised, and partly backward to owners and to suppliers of other variable factors insofar as pure profits and capital requirements are lowered.” *Id.* In other words, these policies make food more expensive for

consumers and reduce the incentive for grocery stores to expand or for companies to open new stores. This is one reason featherbedding is illegal under the National Labor Relations Act, *see* 29 U.S.C. § 158(b)(6). Thus, if the terms included in the Retention Ordinance had been imposed on a union employer through a collective bargaining agreement, it might be a violation of federal law.²

The difference between this Ordinance and classic featherbedding is that instead of being incorporated into a collective bargaining agreement that requires the employment of unnecessary union laborers, the Retention Ordinance imposes featherbedding on *non-union* grocery stores, in an attempt to increase the cost of business for *non-union* employers. Thus the Retention Ordinance is a means by which to add to the *non-union firms'* labor costs, thereby helping to coerce them into agreeing to collective bargaining agreements. As Judge Richard Posner recently observed, such featherbedding rules “make it difficult for a firm to optimize its use of labor, and, like the higher wages and benefits that unions obtain, add to the firm’s labor costs

² Actually, labor unions routinely evade anti-featherbedding laws through the cynical device of assigning the unnecessary employees to some “bogus” task. *See, e.g., Am. Newspaper Publishers Ass’n v. NLRB*, 345 U.S. 100 (1953). Since courts have allowed such evasions to continue, *see id.* at 110, featherbedding contracts now take the form of requiring employers to hire or retain workers for “actual, if unnecessary, work.” Mindy Schwartz, *The American Federation of Musicians: An Unearned Encore for Featherbedding*, 47 *Wayne L. Rev.* 1339, 1350 (2002).

relative to those of its nonunion competitors.” Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/12/can_the_united.html (Dec. 28, 2008, 16:26 CST).

This is why the Ordinance contains an exception for companies that already have a collective bargaining agreement. As Eugene Scalia, former Solicitor of the Department of Labor, has written, “[u]nions are among the principal advocates of employment regulation. By raising costs for rival non-union companies, employment regulations help union companies preserve market share and thus protect union jobs and wages.” *Ending Our Anti-Union Federal Employment Policy*, 24 Harv. J.L. & Pub. Pol’y 489, 490-91 (2001).

The Ordinance is therefore a type of reverse featherbedding: imposing inefficiency on non-union businesses in an attempt to make them less competitive with union labor. This raises costs to affected businesses, which pass much of that cost along to consumers in the form of higher prices for food. And it destroys potential unskilled, entry-level jobs, because businesses forced to spend money on unnecessary employees will hire fewer workers overall. *See, e.g.,* Assar Lindbeck & Dennis J. Snower, *Job Security, Work Incentives and Unemployment*, 90 Scandinavian J. of Econ. 453, 454-55 (1988) (job security rules make “outsiders . . . unable to find jobs, even though they are willing to work for less than the insider wage and are identical to the insiders in terms of potential job performance [O]utsiders have no jobs

because they face a smaller choice set than insiders.”); Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q. J. of Econ. 699, 718 (1990) (“[I]ncumbents are different from new hires. To the extent that [job security] has negative effects on employment, it works by reducing the new hire rate.”); James Heckman & Carmen Pagés-Serra, *The Cost of Job Security Regulation: Evidence from Latin American Labor Markets*, 1 *Economía* 109, 110 (2000) (“regulations promoting job security reduce . . . aggregate employment, and that the greatest adverse impact . . . is on youth and groups marginal to the work force. Insiders and entrenched workers gain from regulation, but outsiders suffer [J]ob security regulations reduce employment and promote inequality across workers.”). Opportunities for the unemployed are sacrificed for the benefit of those who already hold jobs.

In some ways, this reverse-featherbedding is worse than classic, illegal featherbedding. The Supreme Court has refused to use the federal anti-featherbedding law to invalidate certain labor agreements, because it holds that employers remain free to negotiate better terms in these agreements if they choose. *See, e.g., Scofield v. NLRB*, 394 U.S. 423, 434 (1969) (“If the company wants to require more work of its employees, let it strike a better bargain.”). But the employers in this case are given *no* choice: they are required, against their will, to retain workers whose labor is not needed, and whose employment only increases costs to consumers and reduces

opportunities for entry-level workers. And while classic featherbedding is an unfair labor practice between two private parties, the Ordinance enlists the power of the government to impose a bias in negotiations between unions and employers. Intervenor's claim that the Ordinance does not interfere with free negotiations between grocery store owners and labor unions, IOB at 12, is profoundly disingenuous.

Public policy counsels in favor of *freedom of contract* for unions and employers to negotiate agreements cooperatively. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). It counsels against biasing that process through unfair burdens cleverly tailored to target particular employers for unequal burdens. *Cf. Thunderbird Mining Co. v. Ventura*, 138 F. Supp. 2d 1193, 1199 (D. Minn. 2001) ("By giving the Union a thumb to put on the economic scale, the State has improperly distorted that process, regardless of the outcome.").

Moreover, the Equal Protection Clause forbids the government from implementing economic policies based on political favoritism, or policies tailored to target specific groups simply because their political or economic positions are disfavored. *Romer*, 517 U.S. at 632; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Schwartz v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232, 239 (1957). A governmental desire to aid labor unions in their competition with non-union businesses is not a rational basis sufficient

to support an economic restriction of this sort. The Retention Ordinance, with its exception for grocery stores that already have collective bargaining agreements in place, was “drawn for the purpose of disadvantaging the group burdened by the law.” *Romer*, 517 U.S. at 633. It is therefore unconstitutional.

CONCLUSION

The Retention Ordinance is a form of reverse-featherbedding, designed to raise the business costs of non-union grocery stores by forcing them to retain unnecessary employees. It is not rationally related to a legitimate government objective, and is an unconstitutional form of favoritism. More, it increases the cost of living to consumers and makes it more difficult for entry-level employees to find work. The decision of the superior court should be *affirmed*.

DATED: March 25, 2010.

Respectfully submitted,

TIMOTHY SANDEFUR

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT is proportionately spaced, has a typeface of 13 points or more, and contains 4,955 words.

DATED: March 25, 2010.

TIMOTHY SANDEFUR

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On March 25, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT were placed in envelopes addressed to:

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BARBARA A. SIEBERT