17-1849 (L),

17-3476 (XAP)

United States Court of Appeals
for the Second Circuit

ASSOCIATION OF CAR WASH OWNERS INC.,
ZOOM CAR SPA, LLC, and FIVE STAR HAND WASH LLC,

Plaintiffs-Appellees-Cross-Appellants,

against

CITY OF NEW YORK and LORELEI SALAS, in her official capacity as Commissioner of the New York City Department of Consumer Affairs,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANTS

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007
212-356-0853 or -2500
igustafs@law.nyc.gov

RICHARD DEARING
INGRID R. GUSTAFSON
of Counsel

December 20, 2017

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

PRELIMINARY STATEMENT

In June 2015, in response to extensive evidence of systematic and extreme wage-and-hour violations, environmental concerns, and consumer complaints, the New York City Council enacted the Car Wash Accountability Law, requiring car washes to obtain a license to operate in the City. Like many such licensing laws, the Car Wash Law includes a provision requiring applicants to obtain a surety bond, which ensures that the licensee will be able to meet its financial obligations to its workers, consumers, and the City.

Before the law became effective, two individual car wash owners and the Association of Car Wash Owners—a group of anonymous car wash owners formed in response to proposed regulation of the industry (collectively, "the Association")—brought this action. Based on a single subdivision of the law's surety bond provision, the Association contended that the law, in its entirety, was preempted by the National Relations Labor Act (NLRA), Congress's statute for safeguarding the collective-bargaining process. The challenged subdivision reduces the required face amount of the bond from $150,000 to $30,000 (the actual cost to obtain the bond is a small percentage of the face amount) if the

licensee has a mechanism for resolving wage disputes in place—either a collective-bargaining agreement (CBA) providing for the timely payment of wages and an expeditious process for resolving wage disputes, or an active monitoring agreement imposing similar terms.

The United States District Court for the Southern District of New York (Hellerstein, J.), held that the NLRA preempted the subdivision of the law that reduced the bond amount where there was a CBA setting forth certain specified terms. Applying the doctrine known as *Machinists* preemption, the court held that a reduced bond amount "interferes" with the collective-bargaining process by "penalizing" owners who are not party to a CBA and thus "pressuring" car wash owners to unionize. Although the court initially struck down the entire law on this basis, the City successfully sought reargument, and the court ultimately severed the subdivision at issue from the remaining provisions of the law, thereby permitting the law's remaining sections of the law to take effect, including the requirement that all car washes obtain a surety bond in the face amount of $150,000, absent an active monitoring agreement.

This Court should reinstate the invalidated subdivision. The district court's decision misconstrues both the scope of *Machinists* preemption and the surety bond provision in the local law. *Machinists* preempts state and local action that interferes with the mechanics of the collective-bargaining process that is the NLRA's focus—that is, the ability of the parties to employ economic weapons like strikes and lockouts during collective bargaining. A surety bond provision that reduces the required bond amount in narrowly defined circumstances in no way inhibits the use of these weapons, either by its express terms or in its effect.

Instead, the bond requirement—similar to a law establishing a minimum wage or requiring employers to pay for unemployment insurance—is a substantive local labor standard that affects labor relations only indirectly by altering the backdrop against which collective bargaining occurs. Even though these laws inevitably alter the incentives and bargaining positions of the parties, courts have repeatedly upheld such laws as falling well within the states' traditional police powers. For the same reason, this Court should grant judgment to the City.

Alternatively, this Court should vacate the judgment and remand to the district court for discovery. To succeed on a summary judgment motion, a party must clear a high bar, and that is particularly true when the party moves pre-discovery, as the Association did here.

But the Association has not cleared that bar. Although it asserts that the surety bond provision will impose significant financial pressure on car washes, forcing many to "unionize," that contention is not only misguided legally, but unsupported factually. The Association has introduced no evidence about the identity and financial position of its member car wash firms, let alone more than cursory evidence about the total costs of a $150,000 bond. In fact, its only such evidence shows that the difference in premium costs between a bond in a face amount of $150,000 and one in a face amount of $30,000 is likely minimal, and likely substantially less than the overall costs stemming from becoming party to a CBA. Far from warranting judgment as a matter of law, this evidence undermines any contention of significant financial pressure. At the very least, discovery is required to make that determination, precluding summary judgment for the Association.

JURISDICTIONAL STATEMENT

Asserting claims under 42 U.S.C. § 1983 and the NLRA, 29 U.S.C. §§ 151-69, as well as pendant state claims, the Association invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1367 (A40). The district court initially entered judgment on May 26, 2017, and the City filed a timely motion to correct or amend the judgment on June 9, 2017, as well as a timely notice of appeal on June 12, 2017 (A16, 1779-80, 1785). The district court issued an amended judgment on June 20, 2017, to correct clerical errors (SPA14-15). After the district court granted the remainder of the City's post-judgment motion on August 31, 2017, the court entered a further amended judgment on September 27, 2017, and the City filed a timely amended notice of appeal on October 2, 2017 (SPA30-36, 40-41, 1828-29).

Because the district court's judgment is final, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Is the City entitled to judgment on the pleadings on the Association's NLRA preemption claim, where the subdivision of the Car Wash Law at issue in no way interferes with the mechanics of the collective-bargaining process that the NLRA seeks to protect?

2. Alternatively, should this Court vacate the judgment and remand for discovery, where the Association's request for summary judgment in its favor relies on unsubstantiated factual assertions that depend on as-yet-undisclosed information about its members' own financial condition and other information in its possession and control?

STATEMENT OF THE CASE

A. DCA's authority to regulate local businesses through licensing

States have inherent power to provide for the health, safety, and welfare of their citizens, including by regulating the conditions of labor. In New York, a "home rule" state, this power extends to localities. *See* N.Y. Const., Art. IX § 2(c)(ii)(10) (empowering localities to adopt or amend laws addressing the "government, protection, order, conduct, safety, health and well-being of persons or property therein"). By statute, a locality's police power extends to, but is not limited to, the power to adopt laws regulating or licensing occupations or businesses. *See* N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(12).

The New York City Department of Consumer Affairs (DCA) is responsible for licensing businesses and occupations in New York City as part of its mission to "protect and enhance the daily economic lives of

New Yorkers and to create thriving communities." *See* N.Y.C. Admin. Code § 20-101 *et seq.* (setting forth DCA's responsibilities, powers, and purpose).[1] DCA licenses over 81,000 businesses in 55 different categories, including laundries, pawnbrokers, process servers, garages and parking lots, storage warehouses, auctioneers, and many others (A565).[2] *See id.* DCA also enforces the City's workplace laws, including laws requiring paid sick leave, laws protecting freelance workers, and the City's living wage ordinance.[3] *See id.*

In addition to the Car Wash Law, 14 of the licensing laws enforced by the Department include a surety bond requirement, which seeks to ensure that the holder of a license from the City will be able to meet its financial obligations (A647, 649). Examples include required bonds of $10,000 for storage warehouse operators, and $100,000 for process-serving agencies. *See* N.Y.C. Admin. Code §§ 20-479, 20-406.1(c).

---

[1] *See also* Consumer Affairs, "About," www1.nyc.gov/site/dca/about/overview.page (last accessed Dec. 19, 2017).

[2] *See supra* note 1.

[3] *See* Consumer Affairs, "Worker Rights," www1.nyc.gov/site/dca/workers/worker-rights.page (last accessed Dec. 19, 2017).

Surety bonds are a common element of workplace laws enforced by the states, and shortly before the City Council enacted the Car Wash Law, two states adopted comparable wage bond requirements. New York adopted rules requiring nail salons in New York to obtain a bond of up to $125,000 to cover unpaid wage claims, and up to $75,000 for accident and professional liability. *See* 19 N.Y.C.R.R. § 160.9(a). And California adopted a $150,000 surety bond requirement for car wash owners to cover unpaid wage claims (*see infra* at pp. 18-19 [discussing Cal. Lab. Code § 2055(b)]). In light of the many governmental and other bond requirements, there is a well-developed, national surety bond market, including for the car wash industry (A1269-71).

B. The City Council's enactment of the Car Wash Law to ensure compliance with environmental regulations and labor standards

In June 2015, the New York City Council enacted Local Law 62, entitled the Car Wash Accountability Law. *See* N.Y.C. Admin. Code §§ 20-539–20-546, 24-529. The law makes it unlawful for a car wash to operate in the City without a license. *See id.* § 20-541(a). To obtain a license, the owner of a car wash must certify that the business is in compliance with regulations safeguarding the City's water supply, has

no outstanding judgments or warrants, and is in compliance with the law's surety bond requirements; submit certificates of insurance for workers' compensation and unemployment and disability insurance; certify compliance with record-keeping requirements, and submit copies of liability insurance policies. *See id.* §§ 20-541(d), 24-529. The law also contains a severability provision stating the City Council's intention, should any provision be declared unconstitutional or invalid, that the remaining portions continue in full force and effect. *See id.* § 20-539.

This lawsuit focuses on a single provision of the 11-page law: the requirement that applicants for a car wash license obtain a $150,000 surety bond for each car wash they operate to satisfy fines, obligations to the City; judgments obtained by customers who sustained damages from car wash services; and judgments obtained by employees for underpayment of wages. *See* N.Y.C. Admin. Code § 20-542. The Association complains about one of the two circumstances in which a *reduced* bond amount of $30,000 is required—if the applicant is party to a bona fide CBA expressly providing for the timely payment of wages and an expeditious process for resolving wage disputes. *See id.* § 20-542(b)(1). The bond amount is also reduced to $30,000 where the

applicant is covered by an active monitoring agreement pursuant to a settlement supervised by specified state or federal enforcement agencies and satisfying similar requirements. *Id.* § 20-542(b)(2).[4]

---

[4] In its entirety, the surety bond provision provides as follows:

§ 20-542: Surety bonds

a. Except as provided in subdivision b of this section, prior to the issuance or renewal of a car wash license, each applicant shall furnish to the commissioner a surety bond in the sum of one hundred fifty thousand dollars, payable to the city of New York and approved as to form by the commissioner.

b. Prior to the issuance or renewal of a car wash license, an applicant described in paragraph one or two of this subdivision shall furnish to the commissioner a surety bond in the sum of thirty thousand dollars, payable to the city of New York and approved as to form by the commissioner.

> 1. The applicant is a party to a current and bona fide collective bargaining agreement, with a collective bargaining representative of its employees, that expressly provides for the timely payment of wages and an expeditious process to resolve disputes concerning nonpayment or underpayment of wages.
>
> 2. The applicant is covered by an active monitoring agreement pursuant to a settlement supervised by the office of the attorney general of the United States or the state of New York, or the department of labor of the United States or the state of New York, or other government agency with jurisdiction over wage payment issues, on the condition that such monitoring agreement:
>
> > i. expressly provides for the timely payment of wages at or above the applicable minimum wage rate;
> >
> > ii. requires that the employer be subjected to at least monthly monitoring by an independent monitor appointed; and
> >
> > iii. provides for an expeditious process to resolve disputes concerning wage violations without the expense of litigation, including reasonable mechanisms to secure the assets necessary to cover any judgment or arbitration award.

c. The surety bond required by subdivisions a and b of this section shall be conditioned upon the applicant's compliance with the provisions of this subchapter

(cont'd on next page)

Between April 2012 and the law's enactment in June 2015, the City Council's Committee on Service and Labor held three hearings and considered five different drafts of the Car Wash Law (A265-72, 323-446, 450-57, 473-519, 521-34, 536-47, 629-796). Council Members expressed concern that the car wash industry—consisting of an estimated 200 businesses employing up to 5,000 employees (A164, 276, 429)—was not regulated, given that many similar businesses cannot operate without a license, and given the serious impact car washes may have on the environment and on the City's water supply (*e.g.*, A226).

1. The car wash industry's history of wage theft and exploitation of a vulnerable population

During the legislative process, the City Council received extensive testimony and evidence about the New York City car wash industry's

---

and any rules promulgated thereunder, and upon the further condition that the applicant shall pay or satisfy:

> 1. any fine, penalty or other obligation to the city within thirty days of the imposition of such fine, penalty or obligation;
>
> 2. any final judgment recovered by any person who received car wash services from a licensee thereunder and was damaged thereby within thirty days of such judgment; and
>
> 3. any final judgment recovered by any employee of the licensee for nonpayment or underpayment of wages within thirty days of such judgment.

history of wage violations, and the unsuccessful enforcement of wage-and-hour laws for the vulnerable populations employed by the industry.

First, investigations by both the State Department of Labor (DOL) and a coalition of workers' rights groups, WASH NY, had revealed that such violations were prevalent. In 2008, the State DOL reported that almost 80 percent of the car washes it had investigated in New York City had serious wage-and-hour violations, including failure to pay the minimum wage, or to pay overtime for work over 40 hours (A276-77). In 2012, WASH NY reported that 75 percent of the workers it had interviewed did not receive overtime pay despite working over 40 hours a week, and 66 percent reported being paid less than the minimum wage at times (A610).

Of the 28 New York City car washes investigated by the State, 21 were found to be committing minimum wage and overtime violations, 11 had improperly given a portion of workers' tips to management, and 24 were guilty of recordkeeping or wage statement violations (A164). For example, records and interviews collected during the investigation of one New York City car wash revealed that employees generally worked 12 hours a day, six days a week, without being paid overtime;

earned as little as $3.75 an hour when the minimum wage was $6.75 an hour; and were forced to share tips with non-service employees (A277).

Council Members also heard that these rampant wage-and-hour violations often go unreported, and are difficult to prove. Many car wash workers are recent immigrants, who may not be fluent in English and may not be aware of legal requirements (A163, 165-66, 289, 381-83). Moreover, car washes operate largely on a cash basis, and many workers are paid off the books (*id.*). And even if a violation is reported, car wash workers may lack any remedy: car washes may adopt a complex ownership structure, making it difficult to identify the entity with ownership (A748-49). They may also sell to a successor company, leaving workers who obtain settlements unable to collect (A227-28).

When employees or enforcement agencies have succeeded in bringing wage violations to light, they have obtained substantial judgments against New York City car wash owners. For example:

- In 2008, the U.S. Department of Labor reached a settlement with four car washes for $727,182, and Lage Management, the owner of a large chain of car washes in the City, for $535,838, including back wages from 2002 to 2005 (A604).

- In 2009, the U.S. Department of Labor reached a further $3.4 million settlement with Lage Management based on

unpaid wages for over 1,180 employees at eight car washes from 2002 through 2005 (A149).

- In 2009, the U.S. Department of Labor reached a wage claim settlement for $219,985 in unpaid overtime from 2005 to 2008 (A149, 604).

- In 2010, the State DOL announced a $1.9 million settlement with Broadway Bridge Car Wash, including over $1.3 million in back wages, overtime, and earned tips owed to 36 workers for work performed from 2003 through 2008 (A149).

- In 2012, workers settled a lawsuit with two car washes for $200,000, and the New York State Attorney General settled charges against a third car wash for $150,000, including jail time for the owner (A604). According to the felony complaint, from March 2007 through January 2009, the third car wash owner paid eight car wash workers only $4 per hour, did not pay overtime, and did not have workers' compensation insurance (A148).

- In 2014, the New York State Attorney General reached a $3.9 million settlement for labor law violations, including $2.2 million in unpaid wages to an estimated 1,000 workers from 2006 through 2012, with 22 car washes owned by John Lage and Fernando Maghaes (A149, 604).

- In 2015, the State DOL announced that it had identified more than $446,000 in underpayments to 97 employees at eleven Brooklyn car washes (A148).

- In 2015, car wash workers obtained a $1.65 million settlement for unpaid wage claims at four car washes for a period from 2005 through 2011 (A149). The complaint alleged that workers were paid $50 to $70 a day for 12-hour shifts without a break, without overtime wages, and below the minimum wage (*id.*).

Numerous car wash workers appeared before the Council's Committee on Service and Labor to recount their personal experiences with the industry, and to report that wage theft was ongoing despite state and federal enforcement efforts (*e.g.*, A289-94; 302-04; 488-93; 575-76; 676-87). The workers reported that car washes frequently paid them less than the minimum wage; failed to pay the mandated overtime wage for hours worked over 40 hours a week; did not provide required breaks; and paid for damages to customer vehicles out of employees' tips (*see id.*). They also reported insufficient training and protective gear for the chemicals they used (*see id.*). One worker recounted that when the State DOL visited the car wash where he worked, management asked many workers to hide before underreporting its employees (A388-89).

2. The City Council's other concerns in enacting the Car Wash Law

In addition to the testimony and evidence on issues of wage-and-hour violations, substantial evidence was also presented on other concerns. Council Members evinced particular concern about the potential impact of car washes on the environment and the City's water

supply, in light of the harsh degreasers, industrial shampoos, and other chemicals employed by the car wash industry. For example, Council Members extensively questioned the Commissioner of the Department of Environmental Protection (DEP) about the regulations to which car washes are subject, and about violations by the car wash industry (A332-74, 651-53, 660-72; *see also* A494-99, 568-72). While DEP shared official complaints, including five complaints of improper discharge, workers had also observed waste water routinely being improperly disposed into the sewers (A285, 486-87, 687).

Extensive testimony and evidence was also given about worker safety, including that many workers are not provided with training or protective gear for handling chemicals used by car washes, and that inspections of New York City car washes had discovered dozens of serious violations (A278, 404-12, 421-28). Moreover, before the Car Wash Law was passed, car washes were not required to report damage to vehicles or to carry liability insurance, and workers reported that it was standard practice for management to deal with customer complaints of vehicle damage by paying in cash taken from workers' tips or salary (A277-78, 607).

3. The bond provision

To address the car wash industry's rampant underpayment of wages, and to ensure that sufficient funds were available to satisfy fines, obligations to the City, and judgments on damages claims brought by customers, every draft of the Car Wash Law considered by the City Council included a surety bond provision (A265-72, 449-57, 521-534, 536-47, 799-808). In light of recent, substantial settlements against car wash owners, the required bond amount was also substantial. In the first draft of the law, the bond amount was set at $300,000 for all car wash owners (A269-70). In the second draft, the bond amount varied from $150,000 to $300,000, depending on the number of employees, and was reduced to "not less than" $30,000, if the employer had signed a CBA (A454-55). In the third and fourth drafts, however, the bond amount returned to $300,000 for all owners (A527-528, 542).

At the committee hearing on the fourth draft, the Association and a number of individual car wash owners testified that the bond amount of $300,000 was too high, claiming that car wash owners would be unable to afford it (*e.g.*, A600). Others insisted that surety companies would not even offer such a bond to car wash owners (*e.g.*, A599).

After the car wash owners' testimony, the City Council reduced the bond amount to $150,000 for all owners—the lowest bond amount required in any draft by half, and the same amount required by California's car wash law (A804-05). The new provision provided that the required bond amount would be reduced even further, to $30,000, if an alternative enforcement mechanism was in place to ensure the prompt payment of wages, and thus mitigate the risk that car wash owners would accumulate the substantial back-pay obligations revealed in recent settlements and judgments (*id.*). In either event, the bond amount must be available to satisfy: (i) fines, penalties, and obligations to the City; (ii) final judgments obtained by customers who sustained damages from car wash services; and (iii) final judgments obtained by employees for underpayment of wages (*id.*).

In setting the final bond amounts, the City Council looked to California's car wash law, which was first enacted in 2003 and amended in 2009 and 2014, also in response to reports and investigations of mistreatment of car wash workers (A150). *See* Cal. Lab. Code §§ 2050–2066 (2016). California's law requires car washes to register with the Commissioner of Labor annually, and to obtain a surety bond or

certificate of deposit (CD) to ensure payment of back-pay claims. *See id.* §§ 2054, 2055(b). As of January 1, 2014, California's law requires every car wash in the state to obtain a wage surety bond in the amount of $150,000. *See id.* § 2055(b). California's law, however, *entirely eliminates* the bond and CD requirement if a car wash owner is a party to a CBA providing for wages, hours of work, and working conditions, and sets forth an expeditious process to resolve disputes concerning non-payment of wages. *See id.* § 2055(b)(4).

Significantly, although California's $150,000 bond requirement had been in effect for a full year and a half before the City Council enacted the Car Wash Law, the California law was not (and still today has not been) subject to any legal challenge on NLRA preemption grounds. Moreover, although California's law entirely eliminates the requirement that a car wash owner obtain a bond or CD if it is party to a CBA setting forth certain terms, only a tiny fraction of California's over 1,000 car washes—about one to two percent—are covered by CBAs; virtually all have instead chosen to obtain the $150,000 bond or CD

(A150-51).[5] A Council Member looking at these numbers would have seen that a car wash industry may flourish in spite of the costs of obtaining a $150,000 bond, and that a provision reducing a required bond amount where there is a CBA establishing certain requirements does not "force," or even commonly lead to, unionization.

4. The Car Wash Law's enactment and DCA's adoption of rules implementing the law

In June 2015, the City Council voted to adopt the fifth and final draft of the Car Wash Law, and the Mayor signed the bill into law (A1024, 1121-22). The law was initially scheduled to go into effect 180 days later, but was stayed pending resolution of the proceedings before the district court (A27-28). In October 2016, following a public notice and comment period, DCA adopted rules implementing the law (A1125-32, 1148-80, 1212-16).

---

[5] California's car wash registry is at www.dir.ca.gov/databases/dlselr/carwash.html. A list of registered car washes is available in an Excel spreadsheet indicating whether each car wash has obtained a bond or CD, or is exempted because it is party to a CBA (*see* A150-51).

C. The Association's facial challenge to the Car Wash Law

After the law was enacted, but before it was enforced, the Association and two individual car wash owners filed this lawsuit. The amended complaint asserts that the Car Wash Law is preempted by state and federal law, and asserts causes of action under 42 U.S.C. § 1983 for violations of the individual plaintiffs' rights to due process and equal protection (A35-56). The amended complaint also asserts that certain provisions of the rules implementing the law are arbitrary and capricious under New York law (A56).

With respect to federal preemption, the amended complaint alleges that the NLRA preempts the Car Wash Law because the surety bond provision "interferes" with the collective-bargaining process and "impair[s] the economic advantages" of car wash owners (A48, 49). In support, the amended complaint alleges that the individual plaintiffs and other unidentified owners "may not" be able to afford the costs of a higher bond, and would suffer severe economic harm and competitive disadvantage as against car washes that could obtain the lower bond (A36, 49). As a result, the amended complaint continues, the surety bond provision will place "significant pressure" on owners to "unionize"

employees that had not voted to join a union, and will give unions leverage during collective bargaining (A36, 44).

After the City answered the amended complaint (A62-73), the City sought judgment on the pleadings, and the Association sought partial summary judgment on its state and federal preemption claims (A93-94, 145). In its motion, the City contended that the Association was mischaracterizing the Car Wash Law's purposes and operation, and that under established precedent, the law was not preempted by the NLRA (SDNY ECF Dkt. ["Dkt."] No. 50 at 18-19, 24-35). The City also sought judgment on the Association's remaining claims (*id.* at 35-57).

The Association's motion, filed before the parties had conducted discovery, sought summary judgment on its federal and state preemption claims. With respect to NLRA preemption, the Association repeated the contentions in its amended complaint: that the law interfered with the collective-bargaining process because it was purportedly designed to "pressure" car washes to unionize by imposing a "harsh penalty" on non-unionized car washes (Dkt. No. 23 at 18-29).

In support, the Association relied on a selective and one-sided reading of the law's legislative history (A240-62); perfunctory

declarations by the individual plaintiffs that each would "feel significant pressure to enter into a collective-bargaining agreement in order to qualify for the lower bond requirement" (A133-34, 142-43); and the declaration of the president of one bond wholesaler (A136-39). The wholesaler declared that a bond would likely cost between 1 and 3% of the face amount of the bond, and possibly up to 5%; that bond providers "will typically" seek to review certified financial statements for a $150,000 bond; and that bond providers "may" require collateral (A137-38). However, the wholesaler conceded that "substantial uncertainty" remained about the costs and difficulty of securing a bond (A139).

In opposition, the City contended that the Association's claims of "financial pressure" were entirely irrelevant to their contentions of NLRA preemption, because the law did not interfere with the mechanics of collective bargaining (A1219). Even assuming that the allegations were relevant, the City continued, a motion for summary judgment on these grounds was premature (A1222-26; *see also* Dkt. No. 55 at 17-23). Although the Association had put the financial condition of its members at issue, it had submitted absolutely no financial information about the individual plaintiffs against which their claims

could be judged—let alone the financial information of its other 100 unidentified members (A1222-26). It also admitted that there was "substantial uncertainty" about what the actual requirements would be (*id.*). Thus, the motion could not be resolved without discovery (*id.*).

The organizations that collaborate in the WASH NY campaign submitted an *amicus* brief in support of the City (Dkt. No. 59-1). The brief provided extensive background about the campaign's experiences with the car wash industry (*id.* at 8-51). It also reported that, in its experience, the costs of obtaining a $30,000 bond plus entering into a CBA were greater than the costs of a $150,000 bond (*id.* at 59-60; *see also id.* at 47-48).

D. The district court's partial grant of summary judgment to the Association before discovery, and partial grant of judgment on the pleadings to the City

After oral argument, the district court granted both parties' motions in part. The court first granted the Association's motion for summary judgment on its federal preemption claim, and denied the City's motion for judgment on the pleadings on its corresponding claim. In only a single page of analysis, the court held that the subdivision of

the Car Wash Law that reduces the bond amount impermissibly interferes in the collective-bargaining process because it "explicitly" encourages and pressures unionization by imposing a "penalty" on car washes without a CBA or monitoring scheme (SPA7). Relying on general statements about unionization made by three legislators, the district court concluded that the legislative history of the law "makes clear" that "a central purpose" of the law is to encourage unionization in the car wash industry (SPA7-8).

The court next granted the City's motion with respect to the claims for equal protection and due process violations (SPA8-10). The court held that there was a rational basis for the City Council's decision to reduce the bond amount required of car washes covered by a CBA providing protections for workers' pay (SPA8-10). On this ground, the court also dismissed the Association's separate claim for violations of § 1983, as the Association had addressed § 1983 only in connection with the claims for violations of due process and equal protection (SPA10). The court lastly declined to exercise supplemental jurisdiction over the Association's claims under state law (SPA10-12).

Although the district court had found only one aspect of the surety bond provision of the Car Wash Law impermissible, the court initially struck down the entire law (SPA12). The court found that no party had "directly raised" the issue of whether the subdivision reducing the bond amount could be severed from the rest of the law (SPA 8 n.2; *but see* Dkt. No. 50 at 31 n.10, 42 n.14; Dkt. No. 55 at 13 n.4, 18, 21 n.6, 25 n.10, 31-32 & n.14, 33 n.16; Dkt. No. 67 at 8).

E. The district court's grant of both parties' motions for reconsideration

After the district court entered judgment, the parties filed motions for reconsideration. The City's motion sought an order severing the subdivision reducing the required bond amount if the employer was party to a CBA setting forth specific protections (A1779-80).[6] The City contended that it had preserved the argument that the court should sever the subdivision from the law if the court otherwise granted the Association's motion (Dkt. No. 78 at 7, 11-13). In any event, the court

[6] The City also sought an order correcting clerical errors in the court's order and judgment (A1779-80). The district court granted that motion and issued a corrected order and judgment, striking the original order and judgment from the docket sheet (A1787; SPA2-12, 14-15).

should sever that provision because the plain terms of the statute, which included a clear and unambiguous severability clause, and the legislative history demonstrated that the City Council would have desired to enact the law with a required bond amount of $150,000, even if the lower bond provision were excised (*id.* at 7, 14-10).

The Association's motion sought reconsideration of the district court's dismissal of its § 1983 claim for damages (A1782-83). The Association did not contend that it had raised the argument in its motion papers, only that a claim for NLRA preemption gives rise to a claim under 42 U.S.C. § 1983 (Dkt. No. 80).

The district court granted the parties' motions. Though finding the parties' contentions unpreserved, the court held that reconsideration was warranted to prevent manifest injustice (A1788; SPA30, 35). The court treated the City's motion as a motion to sever, and then granted that motion, holding that the plain terms of the Car Wash Law evinced clear legislative intent to enforce all parts of the law not found to be preempted (SPA33-34). The court treated the Association's motion as a motion to reinstate its § 1983 claim, and granted that motion as well,

holding that an action under the NLRA was enforceable under § 1983 (SPA34-35).

Following entry of the amended judgment, DCA has begun implementing the remaining provisions of the Car Wash Law, including the requirement that all car washes obtain a $150,000 bond, unless they are subject to an active monitoring agreement. As of the time of writing, DCA has received 44 license applications that include proof of satisfaction of the surety bond requirement, even though enforcement of the law is not scheduled to commence until January 15, 2018.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Under the required *de novo* review of the denial of a motion for judgment on the pleadings and the grant of a motion for summary judgment, *see Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 84 (2d Cir. 2015); *Rondout Elec., Inc. v. N.Y. State Dep't of Labor*, 335 F.3d 162, 165 (2d Cir. 2003), the Court should reverse the district court's judgment. The City was entitled to judgment on the pleadings on the Association's claim of federal preemption. At the very least, the court's grant of summary judgment to the Association was premature.

Contrary to the district court's conclusion, the *Machinists* doctrine does not preempt any portion of the Car Wash Law. *Machinists* protects the collective-bargaining process that is the focus of the NLRA, but the surety bond provision at the center of this litigation does not regulate that process, either by its express terms or in its effects. Instead, the surety bond provision is akin to substantive state labor standards that have been repeatedly upheld as within the scope of states' traditional police powers, and outside the scope of *Machinists* preemption. And the law's legislative history overwhelmingly confirms that the law was intended to protect workers, the public, and the City—not to intervene in the collective-bargaining process.

The district court's conclusion that one subdivision of the surety bond provision nonetheless regulates the collective-bargaining process by "pressuring" car wash owners to unionize misunderstands the clear terms of the law as well as the scope of *Machinists* preemption. The subdivision merely reduces the bond amount when one of two mechanisms is available to mitigate the risks that car wash owners will accumulate substantial back-pay obligations. Like every state labor law setting minimum requirements that employers and employees may

contract out of, the provision may affect the bargaining positions or incentives of the parties. But as the Supreme Court and the courts of appeals have held, that result does not warrant NLRA preemption. Indeed, just last year, the Ninth Circuit rejected out of hand the proposition that *Machinists* preempted a local law that set a heightened minimum wage requirement for certain workers in large hotels, but allowed waiver of the requirement through a CBA. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 964 (9th Cir. 2016).

The court also erred in granting the Association's pre-discovery summary judgment motion over the City's objection. The Association's claims that the surety bond provision will expose its members to significant financial pressure are simply not relevant to the preemption analysis, and the Association in any event has not adduced sufficient evidence supporting this contention to warrant summary judgment. To the contrary, the little evidence the Association has presented shows that the costs associated with the higher bond amount are minimal, undercutting any claim of financial pressure and more than raising a fact issue. At the very least, the court abused its discretion in rejecting the City's well-supported contentions that it required discovery to refute

the Association's contentions. Thus, this Court should grant the City judgment as a matter of law, or at a minimum, remand to the district court for discovery.

ARGUMENT

POINT I

THE CITY IS ENTITLED TO JUDGMENT ON THE PLEADINGS

A. The Car Wash Law is not preempted because it does not regulate the mechanics of collective bargaining or frustrate the NLRA's purposes.

Congress enacted the NLRA with the stated purpose of remedying the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." National Labor Relations Act § 1, 29 U.S.C. § 151 (1935). Congress found that the inequality in bargaining power had resulted in depressed wage rates, which had in turn decreased the purchasing power of wage earners, and increased industrial strife. *See id.* Through provisions of the NLRA encouraging "the practice and procedure of collective bargaining" and protecting the rights of workers,

Congress sought to promote "competitive wage rates and working conditions within and between industries." *Id.*

Although the NLRA contains no express preemption provision, *see* 29 U.S.C. §§ 151–69, the Supreme Court has articulated two doctrines of NLRA preemption. The first, called *Garmon* preemption, protects the jurisdiction of the National Labor Relations Board to determine in the first instance what conduct is prohibited or protected by NLRA §§ 7 and 8, which protect the rights of employees to engage in concerted activities and outline the conduct by employee organizations and employers that constitutes an unfair labor practice. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). The second, called *Machinists* preemption, prevents a state or locality from regulating union or employer conduct during collective bargaining that is not covered by §§ 7 and 8, on the theory that Congress intended to leave the conduct to be controlled by the "free play of economic forces." *Int'l Assoc. of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 144-51 (1976).

When applying these doctrines, courts honor the presumption that Congress did not intend to supersede the historic police powers of the

states. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 756-57 (1985). Thus, when a state or locality acts to protect the public safety, health, and welfare, courts hold the action to be preempted only if it "prevents the accomplishment of the purposes of the [NLRA]." *Id.* at 756; *see also Golden State Trans. Corp. v. City of Los Angeles*, 475 U.S. 608, 615 (1986) (defining the "crucial inquiry" as whether state conduct "would frustrate effective implementation of the Act's processes" (internal quotation marks and citations omitted)).

In this lawsuit, there is no dispute that the Car Wash Law is not preempted under *Garmon*. No provision of the law even arguably addresses conduct that falls within the scope NLRA §§ 7 and 8. *See* 29 U.S.C. §§ 157–58. Instead, the district court held that a single subdivision of the law is preempted under *Machinists* because it "interferes" in the collective-bargaining process by creating conditions in which car washes owners will purportedly feel substantial "pressure" to unionize (SPA7). But this reasoning misconstrues the scope of the *Machinists* doctrine as well as the clear terms of the Car Wash Law.

As this Court recently emphasized, *Machinists* preemption is centrally concerned with the mechanics of the collective-bargaining

process. *See Concerned Home Care Providers*, 783 F.3d at 84; *see also id.* at 86 ("[T]he Supreme Court has never applied *Machinists* preemption to a state law that does not regulate the mechanics of labor dispute resolution."). The premise of the doctrine is that, in establishing a framework for self-organization and collective bargaining, Congress determined which economic weapons (like employer lockouts and union strikes) should be regulated, and which should be left unregulated. *Golden State*, 475 U.S. at 615; *Rondout Elec.*, 335 F.3d at 167 ("[S]tate action is only preempted if it regulates the use of economic weapons that are recognized and protected under the NLRA ...."). Thus, in *Machinists*, the Supreme Court held that a state could not enjoin a union from engaging in a method of self-help—there, the refusal to work overtime—that was not prohibited under the NLRA. *Machinists*, 427 U.S. at 155.[7]

[7] *See also Chamber of Commerce v. Brown*, 554 U.S. 60, 66, 68 (2008) (preempting state law addressing "noncoercive speech" by employer in collective bargaining in light of Congress's "explicit direction" to leave such speech unregulated); *Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 259-60 (1964) (enjoining state from penalizing secondary boycott activities prohibited under state law, but not federal labor law).

But the surety bond provision of the Car Wash Law, by its plain terms, does not interfere with the mechanics of collective bargaining. The provision in no way restricts any of the economic weapons or self-help measures that would otherwise be available to employers or unions during the bargaining process. Nor does it require the parties to agree to specific terms. Instead, it establishes a surety bond requirement, in substantial part to secure the most basic protection for car wash workers—payment of wages for work performed, as required by agreement or by federal and state laws that are concededly not preempted. And as a matter of regulatory restraint, the bond provision reduces the required bond amount where there is a narrowly drawn alternative enforcement mechanism in place, mitigating the risk of substantial back-pay obligations.

To be sure, a state action that does not expressly regulate economic weapons may nonetheless be found preempted under *Machinists*. Thus, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), the Supreme Court held that Los Angeles could not condition the renewal of a soon-expiring franchise license to a taxi company on the company's ending an ongoing labor dispute with its

drivers. *Id.* at 615-16. Although the city had not expressly regulated an economic weapon, the Court reasoned, the city "in effect" had "imposed a positive durational limit on the exercise of economic self-help." *Id.*

In striking down part of the Car Wash Law's surety bond provision, the district court analogized this case to *Golden State* (SPA7). But the two cases bear little resemblance. In *Golden State*, the Court did not conclude that the city's actions were improper because they "pressur[ed] [the taxi company] to unionize," as the district court concluded, but because they curtailed or entirely prohibited the taxi's exercise of an economic weapon of self-help during an ongoing bargaining dispute with an existing union. *Id.* at 615-16; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987) (characterizing the city's act in *Golden State* as "forc[ing] a party to forgo the use of one of its economic weapons"). Unlike Los Angeles in *Golden State*, the City did not insert itself into an ongoing collective-bargaining dispute, nor did it limit any employer's exercise of self-help. With or without the law's provision reducing the bond amount, the car wash owner has the same tools available to resist union pressure regarding bargaining demands.

This Court should reject the district court's expansion of *Golden State* to these circumstances. The critical inquiry here, as in every case addressing state or local action taken pursuant to traditional police powers, is whether the Car Wash Law frustrates the NLRA's purposes to restore the equality of bargaining power between employees and employers. But far from curtailing the availability of any economic weapon in the bargaining process, or interfering in the bargaining process itself, the law seeks to ensure that there are mechanisms in place enabling employees to collect unpaid wages, the City to collect fines and other obligations, and consumers to collect on judgments for damages sustained as a result of car wash services. It is, in other words, simply an exercise of the police power. *See supra* at pp. 7-8 (noting surety bond requirements covering employers in other industries).

B. That a state or local law affects the backdrop against which negotiations occur is insufficient to warrant preemption.

Although the Car Wash Law does not regulate any economic weapon, the district court nonetheless held that the NLRA preempted one subdivision, which it reasoned would have the effect of placing economic pressure on car washes to unionize. But that is an inaccurate

characterization of the operation of the provision, and of labor law more broadly. To be sure, the subdivision will affect the backdrop against which labor and management negotiate, but that is true of every state law that sets a substantive labor standard to protect employees. The courts have consistently refused to hold that the NLRA preempts such laws lying at the heart of traditional state police powers.

1. The courts have repeatedly declined to preempt state laws that, like the provision at issue, set substantive labor standards.

As this Court recently reaffirmed, state laws setting baseline labor standards—like laws requiring overtime pay or requiring employers to carry unemployment insurance—are "'not incompatible' with the 'general goals of the NLRA'" to protect the collective-bargaining process. *Concerned Home Care Providers*, 783 F.3d at 85 (quoting *Metro. Life*, 471 U.S. at 755). Although such laws indirectly affect labor negotiations by shifting the background against which the negotiations occur, states "have traditionally possessed 'broad authority under their police powers to regulate the employment relationship.'" *Id.* (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)); *see also Metro. Life*, 471 U.S. at 757 (courts "cannot declare pre-empted all local regulation that touches or

concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the states" (internal quotation marks and citation omitted)).

Moreover, because state and local laws *always* affect the background bargaining positions of the parties, that possibility is an insufficient basis to impose preemption. *See Metro. Life*, 471 U.S. at 757 (precluding states from establishing labor standards "would remove the backdrop of state law that provided the basis of congressional action … and would thereby artificially *create* a no-law area" (internal quotation marks and citation omitted) (alteration in original)); *Coyne*, 482 U.S. at 21 ("Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." (quoting *Metro. Life*, 471 U.S. at 757)). For example, the at-will default rule of most states' employment law gives an employer a strong starting position in negotiations. And the more stringent worker-protection laws of some states may reduce employee incentives to bargain collectively or improve their bargaining position when they do so.

As a result, courts have repeatedly held that state laws setting substantive labor standards are not preempted by the NLRA.[8] These cases have their roots in the Supreme Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), which approved what the Court termed "minimum labor standards." *Id.* at 757. In *Metropolitan Life*, the Court described a minimum labor standard, like the state law before it, as applying to all employees equally, being designed neither to encourage nor discourage the bargaining process, and having only an indirect effect on rights of self-organization. *Id.* at 757 (state law setting minimum requirements for employee benefit plans not preempted).

The doctrine soon evolved to recognize that the mere fact that a law setting a minimum labor standard may affect unionized and non-

[8] *See, e.g.*, *Concerned Home Care Providers*, 783 F.3d at 85 (state law setting minimum total compensation for certain employees not preempted); *Rondout Elec.*, 335 F.3d at 167 (state regulation implementing prevailing wage law and requiring non-unionized employers to provide certain benefits to employees working on both public and private contracts, not preempted); *R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17, 32-33 (1st Cir. 2011) (local law requiring hospitality industry employers to retain employees for 90 days following change in ownership not preempted); *Assoc. Builders & Contrs. of S. Cal. v. Nunn*, 356 F.3d 979, 988-91 (9th Cir. 2004) (state prevailing wage law not preempted); *Wash. Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811, 817 (D.C. Cir. 1995) (law requiring successive owners taking over public service contracts to retain employees subject to detailed requirements not preempted).

unionized employees differently does not require preemption. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the state law at issue established baseline requirements for severance pay, but exempted employers who were party to a contract—including a CBA—addressing severance pay from that requirement. *See id.* at 20-22. In a further development of the Court's holding in *Metropolitan Life*, the *Coyne* Court held that such laws should not be held preempted because allowing parties to contract for alternate labor standards *protects* the collective-bargaining processes protected by the NLRA. *Id.* at 20, 22.

Applying these principles, the courts of appeals have repeatedly declined to preempt state laws adopting substantive labor standards, even where the law treats unionized employers differently by exempting them from, or allowing them to bargain around, its requirements.[9] The

---

[9] *See, e.g.*, *Am. Hotel*, 834 F.3d at 964 (local law setting $15.37 hourly wage for certain employees of large hotels, nearly $5 per hour higher than the state-wide minimum wage, not preempted, even though unionized large hotels could waive these provisions); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 242-46 (3d Cir. 2000) (territorial law limiting grounds for employee discharge not preempted, even though parties to a CBA could contract around the provision); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 485, 490 (9th Cir. 1996) (state eight-hour-shift limit for miners not preempted, even though employers party to a CBA addressing safety and hours issues were exempt); *Nat'l Broad. Corp. v. Bradshaw*, 70 F.3d 69, 71-72 (9th Cir. 1995) (state wage order setting mandatory

(cont'd on next page)

courts have emphasized that these "opt-outs" do not impact rights to collective bargaining but merely set the backdrop for negotiations to occur. *See Am. Hotel*, 834 F.3d at 964 ("As *Metropolitan Life* and [*Coyne*] clarify, state action that intrudes on the mechanics of collective bargaining is preempted, but state action that sets the stage for such bargaining is not."); *cf. Livadas v. Bradshaw*, 512 U.S. 107, 132 n.26 (1994) ("Nor does it seem plausible to suggest that Congress meant to preempt such opt-out laws as 'burdening' the statutory right of employees not to join unions by denying nonrepresented employees the 'benefit' of being able to 'contract out' of such standards.").

The Car Wash Law's surety bond provision should be sustained under the same reasoning. The City enacted the provision pursuant to its traditional police powers to license occupations and to provide for the safety, health, and well-being of the City, the public, and the workers. *See* N.Y. Const., Art. IX § 2(c)(ii)(10); N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(12). The provision sets a baseline with which all owners must comply to ensure that they have funds available to satisfy their

---

overtime benefits for broadcast employees not preempted, despite exemption for unionized employees).

most basic obligations to employees as well as other outstanding obligations, in the face of a documented history of widespread noncompliance across the City. The law thus requires car wash owners to secure a bond in the face amount of $150,000 (a few thousand dollars in actual cost) per car wash location, but reduces the required bond amount where the employer is party to a CBA (or monitoring agreement) providing for specific terms that mitigate the risk that owners will accumulate the substantial back-pay obligations revealed in recent settlements and judgments. The law in no way interferes with the process of collective bargaining.

2. The Association's claims of economic pressure are not relevant to the preemption analysis.

Despite the close connection between the Car Wash Law's surety bond provision and the state labor standards repeatedly approved by the courts, the district court reasoned that the reduction in bond amount is nonetheless improper because it "penal[izes]" car wash owners that are not party to a CBA, thereby improperly "[p]ressuring businesses to unionize" (SPA7). But this conclusion mischaracterizes

the operation of the law and relies on a premise that has been soundly rejected by the courts.

The law does not treat car washes differently—let alone penalize them—based on the mere presence or lack of a CBA. Rather, the law sets a baseline standard that all car wash owners must follow, requiring all owners to obtain a $150,000 bond. The bond amount is then reduced only if one of two strict requirements is met: (1) the parties have negotiated specific contract terms providing for the timely payment of wages and the expeditious resolution of wage disputes, or (2) the owner is subject to an ongoing, active monitoring agreement with the state or federal government providing for similar terms.[10] As the legislative history makes clear, the reduction of the amount under certain circumstances was in no way intended to penalize car wash owners. Instead, in response to complaints by owners that the costs of a $300,000 bond were too expensive, the City Council reduced the bond amount to $150,000—the amount that California had required for over

[10] The Association has asserted without substantiation that nearly every CBA contains terms along these lines. But even if that were true, it would not justify preemption. Instead, it would only reflect how basic ensuring timely wage payment is among worker protections, as well as underscore how dramatically many car wash workers have been mistreated.

a year—and further reduced the amount where alternative enforcement mechanisms were in place.

Moreover, any contention that the law has the effect of pressuring car wash owners to unionize is based on a false premise: that *owners* can initiate unionization or exercise a unilateral right to enter into a CBA. It is a fundamental principle of labor law that it is employees who possess self-determination rights, not employers. *See, e.g.*, 29 U.S.C. § 158(a)(2) (making it illegal for an employer to recognize a union that does not have a signed authorization cards from a majority of workers or that has not won an NLRB-conducted election). Protecting this right of employees to self-determination is perhaps the most central objective of the NLRA. *See id.* § 157.

Federal law does not permit employers to coerce, intimidate, or threaten employees not to organize, and it does not permit employers to support or dominate the formation of an employee organization. *See* 29 U.S.C. § 158(1)-(2). Employers may engage only in noncoercive fact-based speech regarding the question of unionization (and they may be subject to further restrictions in the time surrounding a scheduled election). *See id.* § 158(c); *Peerless Plywood*, 107 N.L.R.B. 427, 429

(1953). The district court did not explain any process consistent with the NLRA by which the Car Wash Law could, or would, lead *employers* to effect unionization of their work forces.

To the extent the district court analysis relies on the inference that the law could, in effect, apply economic pressure during a future collective-bargaining process by altering a car wash owner's incentives, that inference is not only implausible as a matter of fact, *see* infra at 63-66, but misdirected as a matter of law. Again, any state law that establishes a labor standard for which an employee would otherwise have to bargain, yet allows parties to contract out of that standard, will change the incentives of the parties and may influence what terms they are able to achieve through bargaining. But the courts have consistently held that such laws have too indirect an effect on the mechanics of collective bargaining to frustrate the purposes of the NLRA and warrant preemption.

In *Coyne*, the employer made a similar argument, insisting that the law requiring severance pay was preempted because it "intrude[d]" on the collective-bargaining process by "undercut[ting] an employer's ability to withstand a union's demand for severance pay." *Coyne*, 482

U.S. at 20. The Supreme Court rejected that contention, reasoning that the NLRA sought to ensure an "equitable bargaining *process*, not with the substantive terms that may emerge from such bargaining." *Id.* (emphasis added).

Similarly, in *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1995), a non-union mining operation challenged a state law providing that miners could not work more than eight hours in a 24-hour period, unless the employer had entered into a bona fide CBA expressly providing for wages, hours of work, and working conditions. *See id.* at 485-86. The employer, whose employees preferred a shorter work week, contended that the law put its mine at a competitive disadvantage as against unionized mines, which enjoyed the option of satisfying their employees' desires for the shorter workweek. Although the Ninth Circuit recognized that an "opt-out" provision for CBAs altered the employers' incentives during the bargaining process, the court held that a "potential benefit or burden in application does not invalidate an 'opt-out' provision." *Id.* at 490.

More recently, in *American Hotel and Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958 (9th Cir. 2016), the employer challenged a local

regulation requiring large hotels in the City to substantially increase the minimum wage paid to employees to $15.37 per hour, and to provide paid leave and unpaid sick leave to full-time employees, unless those provisions were expressly waived in a CBA. *See* No. 14-09602-AB, U.S. Dist. LEXIS 106914, *22-23 (C.D. Cal. May 13, 2015), *aff'd*, 834 F.3d 958 (9th Cir. 2016). The hotels contended that the law treated non-union and union workplaces differently, disrupted the balance of economic power set by federal law, and exerted "extraordinary economic pressure" on non-union hotels to accept union demands. *See id.* at *23. But the Ninth Circuit held the law not preempted under *Machinists*. The court reasoned that "state action that intrudes on the mechanics of collective bargaining is preempted, but state action that sets the stage for such bargaining is not." *See Am. Hotel*, 834 F.3d at 964.[11]

The principles underlying these cases are clear: any background law on labor standards has the potential to affect the parties' incentives

[11] The Third Circuit reached a similar conclusion in *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000), which addressed a territorial law that limited the grounds on which employees could be discharged, unless modified by a CBA. *See id.* at 242-46. Although the employer argued that the law's opt-out "forced" unionization, the Third Circuit held that such opt-outs are not inconsistent with the NLRA. *Id.* at 244-45.

or bargaining positions, but such a possibility, by itself, is insufficient to warrant preemption, especially when a state or locality is acting within the scope of its traditional police powers. This is true even when the law may incidentally affect future negotiations between management and labor. Instead, to be preempted, a state or local law must interfere with the mechanics of collective bargaining by "eliminat[ing] particular bargaining tools" or "bind[ing] an employer or employee to a particular choice." *Rondout Elec.*, 335 F.3d at 169 (regulation imposing additional cost on non-union employers not preempted because increase does not affect the bargaining process and was not "designed" to encourage bargaining). Because the subdivision does neither, it does not frustrate the NLRA's purposes, and preemption is unwarranted.

3. The preemption analysis does not turn on whether the provision meets the district court's narrow, technical definition of a "minimum labor standard."

The district court also appeared to conclude that it was significant that the surety bond provision, in the court's estimation, could be distinguished from the minimum labor standards that courts had repeatedly approved (SPA7). But the court did not explain the import of

that distinction. The Supreme Court has never held that all state laws affecting the relationship between unions and employers, but falling outside the "minimum labor standards" category, are thereby preempted for that reason. In fact, it has repeatedly reached the contrary conclusion.[12] Nor would any other conclusion make sense, as the crucial inquiry when a locality is acting pursuant to its traditional police powers is whether its action frustrates the purposes of the federal act at issue.

Indeed, the First Circuit has questioned the usefulness of the "minimum labor standards" concept in resolving which laws the NLRA preempts. *See R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17, 32-33 (1st Cir. 2011). The court reasoned that the Supreme Court has not clearly indicated what distinguishes a minimum labor standard from other labor standards, or explained why minimum labor standards are "by virtue of that status" not inconsistent with the goals of the NLRA.

---

[12] *See, e.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491, 500-08 (1983) (no preemption of state-law breach-of-contract cause of action brought by replacement worker fired after conclusion of strike); *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 545-46 (1979) (plurality opinion) (no preemption of state law requiring payment of unemployment compensation to striking workers); *cf. Sears v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978) (no preemption of state jurisdiction over conduct touching interests "deeply rooted in local feeling and responsibility").

Id. at 32. As a result, the court concluded, it is not clear that the "phrase helps achieve clarity as to the boundaries of permissible state regulation." *Id.*

In any case, it is hard to identify any distinction relevant to the purposes of *Machinists* preemption between the surety bond provision in the Car Wash Law and other "minimum labor standards" that have been consistently sustained. If anything, the surety bond provision is only further removed from the ordinary collective-bargaining process: unlike other state and local laws that have been held not preempted, the surety bond provision does not even address a mandatory subject of collective bargaining. *See Metro. Life*, 471 U.S. at 753 (resolving whether "state laws of general application affecting terms of [CBAs] subject to mandatory bargaining" are preempted); *Excello Dry Wall Co.*, 145 N.L.R.B. 663, 663-37 (1963) (holding that wage bonds are not a mandatory subject of bargaining). Nor does the local law in any way regulate wage-and-hour issues—the core subjects of collective bargaining. Rather, those matters are governed entirely by the parties' formal or informal agreements and by unchallenged federal and state laws. And the City's law aims to provide only the most basic and

minimum protection for workers by ensuring that owners pay them the wages owed for work actually performed, against a legislative record showing that this lowest of bars was frequently going unmet by car wash owners across New York City. There is no sound justification for finding the law preempted under *Machinists*.

Nor is the answer on preemption changed by the mere fact that a CBA meeting defined standards provides a path to a lower bond requirement under the law. To be sure, in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the Supreme Court distinguished the state action before it from a minimum labor standard in part on the ground that the action differentiated between employees who were and were not covered by a CBA. *See id.* at 131-132. But the Court did not indicate that such differentiation is alone dispositive.

Quite the contrary, the Court in *Livadas* was careful not to "suggest … that every [state law drawing a] distinction between union-represented employees and others is invalid under the NLRA." *Id.* at 129. This Court has confirmed the principle well after *Livadas*: the fact that a regulation "may impose an additional cost on non-union employers" does not disqualify it as a "minimum labor standard" or

require preemption. *Rondout Elec.*, 335 F.3d at 169. And as noted, other circuits have upheld "opt-out" laws analogous to this one against *Machinists* challenges. The weight of authority is thus strongly against preemption. Although *Livadas* uses some expansive language, it is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. St. Paul*, 505 U.S. 377, 386 n.5 (1992).

The state action invalidated in *Livadas*, moreover, differs sharply from the bond provision at issue here. *Livadas* found preempted a state labor commissioner's refusal to enforce a state law requiring immediate payment of all wages due upon an employee's discharge when the discharged employee was covered by a CBA with an arbitration clause. The Court primarily rooted its decision not in *Machinists*, but in *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), where the Court had rejected a state policy of withholding unemployment insurance benefits solely because an employee had filed an unfair labor practice charge against the employer with the NLRB. *See id.* at 239.

In both *Livadas* and *Nash*, the state policy visited an adverse consequence on an employee for his or her exercise of a right under the NLRA, where the relationship between the two was attenuated. The policies thus operated as de facto penalties for the exercise of federal rights. In *Livadas*, for example, the Court noted that the immediate-pay statute would not be enforced for an employee covered by a CBA with an arbitration clause, regardless of whether the arbitration clause even covered claims under that statute. *See Livadas*, 512 U.S. at 127-28. The Court unsurprisingly held that the refusal to enforce the statute in effect penalized the employee for exercising her collective-bargaining rights, frustrating the purposes of the NLRA. *See id.* at 128-29.

The surety bond provision presents a marked contrast. At bottom, the Association does not claim infringement on employees' federal rights, but rather asserts an invasion of employers' purported rights regarding a matter—the threshold question whether to organize—that the NLRA makes the employees' sole prerogative. In any case, the purpose of the bond requirement and the logic of the opt-out are closely connected here: provisions for the timely payment of wages and an expeditious procedure for resolution of wage disputes prevent

accumulation of large amounts of unpaid back wages, so the amount of the bond requirement is accordingly reduced. Unlike in *Livadas*, if the expeditious dispute resolution procedure under the CBA does not cover wage disputes, the reduced bond amount does not apply. The surety bond provision is thus the kind of familiar and "narrowly drawn" opt-out statute that *Livadas* expressly "cast no shadow" upon, *id.* at 132, and that subsequent circuit-level precedents have consistently upheld.

C. The law's purpose to protect the City, workers, and consumers further supports the conclusion that the law is not preempted.

A full review of the Car Wash Law's text, purposes, and history makes clear that the City Council's purposes in enacting the law were fully consistent with the goals of the NLRA (*see supra* pp. 8-20). Far from seeking to regulate employer and union conduct during the collective-bargaining process, the law seeks to protect the safety, health, and well-being of the public as well as the City's workers—a task that Congress has left primarily to the states. *See Metro. Life*, 471 U.S. at 757 (state laws establishing labor standards not preempted "so long as the purpose of the state legislation is not incompatible with [the] general goals of the NLRA").

The district court nonetheless found, in a single page of analysis, that "a central purpose" of the Car Wash Law is to encourage unionization (SPA7-8). But that conclusion ignores the best evidence of the statute's intent—its plain language—and contradicts the law's stated purposes. *See Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162 (2013) (in preemption context, statutory construction begins, as with any statute, with the text of the provision in question, and considers, as need be, the law's structure and purpose). And the conclusion is only further rebutted by the legislative history.

Although this lawsuit has focused on the surety bond provision, the structure and text of the Car Wash Law as a whole demonstrate that the law is at bottom a licensing law for an industry with an egregious history of wage abuses and presenting considerable public-health risks. The other ten pages of the law: (1) ensure that licensees carry proper insurance and are in compliance with key environmental, public health, and workplace regulations; (2) implement recordkeeping requirements for consumer complaints, chemicals employed, and water purification systems; and (3) set forth when a subsequent owner may be deemed a "successor" for liability purposes. Indeed, echoing three years

of committee reports and public statements, the press release announcing the City Council's vote on the law stated that the purpose of the law was to "help the City enforce environmental laws … as well as consumer protection laws," and "help protect employees."[13]

The law's surety bond provision supplements these provisions by ensuring that there is a pool of funds available to satisfy fines, judgments obtained by consumers for damages, and judgments obtained by workers for unpaid wages. To be sure, one subdivision mentions CBAs. But the plain import of that subdivision is to reduce the bond amount where *one of two* alternate enforcement mechanisms is in place to ensure the timely payment of wages and the expeditious resolution of wage disputes. The focus of these provisions, as well as the fact that the face amount of the bond is reduced in *either* circumstance, demonstrates that this provision aims to ensure the collection of wages as required by law, not to encourage unionization.

---

[13] New York City Council, "Council to Vote on 'Fair Chance Act' Discouraging Employment Discrimination Based on Criminal Record" (June 10, 2015), *available at* https://council.nyc.gov/press/2015/06/10/210/.

A review of the legislative history also overwhelmingly confirms that the City Council's purpose in enacting the law was to protect the City, workers, and the public. The committee reports on each of the law's five drafts, as well as the transcripts of the three public hearings held by the Committee on Service and Labor, show that Council Members were intensely focused on wage-and-hour violations, consumer complaints, environmental threats, and worker safety. Regarding the surety bond provision itself, the legislative history shows that the proposed face amount of the bond was typically $300,000. It also shows that the subdivision reducing the required the bond amount to $30,000 in certain circumstances was adopted only after car wash owners complained about the costs of obtaining a $300,000 bond, and at the same time as the Council reduced the general bond amount to $150,000.

The City Council's reliance on California's comparable car wash law further rebuts any conclusion that the purpose of the law was to encourage unionization. At the time they enacted the Car Wash Law, Council Members were aware that California had required car washes to obtain a $150,000 bond, while entirely eliminating the requirement for car washes that were party to a CBA (*e.g.*, A507, 747). Nonetheless,

California's law was not subject to legal challenge, nor had it caused rampant unionization. To the contrary, only a tiny fraction of California's car washes—one to two percent—were unionized.

The district court nonetheless inferred, based on three statements made by individual Council Members, and cherry-picked from hundreds of pages of committee hearings, that the City Council *also* had the purpose of encouraging unionization. But that inference has no basis in law or fact. As an initial matter, it is well established that comments by individual legislators are not reliable indicators of a legislative body's intent. *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123, 136 (2d Cir. 2004) ("[T]he isolated statements of individual legislators do not express the intent of Congress as a whole ...."), *vacated on other grounds*, 544 U.S. 1012 (2005).

Nor do the three cited comments even support the contention that the motive of those particular legislators, in voting for the law, was to increase unionization. Although the only provision of the law that purportedly encourages unionization is the surety bond provision, none of the cited comments was made in the context of a discussion about a surety bond provision. Moreover, both the first and second comments

are merely expressions of approval that some car washes had unionized, not a statement of intention that the Car Wash Law itself would somehow spur unionization.[14] The third statement was not even a statement in support of unionization, but merely a statement of fact—that a workers' rights coalition including a union had been organizing workers.[15] And any import of these statements is overwhelmed by the weight of dozens of other statements made by these same Council Members, as well as the other sponsors of the Car Wash Law, confirming that the Council's central concerns were wage theft, worker safety, consumer safety, and environmental safety (*e.g.*, A351-52, 355-56, 360, 414-15, 517, 635-36, 661, 671, 673, 688-89, 725-26, 783, 794).

In finding just three statements probative of improper intent, the district court appeared to infer that the involvement of legislators who express support for or approval of unionization in legislative debates

---

[14] *See* A327 ("Chairperson Sanders: There's some good news ... there is talk of some car washes unionizing in the city, perhaps we'll hear more of that."); A480 ("Chairperson Nelson: [S]ome car washes have unionized in the city so hopefully the city is moving in the right direction to make this industry shape up.").

[15] *See* A480-81 ("Council Member Mark-Viverito: [I]t's almost been two years that some of the unions that are represented here and the organizations like New York Communities for Change, Make the Road, RWDSU have been organizing the carwash workers.").

creates an inference that these legislators—and in fact the legislature as a whole—had an improper purpose in enacting particular legislation. But this Court should reject that extraordinary inference. The political views of a few legislators supporting a law are a wholly improper basis to invalidate any statute. *See N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.").

The court appeared to draw a similar conclusion about union advocacy, concluding that WASH NY's support of the law somehow indicates that the law itself was designed to encourage unionization. But that conclusion is erroneous. It is not uncommon for unions to advocate for legislation that supports workers' rights but does not relate to unionization. The conclusion is also one-sided. Business interest groups like the Association also routinely advocate against laws supporting workers' rights. Under those circumstances, it is unclear why only union advocacy should be suspect. In any event, this Court has already held that "*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those

protections may also be the subject of collective bargaining." *Concerned Home Care Providers*, 783 F.3d at 87.

Thus, this Court should reverse and grant the City judgment on the pleadings on the Association's federal preemption claim. The Car Wash Law's surety bond provision does not interfere with the collective-bargaining process, and is instead the type of substantive state labor law that has been repeatedly approved by the courts. Because plaintiff has no other claim remaining for violations of federal law, the Court should also grant the City summary judgment on the Association's claim under 42 U.S.C. § 1983, which does not itself give rise to any substantive rights.

POINT II

AT THE VERY LEAST, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BEFORE DISCOVERY

As the City has demonstrated, the claims of financial pressure on which the Association's motion for summary judgment rests are not relevant to the preemption analysis. Even if they were, the grant of summary judgment to the Association could not stand. Its equivocal and speculative assertions of financial pressure do not warrant judgment as

a matter of law, and the available evidence both undercuts those assertions and highlights triable issues of fact. At the very least, the City was entitled to discovery and the opportunity to dispute the Association's contentions. Accordingly, the grant of summary judgment should, at a minimum, be vacated.

A. The Association did not satisfy its *prima facie* burden at summary judgment.

On summary judgment, the moving party must carry the heavy burden of showing that, resolving all ambiguities and drawing all inferences in favor of the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "This is particularly so when, as here, one party has yet to exercise its opportunities for pretrial discovery." *Nat'l Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975).

The Association failed to satisfy that burden because it submitted insufficient evidence to support its central contentions. Although the City recognizes that the higher surety bond amount will impose some minor additional costs, the Association has introduced absolutely no

evidence that these costs will cause financial duress, let alone such significant pressure that the costs will "force" car wash owners to unionize (to the extent such a result is even possible). The individual plaintiffs have not submitted any information at all about their financial condition—let alone about the financial condition of other, unidentified Association members. Without this information, the Association cannot prevail on its claims of financial pressure, and there is at least a material question of fact on this issue.

The Association's contentions about the costs associated with the bond are no more definite. At most, the Association declares that the premium for obtaining a $150,000 surety bond would likely be about $1,200 to $3,600 more than for a $30,000 bond (that is, 1 to 3% of the difference between the two bonds) (A138). But those amounts are so minor that, far from supporting the Association's contentions of financial pressure, they affirmatively undercut them.

Although the Association also asserts that they "may" be required to obtain CPA-prepared financial statements to obtain the higher bond amount, this equivocal assertion does not support a grant of summary judgment. The Association has submitted no proof, except in the most

conclusory form, about what the cost of such statements would be, and admits that there is "substantial uncertainty" surrounding whether they will have to pay them (A139). Indeed, the Association itself has vacillated about the need for such statements, as well as the bond costs (A1268-71).

Moreover, the Association's argument not only ignores that it is employees who must choose to unionize, but also relies on the dubious assumption that "unionization" is something car wash owners could impose without cost, such that they would be "forced" to choose unionization over the higher bond. But it is highly unlikely that unionization would cost an employer less than $1,200 to $3,600 a year (*see* Dkt. No. 59-1 at 59-60; *see also id.* at 47-48 [discussing the costs of unionization]).

In any event, California's experience provides clear evidence that a surety bond provision like that in the Car Wash Law does not "force" unionization. Although California increased the required bond amount to $150,000 in 2014, and although California's law wholly eliminates the bond requirement where a CBA meets certain requirements, only a tiny fraction of the over 1,000 car washes in the state fulfill the bond

requirement through a CBA. Stated another way, 99% of California's car washes have obtained a $150,000 bond or CD, rather than entering into a CBA without any required bond at all.

There are additional reasons to doubt the Association's assertions of extreme financial pressure. Public records of car wash auctions in New York show that car washes are valued in the millions of dollars and draw substantial revenue, and the Internal Revenue Service has noted that car washes, as a cash-based business, likely underreport their revenue (A1220-21, 1235-38, 1240-60). Certainly, the Association has invested substantial funds in its opposition to the Car Wash Law (A1221-22, 1262-63, 1265-66). Thus, the Association has failed to meet its burden at summary judgment and there are, at the very least, material issues of fact.

B. The district court abused its discretion in denying the City's request for discovery.

The district court also improvidently granted the Association's summary judgment motion—over the City's objection—before discovery. A district court should defer or deny a summary judgment motion where the party opposing the motion submits a declaration or affidavit

that it cannot present facts essential to justify its opposition, *see* Fed. R. Civ. Proc. 56(d); *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372, 374-75 (2d Cir. 1995), especially where the motion is made before discovery, because a party "must" be afforded "a reasonable opportunity to elicit information within the control of his adversaries." *Jasco Tools, Inc. v. Dana Corp.*, 574 F.3d 129, 148-51 (2d Cir. 2009); *see also Hellstrom v. U.S. Dep't of Veterans Affs.*, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.").

Here, the City submitted a detailed declaration explaining why the City required additional discovery to fully refute the Association's claims of financial pressure; that this information was within the Association's control; and that this information was material to disproving the Association's theory of NLRA preemption (A1218-26). Nonetheless, no discovery was conducted: the case was stayed until October 2016, when the Association filed an amended complaint, and the Association filed a pre-discovery motion for summary judgment four months later. Under these circumstances, the City was entitled to discovery on the Association's contentions, and the court's grant of

summary judgment should be vacated. *Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2d Cir. 1995) (grant of summary judgment before discovery premature); *Jones v. Coughlin*, 45 F.3d 677, 680 (2d Cir. 1995) (same).

At bottom, however, this Court need not remand for discovery. The Association's claims of financial pressure are simply irrelevant to the preemption analysis, and are affirmatively undercut by its own evidence that the costs associated with the higher bond are minimal. This Court should instead reverse the district court and enter judgment in favor of the City. Far from frustrating the purposes of the NLRA, the Car Wash Law protects the City's workers and the public, and should be sustained as an exercise of the City's traditional police powers.

CONCLUSION

This Court should reverse the district court's judgment to the extent of granting the City's motion for judgment on the pleadings on the Association's federal preemption claim and claim under 42 U.S.C. § 1983, and denying the Association's corresponding motion for summary judgment. In the alternative, this Court should vacate the grant of summary judgment on the NLRA preemption claim, and remand to the district court for discovery.

Dated: New York, NY
December 20, 2017

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Defendants

By: __/s/_____
INGRID R. GUSTAFSON
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0853
igustafs@law.nyc.gov

RICHARD DEARING
INGRID R. GUSTAFSON
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 13,919 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/
INGRID R. GUSTAFSON