No. 15-55909

United States Court of Appeals for the Ninth Circuit

AMERICAN HOTEL AND LODGING ASSOCIATION;
ASIAN AMERICAN HOTEL OWNERS ASSOCIATION,

Plaintiffs-Appellants,

– v. –

CITY OF LOS ANGELES,

Defendant-Appellee,

– and –

UNITE HERE LOCAL 11,

Intervenor-Defendant-Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
COALITION FOR A DEMOCRATIC WORKPLACE,

Amicus.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR CENTRAL CALIFORNIA
CASE NO. 14-CV-09603, ANDRE BIROTTE, DISTRICT JUDGE

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from an order from the United States District Court, Central District of California under 28 U.S.C. § 1292(a)(1) because such order refused a preliminary injunction.

STATEMENT OF THE ISSUES

Whether Los Angeles City Ordinance No. 183241, entitled "Citywide Hotel Worker Minimum Wage Ordinance" ("*HWO*" or the "*Ordinance*"), as codified in Article 6, Chapter XVIII of the Los Angeles Municipal Code, is preempted by federal labor-law under *Machinists v. Wisconsin Empl. Rels. Comm'n*, 427 U.S. 132, 154 (1976).

REVIEWABILITY AND STANDARD OF REVIEW

A district court's denial of a motion for preliminary injunction is subject to review for abuse of discretion. *E.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A district court abuses its discretion if its decision relies on an erroneous legal standard or clearly erroneous finding of fact. *Id.*

When the district court bases its decision on an erroneous legal standard, the appellate court reviews the issues of law *de novo*. *See, e.g., Arc. of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). If, under the correct legal standard,

the record evidence warrants the issuance of a preliminary injunction, the appellate court itself may grant that relief. *Id.* at 993.

The appellate court must make its decision based on the record that was before the district court, *see, e.g., U.S. v. Walker*, 601 F.2d 1051, 1055 (9th Cir. 1979), or as supplemented on appeal, at the court's discretion, with material possibly helpful to the court and not prejudicial to either party. *See, e.g., See More Light Investments v. Morgan Stanley DW*, 415 Fed. Appx. 1, at *2 (9th Cir. 2011).

STATEMENT OF THE CASE

Plaintiffs-Appellants ("Appellants") seek to enjoin the Defendant-Appellee City of Los Angeles (the "*City*") from enforcing the Ordinance on the ground that it interferes with collective bargaining, union organizing and labor relations at every single one of the larger hotels in Los Angeles. Under the guise of requiring a "fair wage" to hotel workers, the City has constructed, whether by design or consequence, an insidious mechanism that improperly aids the local hotel workers' union in its efforts to organize employees at the City's non-union hotels. Because Congress, in adopting federal labor law, intended to have zones of unregulated activity between labor and management, to leave the resolution of labor-management disputes to the free play of economic forces, and to prevent municipalities from disrupting the balance of economic power between labor and

management that Congress established, the challenged Ordinance is preempted by federal labor law.

Appellants initiated a civil action on December 16, 2014. Their motion for preliminary injunction to prevent the enforcement of the Ordinance was based solely on labor-law preemption under the *Machinists* doctrine.

In support of their motion, Appellants submitted the expert declaration of Professor Zev J. Eigen (R-649 *et seq.*); the declaration of Lynn S. Mohrfeld (R-668 *et seq*.), President and CEO of the California Hotel & Lodging Association, and the declarations from 12 other individuals (*see* R-531, *et seq*.) actively engaged in the hotel industry in the City, who detailed the effects of the Ordinance on labor-management relations at specific hotels. [1]

By an Order dated May 15, 2015 (R-1-44), District Court Judge André Birotte, Jr. denied Appellants' motion for a preliminary injunction.

[1] These declarations are founded on each declarant's personal knowledge, which may be inferred from their years of business experience in the hospitality industry. *See, e.g., Arrow Elecs. v. Justus (In re Kaypro)*, 218 F.3d 1070, 1075 (9th Cir. 2000). All opinions proffered by the declarants are based on each declarant's specialized knowledge. *See, e.g., Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230, 234 (D.C. Cir. 1991).

STATEMENT OF FACTS

1. The Los Angeles Hotel Industry

Of the many hotels within the City of Los Angeles, about 80 have more than 150 rooms. (R-670.) Of those larger hotels, about 40 are organized by UNITE HERE Local 11 ("*Local 11*" or the "*Union*"), and about 40 are non-Union. (*Id.*) In downtown Los Angeles, only two large hotels – the Omni and the Doubletree – are not organized by Local 11. (*Id.*)

Local 11 is the only union that organizes hotel workers (other than engineers) in Los Angeles. (R-542.) As a practical matter, Local 11 organizes hotels only when the employer consents to a card-check recognition or "neutrality" agreement. (R-617-18; R-662-664; R-670-71.)[2] In recent years, Local 11 has been largely unable to induce the remaining non-Union hotel employers to consent to card-check recognition through economic leverage. (*See, e.g.*, R-595-96; R-549-50; *see also* R-664.) It has, apparently, decided to use political influence to achieve the same end.[3]

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[2] In labor-relations practice, "card-check recognition" refers to circumstances whereby an employer agrees in advance with a union that it will "recognize" that union as the bargaining representative for a unit of its employees if a majority sign "authorization cards" and that fact is "checked" by a third-party. *See* Eigen Decl. ¶42; *see generally*, 1 DEVELOPING LABOR LAW, 831-839 (John E. Higgins, Jr., ed., 6th ed. 2012).

[3] *See generally*, Sachs, *Despite Preemption: Making Labor Law in Cities and States ("Despite Preemption")*, 124 HARV. L. REV., 1154, 1169-97 (2011)

2. The Hotel Worker Ordinance

On October 10, 2014, the Los Angeles City Council enacted the HWO, which, *inter alia*, requires hotels in the City that have more than 150 guest rooms or suites to pay a wage rate of at least $15.37 an hour, with this mandated wage-rate being adjusted annually. *See* HWO §186.02(A) at R-451. That wage rate took effect on July 1, 2015 for hotels with 300 or more rooms and will take effect on July 1, 2016 for all other covered hotels. *Id.* §186.04 at R-543. The HWO is enforceable by the City or the City Attorney, or by private action brought by any covered Hotel Worker claiming a violation. *See* Los Angeles Municipal Code §11.00(l); HWO §186.07 at R-454-55. Workers who prevail in private enforcement actions may be awarded treble damages, attorney's fees, and costs. HWO §186.07 at R-580.

In the Ordinance's preamble, the City Council details why – in its opinion – hotels of more than 150 rooms can afford to pay the extraordinarily high purported "minimum" wage of $15.37. *See* HWO §186.00 at R-449.[4] City hotels with fewer

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(detailing efforts by unions to use political influence to obtain employer acceptance of so-called "neutrality" agreements); *id.* at 1188 n.137 (describing refusal of an L.A. city council member to approve hotel development project until developer consented to card-check/ neutrality agreement).

[4] The HWO's "Purpose" section states, in pertinent part, as follows:

> "A large hotel [. . .] is in a better position to absorb the cost of paying living wages to its employees and also to absorb costs without layoffs. First, large hotels more often are part of

than 150 rooms are excluded from the wage-rate requirement, *id.* §186.01(D), presumably because it was the City Council's view that they could not afford it.

The Council knew, however, from its own commissioned economic analyses that this exclusion undercut the Ordinance's stated purpose. In particular, the report of Beacon Economics noted that workers at smaller hotels (with fewer than 100 employees) earned a significantly lower average wage, while the "large hotels, the ones that are to be affected by the proposal, *actually pay employees an average wage that is above the living wage laid out in this proposal*." (*See* R-683, R-938) (emphasis added).

The HWO refers to its mandated wage-rate as the "fair wage," *see* HWO §186.00, presumably to distinguish it from the "living wage" imposed on hotels located in the "LAX Corridor" by ordinance in 2007. (R-673.) As of 2013, that "living wage" was $11.03 an hour for employers providing fringe benefits valued at $1.25 an hour or, if not, $12.28. The City has also previously enacted a "living wage" ordinance for airport workers (the "Airport Worker Ordinance"). (Los

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> international, national or regional chains. [… and], may more easily relocate or transfer employees to other hotels […]. Second, a large hotel often has sources of income beyond mere room rental […] A large hotel is better able than a small hotel to ensure high room occupancy […]. Lastly, a large hotel may more easily absorb the cost of paying employees a higher wage through the economies of scale in operating a large hotel compared to the costs of operating a small hotel."

Angeles Admin. Code § 10.37 *et seq.*, as amended.) (R-673.) In 2013, the mandated "living wage" for employers subject to the Airport Worker Ordinance was $10.70 an hour if fringe benefits of at least $4.67 an hour were provided or a cash payment of $15.37, if not. (R-673.) Some covered hotels already provide fringe benefits of that value or greater. (*See* R-579.) Yet, the preamble to the HWO does not explain why it fails to allow a fringe-benefit option even though the cash wage-rate of $15.37 is the same in both ordinances.

3. Local 11's Prominent Role in Enactment

The HWO was the culmination of a lobbying effort named "Raise LA". The architects of Raise LA were Local 11 and its partner, the Los Angeles Alliance for a New Economy ("*LAANE*"). (R-672.) Although LAANE represents itself as an independent association, it is, as a practical matter, the lobbying and political-action arm of Local 11. (R-670.)[5]

As noted, the HWO applies to only larger Los Angeles hotels – the same hotels that Local 11 had targeted for organizing. (R-672; R-595.) The circumstances suggest that the Union was pursuing this legislation precisely because of its limited success at organizing these hotels. (R-671-72; R-674-75.)

[5] The Deputy Director of LAANE, James Elmendorf, was formerly an official with Local 11 and was actively engaged in the actual drafting of the HWO. (R-533; R-637-38; R-534). He also joined Union president Tom Walsh in attempting to use the HWO as leverage to obtain union recognition at currently non-Union businesses. (*See* R-534-36; R-637-39.)

Indeed, the legislative process leading to enactment was dominated by the Union and its alter ego, LAANE. (R-638; R-675-80.) They used their political influence and back-channel access to help craft the actual language of the HWO itself, while the hotel-trade association, despite persistent inquiries, received no comparable access. (R-675; R-679.) They also expedited the passage of the ordinance, allowing little time for the City Council to consider submissions of the public, the hotel industry, or even City-commissioned economic experts. (R-682-83.)

4. Definitions Tailored to Union Organizing

The HWO's definition of "Hotel Worker" excludes from its coverage any workers who are "supervisory, managerial and confidential employees." *See* HWO § 186.01(F) at R-450. The categories of "managerial" and, in particular, "confidential" employees are classifications peculiar to federal labor law that have no analogue in typical minimum wage statutes. (*See* R-655-56.) As a consequence of its definitional choices, the HWO affects the wage-rate of all – but only – the employees that unions, like Local 11, are lawfully permitted to organize. (R-656.)

5. The Union-Waiver Provision

The HWO contains a provision deceptively labeled "Exemption for Collective Bargaining Agreements," under which a covered hotel may obtain an exemption from "any or all" of the HWO's requirements, but only if the hotel employer is party to a "bona fide" collective bargaining agreement ("CBA") and

only if such dispensation is explicitly granted to it by means of a "clear and unambiguous" waiver "explicitly" written into that agreement. *See* HWO §186.08 at R-455.

Local 11 is the only labor union that organizes or has collective-bargaining agreements affecting employees (except engineering employees) at Los Angeles hotels. (*See* R-542.) Hence, it is the only union that can benefit from the power of dispensation afforded by this union-waiver provision. The union-waiver provision also provides that such waivers cannot be "unilaterally implement[ed]." Understood in the context of federal labor law, this provision in itself is quite disruptive of collective bargaining and labor relations. (*See* R-656-60; *see also* pages 48-53, *infra*.)

6. Labor-Cost Implications for Tipped Employees

It is industry practice for hotels to distinguish between tipped and non-tipped employees in setting wages. (R-633.) Tipped employees are those that receive significant compensation from gratuities or service charges – and therefore need not rely on their base hourly wage for their full cash remuneration. (*Id.*) At many hotels in Los Angeles, tipped workers, such as banquet servers, are paid at or slightly above the California state minimum wage but, when gratuities and services charges are included, are among the highest paid hourly workers at the hotel. (*See, e.g.*, R-542; R-548; R-557; R-633-34.)

Consequently, even at hotels where the wage rate for non-tipped employees is at or above $15.37, the need to raise dramatically the wages paid to tipped employees will significantly increase labor costs. (*See, e.g.*, R-557.) Hotel employers may also need, as a practical matter, to raise wage rates of non-tipped employees, like cooks, to avoid the disaffection that would result from raising the wage-rate only for tipped employees. (*See* R-549.)

The HWO's prohibition on the hotel's retention of any part of the service charge deprives hotels of a significant source of operating income and conflicts with Internal Revenue Service guidance on that subject. (*See* R-554-55.)

7. Ancillary Business Provision

The HWO defines a "Hotel" as including not only a hotel building, but also "any contracted, leased or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building" (an "*Ancillary Business*"). *See* HWO §16.01(D) at R-450. Thus, the HWO requires any independent business operating within the footprint of a covered hotel, such as a restaurant or convenience store, or even within the same shopping complex, to abide by the HWO's economic terms.

In some instances, the Ancillary Business is a relatively small employer, with lower revenues and fewer employees than the smaller hotels which are exempted from the HWO (*see* R-587; R-635-36), presumably, because they could

not afford the mandated wage rate. Local 11 has historically tried to force unionized hotel operators to impose its CBA on non-union Ancillary Businesses (most especially restaurants), but without success. (*See, e.g.*, R-617.)

8. Imbalanced Geographic Impact

Because the Ordinance only applies within City limits, hotels that are located near the borders of the City face additional economic pressure because their direct competitors are unaffected by the costs of HWO compliance.

Los Angeles hotels on the Beverly Hills border face obligations that their most direct competitors do not because the HWO does not apply in Beverly Hills. (R-571.) Likewise, Westwood hotels compete with those in Santa Monica and Culver City (R-590); hotels near Los Angeles International Airport (LAX) compete with nearby El Segundo and Culver City hotels. (R-581.)

At least one affected hotel is located in Torrance on the narrow "Gateway" strip connecting the Port to the City of Los Angeles, which technically falls within City limits despite its distance from downtown. (R-564.) Its geographic competitors lie in unaffected cities. (R-567-68.)

Significantly, the first reported instance of the Union's attempting to use the HWO as an economic lever to induce acquiescence to a card-check recognition agreement was with respect to that Torrance hotel. (R-534-35.)

9. Interference With Labor Relations

According to Appellants' labor-law expert, the HWO will have the effect of interfering with union organizing, collective bargaining, and labor relations for both union and non-union hotels in the City of Los Angeles. (R-652-666.) These conclusions are substantiated by the factual record, which Professor Eigen analyzed from the perspective of federal labor policy and actual labor-management practice.

Local 11 (with its ally LAANE) has already used the HWO's requirements to attempt to induce a non-union hotel owner to accept a card-check recognition (*see* R-534) or to foist Union terms on Ancillary Businesses (*see* R-638; R-617, 620).

At unionized hotels – where, in accordance with industry practice, tipped employees are paid a lower wage-rate than non-tipped employees – the hotel operator must obtain a waiver from Local 11 merely to maintain the wage-rate pattern already in its CBA. (R-631, 633.) Moreover, the HWO makes it a "willful violation" for a Hotel Employer to even attempt to obtain a waiver without doing so through a Union. HWO §186.10 at R-455.

The hotel employers' need to obtain a waiver, even to maintain current contract terms, is already disrupting labor relations. In at least one instance, the

hotel operator was unable to implement a wage increase that was consistent with other terms of its agreement with the Union, but could not do so without securing a Union waiver. (R-622-23.) Moreover, nothing in the HWO prohibits or restricts the Union from attaching pre-conditions to its consenting to a waiver, even ones that contravene federal labor policy. Union officials have already attempted to use their statutory authority as to waivers to exact concessions with respect to union organizing and collective bargaining. (*See* R-635-36; 638-39; R-619-20; R-661.) Immediately following enactment, the Union even attempted to induce the Hotel operator's agreement not to participate in this lawsuit. (*See* R-642.)

In addition to the costs from the wage-rate provisions, the HWO will likely disrupt hotel operations by requiring hotels to change the way they run their restaurants or other services, or the kind of third-party services that their hotels may offer. (*See* R-588-89; R-599-600; R-573-74.) Any adjustment in hotel services could impact the goodwill, customer loyalty, and reputation of affected hotels, further reinforcing the value of obtaining a waiver.

As a consequence of its terms – and especially its requirements as to the wage-rates of tipped employees – the HWO puts non-union hotels at a severe competitive disadvantage as compared to both neighboring hotels that, due to accidents of geography, are not subject to the HWO or to nearby unionized hotels that obtain a waiver. (*See, e.g.*, R-580-81; R-542-43; R-573.)

To avoid these consequences, non-union hotels need a waiver which is only available, realistically, if they accept a Local 11 "neutrality" agreement. The HWO thus assists Local 11 in organizing non-union hotels by putting economic pressure on operators to accept card-check recognition. Hotel estimates of the cost of complying with the HWO, when fully implemented, could be as high as $500,000 to $1.7 million annually. (*See, e.g.*, R-607; R-549.) Compliance costs are so high, in part, because many large hotels offer generous benefits packages, which do not count toward HWO compliance. (*See, e.g.*, R-579.)

This affects the economic calculus of non-union hotel operators if they are confronted by Local 11 with a demand to accept a card-check recognition agreement. Hotel operators face powerful economic pressure to accept an agreement they otherwise would have rejected (*see* R-550; R-574; R-581; R-608). If they persist in declining "neutrality" agreements because they refuse to waive their rights and their employees' rights to have the exclusive bargaining representative (or lack thereof) determined by a secret-ballot election, they are effectively penalized by higher labor costs than their competitors for having a fully lawful labor-relations policy. (*See* R-561; R-600.)[6]

[6] As to the terms of neutrality agreements, generally and with respect to Local 11 in particular, and the legal effect of such agreements on rights afforded by federal labor law to employers and employees, *see* R-661-666; R-618; R-559, and at pages 24-28, *infra*.

SUMMARY OF THE ARGUMENT

This case turns on well-established principles of federalism. The City of Los Angeles may, under its police power, enact such ordinances as, in its judgment, conduce to the well-being of its citizens, including ordinances that set labor standards. But, if an otherwise legitimate exercise of governmental power upsets the economic balance of power between labor and management established by Congress, interferes with collective-bargaining processes contemplated by federal labor law, frustrates the comprehensive federal scheme for labor-management relations, or impinges on labor-law rights or prerogatives – it is preempted under *Machinists*, and its progeny. The City's beneficent purpose is immaterial because there is "assumed priority on the federal side." *N.Y. Tel. v. N.Y.S. Dep't of Labor ("NY Tel.")*, 440 U.S. 519, 549 (1979) (Blackmun, J. concurring).

The unanswered record shows that the HWO does, in fact, have these deleterious effects. For unionized employers, the Ordinance gives the Union bargaining leverage it would not otherwise have in labor negotiations – and which it already has attempted to use, including to induce acquiescence in illegal contract terms. Moreover, by virtue of its union-waiver provision, the HWO pressures non-union hotel employers to accept card-check recognition agreements that have the effect of relinquishing prerogatives afforded them under federal labor law, and

impinging on the free choice guaranteed to their employees to accept – or to reject – unionization.

Neither the City nor the District Judge denied these effects. Rather, it was contended below that because the Ordinance is a "minimum labor standard," customary *Machinists* analysis is inapplicable. That is not the law:

- The HWO is not immunized from *Machinists*. A showing that it "virtually dictates" the outcome of labor-disputes, leaving hotels employers no "economically feasible" choice but to yield to union demands, is not required. Rather, any significant interference with the federal scheme *is* preempted, even as to local laws establishing minimum employment requirements for a class of workers.
- There is no presumed validity for mandated worker benefits. Even well-intentioned worker-benefit programs must yield to the supremacy of United States law when they interfere with the federal framework for labor-management relations.
- The Ordinance is preempted if *its* "real effect" is incompatible with the goals of the NLRA, even if each provision standing alone does not have that effect.
- The union-waiver and unilateral-implementation provisions of the Ordinance are neither customary nor innocuous. They significantly

disrupt the collective-bargaining process and, in themselves, compel *Machinists* preemption.

Moreover, there is ample evidence that the Ordinance was designed to have these effects and, thereby, to advance Local 11's interest in organizing the remaining non-Union hotels. Not only was the Union granted special access in drafting the Ordinance, but provisions of the HWO intensify its pernicious effects on labor-management relations without actually advancing its stated purposes as to hotel-worker welfare.

Because the District Court's order is premised on such errors of law, this Court can, and should, consider the matter *de novo*. And, since the other prerequisites are satisfied – and, especially, to vindicate federal interests over parochial concerns – this Court should itself grant Appellants the preliminary injunction sought.

ARGUMENT

I.

THE ORDINANCE'S INTERFERENCE WITH LABOR RELATIONS MANDATES PREEMPTION UNDER *MACHINISTS* AND ITS PROGENY.

A. The Ordinance Is Preempted Because It Interferes With Labor Relations, Collective Bargaining, and Union Organizing.

In 1935, Congress began regulating the processes of union organizing and collective bargaining when it passed the National Labor Relations Act ("NLRA" or

the "Act"), 29 U.S.C. §151 *et seq*. For the last 30 years, it has been "commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986).

The legal principles controlling this case were clearly and recently stated by the Supreme Court in *Chamber of Commerce v. Brown ("Brown")*, 554 U.S. 60 (2008):

> Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. [. . .] The second [type], known as *Machinists* preemption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economics forces.'" [. . .] *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.'"*

Id. at 65 (*citing Machinists*, 427 U.S. at 140) (emphasis added). Stated otherwise, *Machinists* preemption "protects against state interference with *policies implicated by the structure of the Act itself.*" *Metropolitan Life Ins. v. Mass.* ("*MetLife*"), 471 U.S. 724, 749 (1985) (emphasis added).

In applying *Machinists* preemption, the paramount consideration is the effect of local law on federal labor policy: "Pre-emption analysis . . . turns on the *actual content* of [the ordinance] and *its real effect on federal rights*." *Brown*, 554 U.S. at 69 (internal citations omitted) (emphasis added); *see also MetLife*, 471 U.S. at 753 (under *Machinist*s, courts must assess a "'state law in light of the wider contours of

federal labor policy'") (internal citation omitted); *Derrico v. Sheehan Emerg. Hosp.*, 844 F.2d 22, 28 (2d Cir. 1988) (state law preempted due to "substantial potential for friction [with] the delicate machinery of the NLRA").

Because the Ordinance interferes with collective bargaining, union organizing, and labor relations for the hotel industry in Los Angeles, upsetting the economic balance struck by Congress between labor and management, it is preempted by federal law and cannot be enforced.

While no one denies that cities may, in exercising their police power, enact ordinances promoting their perception of the public good, they cannot do so in a way that intrudes on "a zone of activity" with respect to labor-management relations that Congress "inten[ded] to shield [. . .] from regulation," *Brown*, 554 U.S. at 68, or that interferes with the "implement[ation of] federal labor policy." *Id.* at 65.

Directly applicable here is *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986), where the Supreme Court held that the City was preempted from conditioning the renewal of a taxicab company's franchise on its settling a then-pending strike of its unionized employees. While acknowledging that the City was "exercising a traditional municipal function in issuing taxicab franchises," the Court still held that "a city cannot condition a franchise renewal *in a way that intrudes* into the collective-bargaining process." *Id.* at 618, 619

(emphasis added). *Golden State* teaches that the City goes too far when its use of municipal authority creates, whether by design or consequence, economic pressure on employers' exercise of their prerogatives under federal labor law. That rule controls this case.

1. The Ordinance Interferes With Labor Relations And Collective Bargaining At Unionized Hotels.

The Ordinance establishes a hotel-specific minimum wage that is 70% above the current state minimum wage of $9 per hour.[7] It then requires that this wage-rate be paid to all Hotel Workers, irrespective of their receipt of gratuities or service charges, even though, under California law, service charges are the property of the employer and not at all a gratuity.[8]

The Ordinance is disruptive of labor-management relations not just because it imposes an extraordinarily high required wage-rate but also because its requirement as to service charges up-ends the longstanding basic compensation structure for hotels. (*See, e.g.,* R-633; R-606-07; R-557.) This, in turn, disrupts hotel operations by requiring hotels to change the way they run their restaurants or other services, or the third-party services they offer. (*See* R-588-89; R-599; R-

[7] *See* State of Cal. Dep't of Industrial Relations, "History of California Minimum Wage", available at https://www.dir.ca.gov/iwc/MinimumWageHistory.htm [last viewed July 20, 2015].

[8] *See* Cal. Div. of Labor Standards Enforcement Policies and Interpretations Manual 19.3.5 (Mar. 2006) (available at http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf) [last viewed Aug. 6, 2015].

573-74.) Even more so, it is the power afforded unions to grant hotel employers respite from such burdens that most especially renders the Ordinance preempted.

At unionized hotels – where, in accordance with industry practice, tipped employees are paid a lower wage-rate than non-tipped employees precisely because they receive so much compensation from service charges – the hotel operator must obtain a waiver from Local 11 merely to maintain the wage-rate pattern already existing in its CBA, or to provide contractually prescribed wage increases. (*See* pages 12-13, *supra*.) That undeniably "[enters] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *See Golden State*, 475 U.S. at 616 (*quoting Machinists*, 427 U.S. at 149).

That the Ordinance "is an undue governmental inference with the collective-bargaining processes protected by [the NLRA]," *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995), is further illustrated by the economic leverage afforded Local 11 through the City-ordained power to grant waivers – but *only* to unionized hotels and *only after* it has attempted to use its newly-gained power to try to exact bargaining concessions. This is not speculative; it has already happened.

In one instance, the Union attempted to condition its waiver on the Hotel operator's agreement not to participate in this lawsuit. (*See* R-642.) Not even the National Labor Relations Board can interfere with an employer's reasonably-based

lawsuit against unions or their interests. *See NLRB v. Allied Mechanical Servs.*, 734 F.3d 486 (6th Cir. 2013) (*applying Bill Johnson's Rest. v. NLRB*, 461 U.S. 731 (1983)). But, this City Ordinance gives Local 11 the economic leverage to do just that.

At another hotel, the Union was engaged in bargaining for a successor CBA and made clear that it wanted the contract expanded to cover the employees of the independently operated restaurant located in the hotel. (R-617.) That particular demand was "preventing an agreement." (*Id*.) It is unlawful for unions to force hotels into agreements that extend union representation to some other company's employees, such as those of a lessee restaurant on hotel premises. *See, e.g., Chicago Dining Room Empls., Local 42*, 248 NLRB 604 (1980). Yet, Local 11 is even now using its waiver power under the Ordinance to exert pressure on a hotel to do that very thing. (*Id*.)

At the same hotel, the Union sought certain work-rule changes that were too costly for the Hotel operator to accept. (R-618-19.) The Union held a one-day strike – but the employer did not yield. (R-619.) The Union's bargaining representative then resorted to the threat of the $15.37 wage rate on July 1, 2015 as a bargaining chip to induce the Hotel operator to accede to its work-rule demand – which would be less expensive than following the Ordinance's requirements. (R-620.) This undeniably "upset[s] the balance that Congress has struck between

labor and management," *MetLife*, 471 U.S. at 751, and "interferes with the ability of the [parties] to reach an agreement unfettered by the (labor) restrictions of state law." *Cannon v. Edgar*, 33 F.3d 880, 886 (7th Cir. 1994).

That is irreconcilable with the rock-bottom precept of federal labor policy: the principle of "free collective bargaining." (R-656-57.) While the federal government has a role in regulating the collective-bargaining process, even the NLRB cannot exercise its supervisory power in a way that affects the substantive outcome of labor negotiations. *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107 (1970).

2. The Ordinance Interferes With Union Organizing For Nonunion Hotels.

The Ordinance's disruption of "the balance of power between labor and management expressed in our national labor policy," *Local 10, Teamsters v. Morton*, 377 U.S. 253, 260 (1964), is just as pronounced for non-union hotels. This is so because such employers can obtain relief from the Ordinance's oppressive requirements only by an express waiver in a "bona fide" collective bargaining agreement.

As a practical matter, Local 11 organizes only through card-check recognition agreements. (*See* page 4, *supra*.) Consequently, non-union hotels are effectively required to acquiesce in Local 11's demand for "neutrality" and "card-check recognition" merely to be eligible for a waiver. (*See* pages 13-14, *supra*.)

Such agreements, however, contain provisions incompatible with the comprehensive federal scheme. [9]

By signing a "neutrality" agreements, hotel employers relinquish rights and prerogatives that they would otherwise have under federal labor law: the right to communicate opposition to unionization, to deny the union access to their premises, and to insist on a government-supervised secret-ballot election. (*See, e.g.*, R-662-63; R-559.)

The "neutrality" clause interferes with the NLRA's goal of "robust [] and wide-open debate" on, among other things, whether a workplace should be organized by a union, *see Brown*, 554 U.S. at 68, and the right of employers to express opposition to unionization, *id.* at 67-68.

The "union access" clause relinquishes the federally recognized prerogative of employers to deny access to their premises to non-employee union organizers. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992).

Most importantly, employers have an NLRA-protected right to insist on a secret-ballot election supervised by the National Labor Relations Board (NLRB). *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 305 (1974). That

[9] The common features of neutrality agreements are set forth by Appellants' labor-relations expert, Prof. Zev Eigen (R-662-66), and further detailed in Eigen & Sherwyn, A Moral/Contractual Approach to Labor Law Reform, 63 HASTINGS L. J. 127-137 (2012).

is, moreover, "the preferred method for ascertaining employee sentiment" about bargaining representation. *United Steel Workers of Am. v. NLRB*, 482 F.3d 1112, 1117 (9th Cir. 2007); *see also NLRB v. Gissel Packing*, 395 U.S. 575, 603 (1969).

Yet, once a card-check/neutrality agreement is signed, all these rights are irrevocably waived. *See Hotel Employees, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992). Since the Ordinance significantly changes the economic calculus for hotel employers as to whether to enter into such agreements (*see* pages 13-14, *supra*) – or penalizes them for refusing to do so (*see* R-561; R-600) – it undeniably interferes with the "implement[ation of] federal labor policy." *See Brown*, 554 U.S. at 66.

Not just rights – but outcomes – are affected. As Professor Eigen explains, the card-check recognition process – whereby union organizers solicit employees on-the-spot for signatures (and, with "neutrality" prevent the employer from expressing an opposing viewpoint) – results in union recognition at a significantly higher rate than do secret-ballot elections, even though elections much better capture employee sentiment. (R-664-65.) Just as critically, if a union is recognized by an employer pursuant to authorization cards, the affected employees lose for one year their own right to obtain an NLRB-supervised election to determine the union's majority status. *See Lamons Gasket Co.*, 357 NLRB No. 72 (2011).

The system of unionization by card-check recognition produces outcomes

different from what would have been so under the congressionally-preferred method of NLRB-supervised, secret-ballot elections, and the Ordinance imposes economic pressure on otherwise unwilling hotel employers to accede to that regime. How is that not regulating a "zone of activity" – namely, card-check recognition – that Congress "intended to remain free from all regulations"? *Brown*, 554 U.S. at 74 (internal citation omitted). How is that not "incompatible with [the] general goals of the NLRA," *MetLife*, 471 U.S. at 755, which favors secret-ballots as the preferred means to determine the existence – or not – of a union majority?

The record of *this* case shows that Local 11 has already tried to induce a non-union hotel owner to accept a neutrality agreement (see R-534) and to subject Ancillary Businesses to Union terms (see R-638-39; R-617, 620), explicitly using the imminent effective date of the HWO to induce acquiescence. Such a fact record did not exist in any of the decisions on which the City will likely rely.

By imposing an onerous, though purportedly "minimum" labor standard, and then allowing those who accept the Union's agenda to avoid its consequences, the City has given non-union hotels a Hobson's choice: they can remain non-union – in which case they must pay the excessive wage (which is bad), while their unionized competitors are excused from doing so (which is worse) – or they can acquiesce to card-check recognition and virtually assured Union representation (*see* R-665),

because by virtue of the HWO, Local 11 is now the "low-cost option," *see generally*, U.S. Chamber of Commerce, *Wage Exemption: Unions As the "Low Cost" Option* (2014), at 3 (hereinafter, "*Wage Exemption*"). (*See* pages 13-14, *supra*.) Such "considerable pressure on an employer" to yield lawful prerogatives with respect to union organizing is undeniably preempted under *Machinists*, as the Supreme Court in *Brown* has made clear. *See* 554 U.S. at 73.

Significantly, it has been reported that after a similar ordinance was adopted in Long Beach, hotels that had long resisted unionization became unionized. *See* Chamber of Commerce, *Wage Exemption*, at 5. In other cities adopting similar legislation, "union density" (*i.e.*, the proportion of workers represented by a union) increased, in a noteworthy shift from the nationwide trend of decline. *Id.* (*citing* public records). This augments the sworn testimony contained in this record, which shows unmistakably that the Ordinance's "real effect" is to distort the balance of economic power.

There are academics who believe that federal labor law is "ossified" and skewed in favor of management.[10] Some advocate unions' using their political influence with local governments to enact laws that disguisedly empower unions, so as to correct perceived labor-law defects that a purportedly dysfunctional

[10] *See, e.g.*, Estlund, *The Ossification of American Labor Law*, 102 COLUMBIA L. REV. 1527, 1531 (2002).

Congress will not address.[11] Members of the City Council are entitled to share that viewpoint; they may not act on that view, so as to "level the playing field," as they see it. Congress sets labor policy for the United States – not the City of Los Angeles.

* * * * *

Because the Ordinance affords Local 11 the power to exact onerous or even illegal bargaining concessions from unionized hotels and to pressure non-union hotels into the Hobson's choice of card-check recognition or being dramatically non-competitive with hotels not subject to these requirements, it is preempted by the NLRA under *Machinists*.

Neither Appellees nor the District Court actually denied these effects. They argue instead that because the Ordinance is a "minimum labor standard," the ordinary *Machinists* analysis does not apply. This is not the law.

B. Interference Short of "Virtual[] Dictate" Compels *Machinists* Preemption.

Because "[t]he parties' resort to economic pressure [is] a legitimate part of their collective-bargaining process," any exercise by a municipality of its police power "*in a way that* intrudes into the collective-bargaining process" or "*destroy[s] the balance* of power designed by Congress" is preempted by federal

[11] *See* Sachs, *Despite Preemption*, at 1163-64.

labor law. *Golden State*, 475 U.S. at 615, 619 (emphasis added); *see also Machinists*, 427 U.S. at 132, 153 (state attempts to "*influence* the substantive terms of collective-bargaining agreements are [. . .] inconsistent with the federal regulatory scheme") (emphasis added); *Morton*, 377 U.S. at 260 (state law preempted if it "*upset[s] the balance* of power between labor and management expressed in our national labor policy") (emphasis added); *Babler Bros. v. Roberts*, 995 F.2d 911, 915 (9th Cir. 1993) ("State laws must *not* '*upset the balance* of power between labor and management expressed in our national labor policy.'") (emphasis added); *Derrico*, 844 F.2d at 29 (preempting application of state law that "*would significantly alter* the labor-management relationship") (emphasis added); *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1133 (7th Cir. 2008) (preempting minimum labor standard that "*interfere[s] with* the free play of economic forces" and "*affects* the bargaining process in a way that is incompatible with the general goals of the NLRA") (*quoting Bragdon*, 64 F.3d at 504) (emphasis added); *Cannon*, 33 F.3d at 885 (preempting minimum labor standard that "*intrudes* on the collective bargaining process") (emphasis added).

Nothing in Supreme Court decisions even remotely suggest that *Machinists* preemption turns on whether the state's interference is of such potency that one side or the other is compelled to yield. Indeed, legislation of the City of Los Angeles that merely "thwarted" the exercise of economic power and "[entered]

into the substantive aspects of the bargaining process *to an extent Congress has not countenanced*" has been held to be preempted under *Machinists*. *See Golden State*, 475 U.S. at 616 (emphasis added).

The City there did not dictate – virtually or otherwise – the terms that the recalcitrant franchisee needed to adopt; it "merely" withheld a critical economic benefit until the strike settled, pressuring employer acquiescence. In doing so, it "destroyed the balance of power *designed by Congress"* and "*frustrated Congress' decision* to leave open the use of economic weapons," as the parties see fit. *Golden State*, 475 U.S. at 619 (emphasis added). That was enough for preemption.

Similarly, in *Brown*, *supra*, the Court applied *Machinists* preemption to a California statute that merely "*regulate[d]* within 'a zone protected and reserved for market freedom'" and "*put considerable pressure* on an employer" to forego NLRA-protected rights. 554 U.S. at 66, 73 (emphasis added). State law that "predicat[es] benefits on refraining from conduct protected by federal labor law" is itself "impermissible," without some additional showing that the employer had actually capitulated. *Brown*, 554 U.S. at 73.

Notwithstanding this clear precedent, the court below refused to find preemption solely because the provisions of the ordinance were "not so onerous and extreme so as to *virtually dictate* what would otherwise be the result of the free-play or economic forces." (R-16 (emphasis in original).) The District Court

presumed that anything called a "minimum labor standard" could not be preempted under *Machinists* unless it "not only 'alters the playing field' but also '*forces the hand' of one or both parties*." (*Id*. (emphasis added).)

The District Court also proceeded on the premise that every so-called minimum labor standard is "presumptively valid" (R-43), and that the distinction between a "substantive minimum labor standard" and other enactments "affecting labor relations" was "relevant and critical" to the applicability of *Machinists* preemption (*id.* at R-23 n. 7). Yet, each of these presuppositions – the "virtually dictate" requirement and the "presum[ed] validity" of minimum labor standards – is flatly inconsistent both with controlling Supreme Court precedent, and with the "'mode of analysis'" there used, by which this Court is "bound." *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*quoting* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989)).

In *NY Tel.*, the Supreme Court addressed for the first time the effect of *Machinists* preemption on "law[s] of general applicability," namely, legislation that "implement[s] a broad state policy that does not primarily concern labor-management relations." 440 U.S. at 533-34 (plurality). At issue there was a statute that paid unemployment compensation to strikers. While accepting the statute "altered the economic balance between labor and management," the plurality opined that *Machinists* preemption was "more difficult to infer" for a state

worker-benefit program, rather than for laws expressly regulating labor-management relations. *Id.* at 532-33. The plurality's decision, however, was *not* "ultimately governed" on that premise but rather by their understanding that "Congress intended to allow the States to make this policy determination [namely, providing unemployment benefits to strikers] for themselves." *Id.* at 527, 540.

Justice Blackmun concurred only in the judgment because, in his view, the plurality's opinion was not "fully consistent with the principles recently enunciated in [*Machinists*]," *id.* at 547, which he summarized as follows:

> [T]here *is* pre-emption unless there is evidence of congressional intent to tolerate the state practice. That premise, therefore, is one of **assumed priority on the federal side**. The distinction is not semantic. [. . .]
>
> I believe this conclusion to be applicable to a case where a State alters the balance struck by Congress by conferring a benefit on a broadly defined class of citizens rather than by regulating more explicitly the conduct of parties to a labor-management dispute. **The crucial inquiry is whether the exercise of state authority "frustrate[s] effective implementation of the Act's processes," not whether the State's purpose was to confer a benefit on a class of citizens**.
>
> I therefore see **no basis for determining the question** "whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes" . . . **other than in the very manner set out in *Machinists* in the evaluation of the more direct regulation of labor-management relations at issue in that case**.

Id. at 549-50 (italics in original; bold added).

As the narrowest ground for decision, Justice Blackmun's opinion constitutes "'the holding of the Court.'" *See Marks v. United States*, 430 U.S. 188,

193 (1977). It establishes two critical propositions: *First*, *Machinists* preemption applies to laws of general applicability, there being no "deference," *NY Tel.*, 440 U.S. at 548, or presumed validity for laws that provide economic benefits to workers – as there is always "assumed priority on the federal side."[12] *Id.* at 549. *Second*, any "significant alteration of the balance of economic power" is preempted (absent congressional intent "to tolerate" the interference), *id.*, without regard to degree, as long as it is "significant."

In *MetLife*, *supra*, Justice Blackmun wrote for a unanimous Court with respect to a "mandated benefit" statute. 471 U.S. at 748. He explained that in *NY Tel.*, a "state law [that] 'altered the economic balance between labor and management[]'" was not preempted based on legislative history, and took pains to note that the concurring opinions "agreed with the plurality on only the legislative history ground." *Id.* at 750 & n. 28. Thus, by 1985, the Supreme Court was unanimous in the view that *Machinists* preemption applies to laws of general applicability – full stop.

As the Court explained in *MetLife*:

> Such analysis [*i.e.*, *Machinists*] initially had been used to determine whether certain weapons of bargaining [. . .] could be subject to state regulation. [. . .] It has been used more recently to determine the

[12] Accordingly, the District Court erred in predicating its decision (R-23 n. 7) on such a differential application of *Machinists*.

> validity of state rules of general application that affect the right to bargain or to self-organization. [. . .]
>
> *Such pre-emption does not involve in the first instance a balancing of state and federal interests* [. . .], but an analysis of the structure of the federal labor law to determine whether certain conduct was meant to be unregulated.

Id. at 749 n. 27 (citations omitted) (emphasis added).

MetLife offers no support for the City because the appellants there "[did] *not suggest* that [the mandated-benefit statute] alter[ed] the balance of power between the parties to the labor contract," but argued instead that "the NLRA pre-empts *any* state attempt to impose minimum-benefit terms on the parties." *Id.* at 751-52 (emphasis added). The Court's ruling was only that a statute "potentially limits [NLRA-protected rights] . . . , [but] it does not [actually] limit the rights of self-organization or collective bargaining protected by the NLRA, and is not pre-empted by that Act." *Id.* at 758. The Supreme Court itself later has described *MetLife* as being a case where a "state law [was] held not preempted *because* it 'neither encourage[s] nor discourages[s] the collective-bargaining processes.'" *Livadas v. Bradshaw*, 512 U.S. 107, 118 (1994) (emphasis added).

Thus, *MetLife* holds only that minimum labor standards are not *per se* preempted by *Machinists*, not that they are presumptively immune. The Court's decision in *MetLife* also makes clear that the validity of the challenged statute was not based on its being a "minimum labor standard" but rather on the fact that it did

not actually interfere with labor relations – likely because it set only *minimal* requirements. *MetLife* supports no special variant of *Machinists* analysis for labor-standards legislation.[13]

It follows that "minimum labor standards" *are* preempted under *Machinists* if they "have any but the most indirect effect[s] on" labor-management relations. *See MetLife*, 471 U.S. at 755. As the Court explained:

> Minimum state labor standards affect union and nonunion employees equally, and 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. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively […]. Nor do these laws even inadvertently affect these interests implicated in the NLRA.

Id. at 755; *see also id.* at 756 (Congress did not intend to disturb minimum labor standards that "were unrelated *in any way* to the processes of bargaining or self-organization") (emphasis added).

[13] While some labor-standard laws are preempted under *Machinists* and some are not, it is not correct to say that such laws, as a class, are not "subject" to *Machinists*. This is shown by *Build'g and Const. Trades v. Assoc'd Builders and Contractors ("Boston Harbor")*, 507 U.S. 218 (1993), which held that legislation by a state acting as a market participant (as opposed to a market regulator) is not "subject" to *Machinists*. *Id*. at 227. The Supreme Court has never said that for legislation enacted pursuant to the state police or spending powers. Indeed, even "market participant" legislation can be preempted under *Machinists* if its "spillover effect" is to regulate private-sector labor relations. *See Metro. Milwaukee Ass'n of Comm. v. Milwaukee*, 431 F.3d 277, 279 (7th Cir. 2005).

In contrast to *MetLife*, Appellants here assert preemption on undisputed record evidence that the Ordinance does effect a "significant alteration of the balance of economic power" between labor and management, *NY Tel.*, 440 U.S. at 549, and that it does actually "limit" NLRA-protected rights with respect to union organizing and collective bargaining. *MetLife*, 471 U.S. at 756. More than that is not required.

The Court's subsequent decision in *Fort Halifax Pkg. v. Coyne*, 482 U.S. 1 (1987), which involved a statute requiring "a one-time severance payment to employees in the event of a plant closing," *id*. at 3, is to the same effect. The Court there stated: "*We hold* . . . that the Maine law is not preempted by the NLRA, *since* it establishes a minimum labor standard *that does not intrude upon the collective-bargaining process.*" *Id.* at 6-7 (emphasis added). This necessarily means that the only minimum labor standards not preempted under *Machinists* are those that "do[] not intrude" on federal labor policies.[14]

While "the mere fact" that a state law "pertains" to subjects of bargaining "cannot support a claim of pre-emption," *id.* at 21, that is not what Appellants contend. And, while it may be that laws "that form a 'backdrop' for [labor]

[14] Grammatically, the Court uses "that" as a restrictive subordinating conjunction, which means that the clause it introduces restricts or limits the clause to which it is subordinate.

negotiations" are not be preempted, *id*., the undisputed facts here show that the Ordinance is no mere "backdrop" – it is "center stage."

Nothing in *Fort Halifax* immunizes from preemption a law whose "real effect" is to give non-union employers the Hobson's choice of disrupting basic methods of operations or yielding to union demands for card-check recognition (*see* page 13, *supra*.). To profess that to be a "backdrop" for labor-management relations is disingenuous. To think that the Ordinance does not "encourage unionization" when it allows unionized hotels – but only those – to avoid such consequences is purblind.

Properly applying these principles, this Court in *Bragdon*, *supra,* found that a county's minimum labor standard was preempted because it "affect[ed] the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*" and was "an undue governmental interference with the collective bargaining processes protected by that Act." 64 F.3d at 502, 504; *see also Bechtel Constr. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1226 (9th Cir. 1987) (preempting minimum labor standard that "[u]nlike the minimum benefit standards in [*MetLife*]" had a "distorting effect [. . .] on the bargaining process").

While the *Bragdon* court aptly observed that certain substantive requirements "could be" so restrictive as to "virtually dictate" the results of labor

negotiations, *id.* at 501, nothing in *Bragdon* remotely suggests that "virtual[] dictate" is the *sine qua non* of *Machinists* preemption, even for a purported "minimum labor standard." Nor could it, as that would be contrary to Supreme Court precedent.

Here, the Ordinance affects not just collective bargaining but also union organizing "in a much more invasive and detailed fashion" than was the case in *MetLife* and *Fort Halifax* and has a "distorting effect" on the collective-bargaining process. Nor can it be said that the Ordinance is "unrelated in any way" and has none "but the most indirect effect" on union organizing and collective bargaining. *See MetLife*, 471 U.S. at 755. It, therefore, does not enjoy the shelter from *Machinists* preemption that minimum labor standards are sometimes – but not always – afforded. A further showing that, as the District Court phrased it (R-25), hotel employers will be "forced to (*i.e.*, would have no other option but to) yield to Local 11's demands" is not required for *Machinists* preemption.

C. The Ordinance As A Whole Is Relevant And, Here, Determinative for *Machinists* Preemption.

Formalist notions about wholes being no greater than the sum of their parts (R-15, 42) have no place in *Machinists* analysis. Rather, as the Supreme Court stated unmistakably in *Brown*, 554 U.S. at 69, it is the "actual content" and "real effect" of the Ordinance that this Court must address.

The "real effect" of *this* Ordinance is a function of several interrelated factors: the excessively high mandated minimum; the failure to allow an off-set for service-charge payments; the application only to hotels; the union-waiver and unilateral-implementation provisions, and (given the peculiar configuration of the City of Los Angeles) its impact on subject hotels vis-à-vis their market competitors.

Appellants are not required to show that, hypothetically, the Ordinance would be preempted if it had established a $15.37 hourly wage but did not allow for union waivers (though it probably would be), or if it set a $11.00 minimum but gave unions the power to grant waivers (though it probably would be). Rather, all that Appellants need to show is that the Ordinance's "real effect" – in its totality – significantly interferes with federal labor policy. Even if no element standing alone were sufficient to warrant preemption, Appellants are entitled to relief if several elements additively are.

1. The Ordinance's Minimum Standard Is Not "Minimal".

In *MetLife* and *Fort Halifax*, the Court was dealing with minimum labor standards that were also "minimal," which is to say, the least possible needed to secure the health, safety or economic security of the affected workers. *See MetLife*, 471 U.S. at 756 (using "minimal" and "minimum" interchangeably); *Shannon*, 549 F.3d at 1134, 1136 (as used by Supreme Court, "[m]inimum [. . .] implies a low threshold"); *Bragdon*, 64 F.3d at 500 (noting that "minimal" employment standards not inconsistent with NLRA goals).[15] The HWO, however, is not "minimal" in any sense.

This was demonstrated by the City itself when it enacted Citywide Minimum Wage (the "Citywide MWO").[16] That set minimum wage at $10.50, but not beginning until 2016 and rising incrementally, reaching $15 per hour only in 2020. Under the HWO, the minimum wage for larger hotels goes to $15.37 in 2015 and, adjusting for inflation, *see* HWO §186.02 at R-451, by 2020 may well be over $16.70 an hour.

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[15] *See* Merriam-Webster Online Dictionary. 2015. http://www.merriam-webster.com (15 Jan. 2015) (defining "minimal" as "the least possible <a victory won with *minimal* loss of life> [. . .] barely adequate <a *minimal* standard of living> [. . .] very small or slight <a *minimal* interest in art").

[16] Ordinance No. 183612, available at http://clkrep.lacity.org/onlinedocs/2014/14-1371_ord_ 183612_07-19-15.pdf

Moreover, the prohibition on employer retention of a service charge compounds that effect, as it deprives hotel employers of a significant source of revenue, from which they fund their operations, including paying their employees. (R-645-46.)

And, too, by forbidding employers from using the service charge as an offset to meet the $15.37 requirement, the Ordinance's most immediate effect at many hotels will be to substantially raise the wages of the "tipped" employees, who are among the highest paid at a hotel, while doing very little or nothing for non-tipped employees as they are already paid at or just below $15.37 an hour. (*See* pages 9-10, *supra*; R-632-33; R-556-57.) At one hotel where banquet servers already earn an average effective wage, including service charges payouts and gratuities, of over $27 an hour, HWO compliance would increase that hourly rate to over $40. (R-557.) This is not a "minimal" wage-rate – even for Los Angeles. This militates in favor of *Machinists* preemption. *See Shannon*, 549 F.3d at 1136 (the more "stringent" a substantive labor standard, the more likely it "interferes with the bargaining process").

Even more significant than amount is rationale. The City Council adopted the $15.37 wage-rate based on its perception of what the larger hotels could afford to pay, and to address the "pressing" issue of "[i]ncome inequality." *See* HWO § 186.00 at R-449. But, in enacting the NLRA, Congress, too, addressed "'the

widening gap between wages and profits,' [which were] thought to be the cause of economic decline and depression." *MetLife*, 471 U.S. at 754 (quoting remarks of Sen. Wagner). Congress' way of doing that was by "'restoring equality of bargaining power' among other ways, 'by encouraging the practice and procedure of collective bargaining [. . .].'" *Id.* at 753-54. States and cities are "without authority to attempt to 'introduce some standard of properly 'balanced' bargaining power' or to define [. . .] an 'ideal' or 'balanced' state of collective bargaining." *Machinists*, 427 U.S. at 149-50 (internal citation omitted). The "balance of power" between labor and management *was how* Congress chose to correct the problem now called "[i]ncome inequality." The City has no authority to augment Congress' handiwork.

Because the HWO is not minimal, it is decidedly *not* a mere "backdrop" for negotiations, but rather "invasive[ly]" affects collective bargaining and union organizing, *see Bragdon*, 64 F.3d at 502, and "intrude[s]" on labor relations, disrupting "Congress' intentional balance between the power of management and labor." *Cannon*, 33 F.3d at 885.

2. The Targeted Scope of the HWO Militates Toward Preemption.

That the Ordinance is targeted to hotels only – and also to restaurants, but only if located in hotels (*see* pages 10-11, *supra*) – also weighs in favor of *Machinists* preemption. While the HWO might be called a "law of general

applicability" because it does not, on its face, "primarily concern labor-management relations," *NY Tel.*, 440 U.S. at 533-34 (plurality opinion), that "is not a sufficient reason to exempt it from pre-emption." *Id.* Indeed, *Machinists* preemption is properly used "to determine the validity of state rules of general application *that affect* the right to bargain or to self-organization." *MetLife*, 471 U.S. at 749 n. 27 (emphasis added). Moreover, because laws of general applicability typically implement "a broad state policy," *NY Tel.*, 440 U.S. at 534 (plurality opinion), ordinances that are targeted to a specific industry are more susceptible to *Machinists* preemption.

For example, in *Shannon*, *supra*, the challenged law "applie[d] to only one occupation (room attendants), in one industry (the hotel industry), in one county (Cook County) [. . . and, therefore was] distinguish[ed] [. . .] from the statutes of general application considered in [*MetLife*] and *Fort Halifax*." 549 F.3d at 1130. Other laws of general applicability but with a particular industry scope have also been preempted under *Machinists*. *See Bragdon*, 64 F.3d at 503 ("This Ordinance differs from the usual exercise of police power, which normally seeks to assure that a minimum wage is paid to all employees within the county to avoid unduly imposing on public services"); *Hull v. Dutton*, 935 F.2d 1194, 1198 (11th Cir. 1991) (Alabama longevity pay statute not a "minimum labor standard" because it only applied to state employees); *New England Health Care Employees v.*

Rowland, 221 F. Supp. 2d 297 (D. Conn. 2002) (preempting state's provision of anticipatory payment of legitimately reimbursable costs to nursing-home employers resisting health-care worker strike).

Appellants acknowledge that "the NLRA does not authorize [. . .] pre-empt[ion] [of] minimum labor standards *simply because* they are applicable only to particular workers in a particular industry." *Assoc. Builders of S. Cal. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004) (emphasis added). But, this Court has never said that targeting of a purported minimum labor standard to a particular industry – and doing so based on ability-to-pay, rather than the minimal conditions for worker well-being – is never relevant to *Machinists* analysis and cannot, in conjunction with other factors, be determinative. In this case, it is.

D. The Ordinance Is Independently Preempted By The Purported "Exemption" for Collective Bargaining.

1. The Union-Waiver Provision Warrants Preemption.

In *Livadas*, *supra*, the Supreme Court held that an enforcement policy of the California Labor Commissioner was preempted under *Machinists* because it treated unionized employees differently from all other employees with respect to their statutory, non-waivable right to prompt wage payments after being discharged from employment. The basic rule of *Livadas* is that the state may not differentiate between unionized and non-union employees in affording workplace benefits. 512

U.S. at 116-117. The Court specifically cautioned against providing a false choice of having protectable state-law rights or exercising the right to select a collective-bargaining representative. *Id.* at 119.

The *Livadas* Court did not mean to "suggest [. . .] that every distinction between union-represented employees and others is invalid under the NLRA." *Id.* at 129. It acknowledged that its "holding" applied only to "unusual polic[ies] . . . irreconcilable with the structure and purposes of the Act," but not to "familiar and narrowly drawn opt-out provisions," like the ones in *Fort Halifax*, which it mentioned by name. *Id.* at 132. But, the Court hardly intended for the exception to swallow the rule or for incantation of the word "opt out" to magically shield from *Machinists* preemption municipal ordinances that actually are "unusual" and actually are "irreconcilable with the structure and purposes of the NLRA."

As the *Livadas* Court explained, the opt-out provision of the statute in *Fort Halifax* was valid "[m]ost fundamentally" because it "treated all employees equally, whether or not represented by a labor organization. All were entitled to the statutory severance payment, and all were allowed to negotiate agreements providing for different benefits." *Id.* at 131. Under the HWO, however, unions are empowered to grant waivers, but individual employees are forbidden to do so, and it is a "Willful Violation" for employers even to attempt to obtain an individual waiver. *See* HWO § 186.10 at R-455.

The other sample "opt out" clauses applied to truly "narrow[]" concerns, like having wages paid one day after discharge or, under § 203(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o), allowing what could be called "prep time" to be excluded from "hours worked" for purposes of overtime if so stated either in the "express terms of" or by the "practice under" a CBA. There is, however, no blanket exemption from "any and all provisions" of the FLSA or a requirement for a clear and unambiguous written waiver expressly included in the CBA itself. As Justice Blackmun observed in another context, these differences are "not semantic." *NY Tel.*, 440 U.S. at 549.

Many hotel employers already have CBAs that expressly provide for terms other than those mandated by the Ordinance, such as, for example, providing banquet servers some, but not all, of the service charge. (R-645-46.) Yet, they are still required to obtain a waiver from Local 11. The insidious effects of the HWO's union-waiver provision is shown by the Union's demand for pre-conditions that would have required hotel employers to assist in the Union's organizing efforts (*see* R-634-35) or to waive the right to challenge the legality of the Ordinance itself (*see* R-642). That Local 11 was able to make such demands in the first place and that it remains free to do so in the future, shows that the Ordinance gives the Union a cudgel to use in collective bargaining that the City has no authority to supply.

This Court's decision in *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996) offers no support for the City. There, the "opt-out" clause provided only that a rule prohibiting miners from working more than 8 hours a day for safety reasons did not prohibit a 12-hour workday when the employees are subject to "a valid collective-bargaining agreement" that "expressly provides for the wages, hours of work, and working conditions of the employees." 75 F.3d at 486. Here, as noted, the unionized Hotel employers already had that in place, but still needed to obtain an express written waiver. Moreover, in *Viceroy Gold*, miners not represented by a union had a statutory mechanism for obtaining the same benefit, *see* 75 F.3d at 490, which the HWO does not provide. Thus, that narrow "opt-out" is nothing like the union-waiver provision of the HWO.

The union-waiver provision of the HWO is not "familiar and narrowly drawn," but rather "unusual" and, for reasons already stated, "irreconcilable with the structure and purposes of the [NLRA]." Just like the policy in *Livadas*, it is preempted under *Machinists*.

2. The Unilateral-Implementation Provision Is Effectively A Disruptive "Snap Back".

Permitting its provisions to be waived by a union as part of collective bargaining, the Ordinance then provides that the "[u]nilateral implementation" of terms and conditions of employment "shall not constitute or be permitted" as such

a waiver. This is perhaps the Ordinance's single most pernicious provision for labor-management relations.[17]

Following the Supreme Court decision in *Brown v. Pro Football* ("*Pro Football*"), 518 U.S. 231 (1996), it cannot be denied that "[u]nilateral implementation" by an employer – or the prospect of doing so – is "an integral part of the bargaining process." *Id.* at 239. By prohibiting "[u]nilateral implementation" of waivers, the Ordinance fundamentally undermines the collective-bargaining process, as typically occurs at the expiration of a CBA.

As Professor Eigen explains:

> The right to unilateral implementation is an essential and integral component of collective bargaining and labor relations generally. Unilateral implementation breaks the bargaining impasse and requires further negotiations between the parties. The threat of unilateral implementation is part of the balancing of rights in the negotiation process set out over years of labor law.

(R-658-59; *see generally* R-657-660.) *See generally*, DEVELOPING LABOR LAW 894-902; 1049-1067.

The HWO, however, creates a risk of civil liability for any hotel employer who has been operating pursuant to a waiver and who elects not to accept union demands at the expiration of a CBA, and would, as is commonplace, merely continue the terms and conditions of employment post-expiration while negotiating

[17] Appellants' counsel is not aware of such a provision in any local minimum-wage ordinance in California except for those that affect hotel workers expressly.

a successor contract (R-659-60) – a practice permitted by federal law, *see, e.g.*, *Finley Hospital*, 362 NLRB No. 102 at 2 (2015).

The prohibition against "[u]nilateral implementation" thus functions as a "snap back": it effectively puts the Ordinance's requirements automatically back into effect at the expiration of a CBA or, at the latest, when the employer, in response to an impasse, unilaterally implements a bargaining proposal.

Consider, for example, a hotel that, pursuant to a previously granted waiver, is paying banquet servers a wage-rate that is less than $15.37 and taking a portion of the service charge. Then, the CBA expires. The continuation of that wage-rate and service-charge practice puts the employer at risk of significant financial liability because the HWO creates a private right of action for employees to seek treble damages for willful noncompliance, and individual waiters could argue that their statutory rights were willfully violated simply by the hotel's maintaining the status quo. That creates an intolerable "double bind," as changing wage rates when a CBA expires violates the hotel employer's duty under Section 8(d) of the NLRA to engage in good-faith collective bargaining. This is so because employers are prohibited from making *any change* in the terms of employment during the interim period when a new contract is being negotiated, even if the change is favorable toward their employees. *See Laborers Health and Welfare Trust Fund v.*

Advanced Lightweight Concr., 484 U.S. 539, 544 (1988) (*expanding NLRB v. Katz*, 369 U.S. 736 (1962)).[18]

It has long been recognized that *Machinists* preemption precludes enforcement of state law inconsistent with the terms of a labor agreement, even after it has expired. *Barnes v. Stone Container*, 942 F.2d 689, 693 (9th Cir. 1991) ("the incidental effect of allowing [the plaintiff] to pursue his [wrongful discharge] action after contract expiration, but prior to a bargaining impasse, is precisely the sort of entanglement the Supreme Court sought to avoid in *Machinists*"); *Derrico*, 844 F.2d at 28 ("[t]he Supreme Court has broadly construed this '*Machinists* preemption' doctrine to bar 'state interference with policies implicated by the structure of the [NLRA] itself'" so as to avoid "substantial potential for friction between the delicate machinery of the NLRA" and the enforcement of state employment-law following expiration of a CBA).

But, hotel employers are still at risk that disaffected individuals will sue under the Ordinance, claiming perhaps (as the District Court itself intimated (R-38)), that such rules do not apply to a "minimum labor standard." That risk in itself requires preemption because, as the Supreme Court has now made clear, a

[18] An employer's unilateral action, even one that benefits employees, is unlawful because it effectively communicates to the workforce that they do not need the union to protect their interests. *See NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992).

statute that subjects employers to litigation risk for exercising labor-law prerogatives afforded by Congress is, for that very reason, preempted by *Machinists*. *See Brown*, 554 U.S. at 72; *see also Pro Football*, 518 U.S. at 246 (noting that it interferes with bargaining to have to negotiate under threat of civil liability for treble damages).

This interference is intensified when, after good-faith bargaining, a bargaining impasse is reached.[19] If, in the above scenario, bargaining reaches an impasse, the employer has the well-established labor-law right to implement unilaterally its extant bargaining proposal. (*See* R-657-58; *see generally*, DEVELOPING LABOR LAW 1056-1067.) Unless the hotel includes in that proposal a reversion or "snap back" to the statutory minimums, it is again at risk of liability under the Ordinance. Indeed, the very fact that the employer's option to unilaterally implement after impasse is even potentially impaired interferes with the collective-bargaining process as contemplated by federal labor law. (*See* R658-59 [noting that "the threat of impasse and implementation frequently help[s] the parties to reach agreement"].)

[19] A "bargaining impasse" is a term of art under the NLRA that has been carefully defined. *See Pro Football*, 518 U.S. at 239; *see also* R-657-59. Significantly, unilateral implementation, which is permitted at the point of impasse, has the effect of breaking the impasse and requiring further good-faith bargaining. *See* DEVELOPING LABOR LAW at 894-902; 1049-1067. That is one reason why impasse and unilateral implementation are, as the Supreme Court put it, "an integral part of the bargaining process." *Pro Football*, 518 U.S. at 239.

Any local ordinance that subjects an employer to litigation risk and potential illegality if it exercises its labor-law prerogative to unilaterally implement at a bargaining impasse is "irreconcilable with the structure and purposes of the [NLRA]," *Livadas*, 512 U.S. at 132, and impermissibly "intrudes into the collective-bargaining process." *Golden State*, 475 U.S. at 619.

This principle was undeniably established by the Supreme Court in *Pro Football, supra*, where, after the CBA between the National Football League and the NFL Players Association expired, the parties reached impasse concerning developmental squad players. The club owners implemented the League's proposal of paying a fixed weekly salary to all developmental squad players, which was their lawful prerogative. Some players challenged this, arguing that the employers' collective implementation violated federal antitrust laws (as it was, obviously, a concerted act in restraint of trade) and that the labor exemption to federal antitrust law ceased to apply once the CBA expired (or, if not then, at impasse).

The Supreme Court held, however, that post-impasse unilateral actions of employers were still immunized from federal antitrust law, even though it would otherwise be a conspiracy in restraint of trade, because the policies imbedded in the NLRA and the needs of collective bargaining so required. If federal labor law precludes the enforcement of federal antitrust law following the expiration of a

CBA, impasse and unilateral implementation, then it certainly precludes enforcement of an ordinance of the City of Los Angeles. Therefore, that provision of the Ordinance which disallows "[u]nilateral implementation" from "constitut[ing]" a permissible union waiver is, in and of itself, grounds for preemption.[20]

Lastly, that a statute has a "formidable enforcement scheme" that "impose[s] punitive sanctions for noncompliance [. . .] and deterrent litigation risks" is an additional basis for *Machinists* preemption. *See Brown*, 554 U.S. at 63, 71-72; *Shannon*, 549 F.3d at 1135. That the HWO provides for treble damages for "willful" underpayment, allows lawsuits by individual workers (with the right to recover attorney's fees), and creates doubt as to whether a CBA is "bona fide" and how the "[u]nilateral implementation" ban applies at the expiration of a CBA – surely constitutes the kind of "formidable enforcement scheme" that also compels *Machinists* preemption.

[20] While *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 73 (1995) appears to rule that a reversion to legislatively established labor standards after unilateral implementation is not preempted by *Machinists*, that case was decided before and without the guidance of *Pro Football*. This Court has authority to re-consider a prior panel's decision in light of intervening Supreme Court precedent on a "closely related" even if "not identical issue." *See Miller*, 335 F.3d at 899.

II.

THE ACT'S THINLY DISGUISED PURPOSE TO AFFECT LABOR-MANAGEMENT RELATIONS INDEPENDENTLY MANDATES PREEMPTION.

The Supreme Court has made it clear: an otherwise legitimate labor standard is preempted by *Machinists* if its purpose is to regulate an area of labor-management relations that Congress intended to be unregulated:

> No incompatibility exists [between the NLRA and] legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so *long as the purpose of the state [or city] legislation is not incompatible with these general goals of the NLRA*."

MetLife, 471 U.S. at 754-55 (emphasis added). This Court has said the same. *See also Babler Bros.*, 995 F.2d at 915 (stating that in *MetLife* and *Fort Halifax*, the Supreme Court upheld "statutes intended to provide minimum benefits to employees and *not intended* to interfere with the bargaining position of the parties") (emphasis added). In both *Golden State* and *Brown*, the Court found that otherwise legitimate exercises of, respectively, police and spending powers were preempted by *Machinists* where the evidence showed, directly or indirectly, an intent to favor unions. *See Golden State*, 475 U.S. at 618; *see Brown*, 554 U.S. at 71. Thus, even "minimal labor standards" are preempted under *Machinists* if their "purpose" is "incompatible with [the] general goals of the NLRA."

While the Ninth Circuit does not consider legislative purpose in assessing legislation under the Equal Protection Clause, *see, e.g., RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004), those principles of constitutional adjudication do not apply to labor-law preemption. *Brown*, 554 U.S. at 70-71.

This case does not fundamentally involve the assertion of private rights against the government. It involves national policy being undermined by parochial interest which, in part, take the form, as in *Brown*, of infringing rights and prerogatives afforded by Congress to employers to a degree that is "incompatible with [the] general goals of the NLRA." *MetLife*, 471 U.S. at 755.

Courts have preempted even minimum labor standards on precisely such grounds. For example, the Seventh Circuit found a "labor peace" ordinance preempted in part because the "mismatch" between its actual terms and its stated purpose "demonstrate[d] that the County's motive is dissatisfaction with the balance that the [NLRA] strikes between unions and management rather than [the stated] concern with service interruptions." *Metro. Milwaukee Ass'n of Commerce*, 431 F.3d at 281.

Similarly, this Court in *Bragdon* held preempted a local minimum labor standard, 64 F.3d 497, in part, because its provisions would not actually have advanced its stated public purpose, suggesting that its passage was the work of

interest-group lobbying – thus "substitut[ing] the free-play of political forces for the free-play of economic forces that was intended by the NLRA." *Id.* at 503-04.

The legislative history of the Ordinance demonstrates that it was, in fact, the handiwork of Local 11 and its political ally, LAANE. (*See* page 7-8, *supra*.) Indeed, Local 11's attorney and a high LAANE official secretly drafted portions of the Ordinance, even while City officials informed hotel-industry representatives that no draft ordinance was available for them to see. (R-675, 677-79; R-709-51.)

Even assuming, *arguendo*, that some Council members thought they were acting to advance the economic well-being of hotel workers, one purpose – perhaps the overriding purpose – of the Ordinance was to empower the Union vis-à-vis labor-management relations. This is demonstrated by provisions that are pernicious for hotels but unrelated and, even inconsistent with, the purported benefit for hotel workers:

First, the Ordinance defines Hotel Worker to include ***all but only*** employees eligible to vote in a union election, which differs from the definitional language of most wage-and-hour legislation. (HWO at §186.01(F) at R-450; R-654-55.).

Second, the Ordinance fails to allow employers to offset a portion of the new wage by providing living benefits to workers, as was allowed in prior ordinances that set a more modest "living wage." (R-672-73; *see* pages 6-7, *supra*.) Since

many non-Union hotels already provide such fringe benefits, the absence of that option under the HWO, gives the Union a cudgel in "living wage" clothing.

Third, the Ordinance does not allow any offset for service charges. That results in significant pay raises to, *e.g.*, bartenders and banquet waiters, who are already the highest paid in many hotels, but not to other workers at the same hotel who are already paid more than $15.37, or close to it. (R-632-33; R-556-57.)

Fourth, the City excluded smaller hotels from the Ordinance, ostensibly because they could not afford the increase; yet it knew at the time that workers at smaller hotels are the very ones most likely to be lower paid and that the larger hotels already paid average wage-rates higher than the new mandated minimum, except, of course, for tipped employees. (*See* page 6, *supra*.)[21]

Fifth, despite excluding small hotels, purportedly due to their relative inability to afford such wages, the HWO is expressly applicable as to Ancillary Businesses (*id*. §186.01(D-E) at R-450), merely by virtue of their proximity to

[21] In contrast, the 2007 ordinance applied to all hotels in the LAX Corridor of 50 or more rooms. (See Ordinance No. 178432, formerly Article 4 of Chapter X of Los Angeles Municipal Code, at R-501.) By 2014, that mandated wage had risen to $11.03. (*See* R-578.) The City could easily have required smaller hotels citywide to pay that amount; instead it repealed the 2007 ordinance altogether, *see* HWO §186.13 at R-456, which dropped the minimum wage at the smaller LAX-corridor hotels back to the state-mandated minimum of $9 an hour. The Union would not have been bothered by this reversion to the "mere" California state minimum because by then, the 2007 ordinance had achieved its strategic objective of organizing non-union hotels in the LAX corridor (*see* R-580).

large hotels. This encompasses "mom-and-pop" operations that can no better afford the new ultra-high minimum wage than the excluded small hotels. This provision gives Local 11 added leveraging in organizing hotel-based restaurants, which is a key part of its agenda. (*See* R-638; R-617.) In *Brown*, the stated purpose of neutrality with respect to use of state funds was belied by a provision allowing the use of such funds to help unions organize, and that was part of the reason it was preempted by *Machinists*. *See* 554 U.S. at 63. That applies here as well.

Sixth, the union-waiver and unilateral-implementation provisions, though terribly disruptive to labor-management relations, are unrelated to a "living" wage. The recently enacted Citywide MWO, *see* note 16, *supra*, contains no exemption at all for collective bargaining. Other minimum wage laws, not specifically directed to hotel workers, contain, at most, a general exemption for CBAs or nothing at all – both in Los Angeles[22] and elsewhere.[23] Some local laws that apply, like the

[22] *See* the Citywide Living Wage (L.A. Admin. Code Sec. 10.37.12) affecting city contractors and airport workers (relevant term states in entirety: "Parties subject to this article may by collective bargaining agreement provide that the agreement shall supersede the requirements of this article" and the Grocery Worker Retention Ordinance (L.A. Municipal Code Sec. 181.06) (relevant term states in entirety: "Parties subject to this chapter may, by collective bargaining agreement, provide that the agreement supersedes the requirements of this chapter.") The Citywide MOA has not such

[23] The same is true for labor laws in other cities, *see, e.g*, San Diego, CA, Ordinance No. O-20390 (2014) (no exemption); Cal. Lab. Code § 1182.12 (same);

HWO, specifically to hotel workers, do contain unilateral-implementation provisions, *see e.g*. Long Beach, CA, Ordinance No. 5.48, *et seq*. *and* SeaTac, WA, Municipal Code 7.45, *et seq*., but so far as it appears, not otherwise, which suggest that such provisions are more for the benefit of UNITE HERE than for the economic security of the workers themselves.

Seventh, the City Council based the $15.37 an hour wage not on workers' minimal needs but on what it perceived larger hotels could afford to pay. (*See* pages 5-6, *infra*.) That is what Unions do; not what cities do in the purported exercise of their police power. The City can call this a "minimum labor standard" but that, too, dissembles as to its purpose.

These anomalies belie the City's stated purpose. This Court need not pretend otherwise.

III.

WHERE FEDERAL RIGHTS ARE COMPROMISED, IRREPARABLE HARM IS CLEARLY ESTABLISHED.

A. Loss of Goodwill, Incurring Unwanted Contractual Obligations, And Altering Business Operations Constitute Irreparable Harm As A Matter Of Law.

The record evidence clearly supports a finding that, absent an injunction, both unionized and non-union hotels in Los Angeles that are subject to the

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Or. Rev. Stat. § 653.025 (same); Seattle, WA, Ordinance No. 124490 (same); Wash. Rev. Code § 49.46.020 (general exemption).

Ordinance face irreparable harm. "Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlbarg Int'l Sales v. John D. Brush and Co.*, 240 F.3d 832, 841 (9th Cir. 2001). Indeed, damage to goodwill and business reputation "will often constitute irreparable injury," *Starbucks Corp. v. Heller*, No. CV 14-01383 MMM (MRWx), 2014 WL 6685662, at *8 (C.D. Cal. Nov. 26, 2014), as such "[h]arm to business goodwill and reputation is unquantifiable and considered irreparable." *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007).

This harm is not speculative. One non-union hotel that was subject to the less onerous LAX Corridor ordinance and was unable to secure a waiver had to raise its prices because of the high compliance costs and that led to a decrease in the demand for its services (*see* R-597) – exactly the kind of threat to its business for which a preliminary injunction should issue, *see, e.g*, *Stuhlbarg Int'l Sales*, 240 F.3d at 841. Another hotel provided business projections of the room rental rate increase that it would need to absorb the costs of compliance and explained the damaging effect of such a change for customer retention. (*See* R-608.)

Further, unionized hotels that are negotiating for new CBAs will immediately be affected by the impairment of their bargaining position and the stark choice between assenting to the Union's demands or absorbing the costs of

compliance with the Ordinance. The Union has already shown that it will play this card. (*See* R-620.)

An agreement entered into in the face of a later-preempted law may still impose disruptive and costly damages on a contracting party, for which that party may not be properly compensated by a later court decision. *See, e.g., Am. Trucking Ass'ns. v. City of Los Angeles*, 559 F.3d 1046, 1057-59 (9th Cir. 2009) (reversing denial of preliminary injunction).

B. The City's Interest In Urban Poverty Cannot Countervail Federal Rights and Interests.

Even more is at stake here than irreparable harm to Appellants' member hotels. The Ordinance conflicts with the goals of the NLRA, and federal interests prevail over local concerns – hands down. *See* U.S. Constitution Art. VI:

> Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the [City] of its own law *is not material*."

Brown v. Hotel and Restaurant Employees, 468 U.S. 491, 503 (1984) (emphasis added). Consequently, even if the Ordinance's "real effect" were not so different from its stated purpose, neither that nor the benefits to hotel workers offsets the interference with federal labor policy. *See, e.g., Aeroground, Inc. v. City of San Francisco*, 170 F. Supp. 2d 950, 955 (N.D. Cal. 2001) (granting preliminary injunction to prevent enforcement of rule requiring employers to sign card-check recognition agreements).

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and a preliminary injunction should issue.

DATED: August 6, 2015

Respectfully submitted,

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Dated: August 6, 2015

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Plaintiff-Appellants American Hotel & Lodging Association and Asian American Hotel Owners Association states that there are no related cases pending before this Court.

Dated: August 6, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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