No. 05-1531

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE,

Plaintiff-Appellant,

v.

MILWAUKEE COUNTY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CASE NO. 01-C-0149

HON. JUDGE LYNN ADELMAN

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 05-1531

Short Caption: Metropolitan Milwaukee Association of Commerce v. Milwaukee County

Counsel for the Amici hereby makes the certification required by F.R.A.P. and Circuit Rule 26.1, as follows:

The full name of every party that the attorney represents in the case: **The Chamber of Commerce of the United States, Associated Builders and Contractors, Inc., The Society for Human Resource Management, and The National Federation of Independent Business Legal Foundation.**

The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court: **Venable LLP**

If the party or amicus is a corporation, its parent corporations, if any, and any publicly held company that owns 10% or more of the party's or amicus' stock: **N/A**

Attorney's Signature: _____

Date: **April 18, 2005**

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IDENTITY, INTERESTS AND AUTHORITY OF THE AMICI

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform work on under contracts with state and local governments.

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. Founded in 1948, SHRM represents more than 190,000 individual members and serves the needs of HR professionals by providing essential and comprehensive resources and by ensuring that HR is recognized as an essential partner in developing and executing organizational strategy.

The National Federation of Independent Business Legal Foundation, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members

of NFIB own a wide variety of America's independent businesses from restaurants to manufacturing firms to hardware stores.

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the district court. The district court failed to appreciate the potentially staggering impact of its decision on private employer labor relations throughout the United States, due to the pervasive nature of government contracts entered into between local governments and private businesses in every part of the country, similar in scope and effect to the contracts covered by the Milwaukee Ordinance. The *Amici's* brief will assist this Court in reviewing the issues raised by the Petition, because the *Amici* have broader familiarity than the parties with government contracts and other similar forms of economic interaction between local governments and the private sector.

The City Ordinance upheld below broadly restricts employer and employee rights otherwise protected by the National Labor Relations Act, both with regard to the process of selecting union representation, or refraining therefrom, and the process of collective bargaining. As a result of the district court's decision, countless private businesses will be in jeopardy of losing their rights to freedom of contract previously protected by federal labor law. By expanding the Supreme Court's "market participant" doctrine beyond the narrow confines of individual projects in the construction industry, the district court's decision undermines Congressional intent and threatens interference with the protected rights of significant numbers of private employers and their employees throughout the United States.

The Amici are authorized to file this Brief under F.R.A.P. Rule 29, based upon having received the consent of both parties.

SUMMARY OF ARGUMENT

The district court's ruling that government contracts covered by the Milwaukee "labor peace" ordinance are exempt from labor law preemption significantly undermines the Congressional policies underlying the National Labor Relations Act, by allowing state and local governments to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining "proprietary" interests.

The Supreme Court's "market participant" exemption from labor law preemption has never been applied so broadly as in the present case. The district court appears not to have fully appreciated the pervasiveness and scope of the many types of government contracts potentially impacted by its decision upholding the Milwaukee ordinance. Government contracts similar to those at issue in this case are utilized throughout the country and impact more than a trillion dollars of private goods and services each year. By characterizing a local ordinance regulating such contracts as exempt from NLRA preemption, the district court has opened the door to removal of large numbers of private employers and their employees from the protections of the Act, in a manner never intended by Congress or sanctioned by the Supreme Court.

Among the most important rights of employers and their employees under the NLRA, long recognized by this Court, are the right to bargain collectively only with those unions freely selected as the majority representative of the employees, the right of all parties to engage in free speech on the subject of unionization, and the right to bargain

in good faith without reaching an agreement imposed by any outside agency. The ordinance at issue in the present case plainly abrogates all of these rights in a manner fundamentally at odds with federal labor law.

The Supreme Court, the Fifth Circuit, and the Ninth Circuit have all held that the market participation exemption is limited to circumstances in which a government entity is acting in the same manner as a private employer. In the circumstances of the present case, however, no private entity outside the construction industry would ever be permitted to impose a union agreement requirement on another private employer. By expanding the holding of the Supreme Court's *Boston Harbor* decision beyond the narrow circumstances of the construction industry, the district court has ignored the previous holdings of the Supreme Court and the language and history of Sections 8(d), (e) and (f) of the NLRA.

The district court has misapplied the limited *Boston Harbor* exemption from labor law preemption and has failed to apply the "comparable private action" test developed in the Fifth and Ninth Circuits. As a result, the district court's decision threatens massive disruption of the careful balance of interests established by federal labor law, and must be reversed.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPRECIATE THE BROAD IMPACT OF ORDINANCES RELATING TO GOVERNMENT CONTRACTS ON PRIVATE SECTOR EMPLOYERS AND EMPLOYEES.

State and local governments spend more than a trillion dollars per year in the form of government contracts for goods and services from private employers. Tahi, "Public Procurement Re-Examined," Journal of Public Procurement 9, 21 (2001); Kelman, "Contracting," in The Tools of Government: A Guide to the New Governance 282, 288 (Oxford Univ. Press, 2002).[1] The district court appears not to have fully appreciated the breadth and scope of these pervasive governmental interactions with the private sector, in finding that Milwaukee's ordinance was somehow exempt from federal labor law preemption. The reality is that the standard adopted by the district court would potentially remove staggering numbers of private employers from the protection of the NLRA, as each municipality could impose its own concept of "fair" labor relations policies on private employers. Indeed, absent reversal by this Court, a substantial percentage of the entire private sector business community will be adversely affected by the district court's decision. No justification exists for granting state and local governments *carte blanche* to use their spending powers as weapons to undermine the federally-protected rights of so many private employers and their employees under the NLRA.

[1] These and other sources report that there are more than 87,000 state and local governments in the U.S., who collectively spend more than $1.35 trillion annually in government procurements. The federal government spends an additional $230 billion per year on procurement.

II. THE DISTRICT COURT GROSSLY ERRED IN ITS ANALYSIS OF FEDERAL LABOR LAW PREEMPTION.

The National Labor Relations Act protects the right of employers to enter into agreements with labor unions only on a voluntary basis, as a result of good faith bargaining in a manner regulated by the National Labor Relations Board. Neither the NLRB nor any private employer outside the construction industry is permitted to force another private employer to enter into any involuntary agreement with a union. *See H.K. Porter, Inc. v. NLRB*, 397 U.S. 99 (1970)(citing Section 8(d) of the Act). *See also Connell Construction Co. v. Plumbers and Pipefitters Local 100*, 421 U.S. 616 (1975) (explaining Section 8(e)'s prohibition against so-called "hot cargo" agreements outside the construction industry). Employees likewise have the right not to be forced to accept representation by unions who have not achieved majority support or to be subject to imposition of collective bargaining agreements in the absence of majority union representation, under Sections 7, 8 and 9 of the NLRA. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974).

In the present case, Milwaukee's ordinance requires that private, non-construction industry employers who provide "care or treatment services" under certain contracts with the Department of Human Services or Department of Aging, or who provide "transportation services for the elderly and/or persons with disabilities" under certain contracts with the Department of Public Works," must enter into agreements with unions who do not represent a majority of the employers' workers. See Chapter 31.02(a). The agreements waive numerous rights protected by the National Labor Relations Act and directly infringe on private employers' rights of free speech and freedom of contract.

Neither the NLRB nor any private entity would be entitled to impose such requirements on employers or employees under the NLRA.

Under both *Garmon* preemption (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)) and *Machinists* preemption (*Lodge 76, International Assn of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)), the district court should have found that the Milwaukee ordinance is preempted by the NLRA. The ordinance plainly regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*, and further regulates conduct that Congress intended to be left unregulated under the holding of *Machinists*. *See also Wisconsin Dept of Indus., Labor & Human Relations v. Gould, Inc*., 475 U.S. 282, 286 (1986) ("That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity."); and *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) ("A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power … or to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining.")

In *Bldg. & Const. Trades Council v. Associated Builders and Contractors of Mass./R,.I., Inc*., 507 U.S. 218, 230 (1993) ("*Boston Harbor*"), the Supreme Court recognized a narrow exemption from labor law preemption in the unusual circumstance where a state authority engaged in conduct that any private entity could also engage in, specifically in the construction industry. When the Massachusetts Water Resource Authority entered into a project labor agreement for a large construction project, the

Court found that this was a type of agreement common to the construction industry and was expressly authorized for private construction employers by Sections 8(e) and 8(f) of the NLRA. These sections of the Act permit "employers in the construction industry" and *only* such employers, to require subcontractors to enter into union agreements as a condition of performing work on a particular construction project. Under these unique circumstances, the Court upheld the project agreement "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find…." 507 U.S. at 233.[2]

By expanding the market participant doctrine beyond the construction project circumstances present in *Boston Harbor*, the district court in the present case ignored the language and history of Sections 8(e) and (f) of the NLRA. The NLRA does not permit anyone other than an "employer in the construction industry" to impose union-only requirements on subcontractors. Other private entities do not typically enter into such arrangements; and they are *prohibited* from doing so under the NLRA unless they are in fact employers in the construction industry.

The Supreme Court has held that Congress intended the construction industry proviso of Section 8(e) to preserve only "the pattern of collective bargaining" that existed in the construction industry when Section 8(e) was enacted in 1959. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657 (1982); *Connell Construction Co., Inc. v. Plumbers and Steamfitters, Local 100*, 421 U.S. 616, 627-33 (1975). *See* 105 Cong.Rec.

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[2] *See also Colfax Corp. v. Ill. State Toll Highway Auth.*, 79 F. 3d 631, 633 (7th Cir. 1996), likewise addressing only the unique circumstances of the construction industry and applying the principles stated in *Boston Harbor*.

16414 (1959)(remarks of Sen. Kennedy), *reprinted in*, 2 Leg.Hist. at 1432. Recognizing Congress' intent, the Supreme Court held that questions concerning the scope of the proviso are completely controlled by "Congress' perceptions regarding the [pre-1959] status quo in the construction industry." *Woelke & Romero Framing, Inc. v. NLRB*, *supra*, 456 U.S. at 657.

The legislative history of Section 8(e) further demonstrates that Congress intended the phrase "employer in the construction industry" to refer only to construction contractors. Senator Kennedy and other prominent members of Congress used the phrases "employer in the construction industry" and "contractor in the construction industry" interchangeably. 105 Cong.Rec. 16415 (remarks of Sen. Kennedy) 2 Leg.His. at 1433; 105 Cong.Rec. at 16635 (remarks of Rep. Thompson), *reprinted in* 2 Leg.Hist. at 1720. Congressional debates concerning the propriety of "hot cargo" agreements in the construction industry focused exclusively on agreements between unions and "contractors," "prime contractors" or "general contractors." *Id.* (noting Congress' intent to preserve the right of "unions and prime contractors in construction industry to enter into [hot cargo] agreements"); *id.* at 8359 (remarks of Sen. Goldwater), *reprinted in* 2 Leg.Hist. at 1829-30 ("a building trades union may enter into a contract with a contractor – building contractor – whereby he agrees that he will not let work to any subcontractor who is nonunion").[3]

The legislative history of Section 8(f) even more clearly demonstrates that the "pattern of collective bargaining" that Congress perceived (and intended to preserve) was a pattern of agreements between unions and construction contractors, not owner-

[3] *See also* 105 Cong.Rec. App. 8141 (remarks of Sen. McNamara), *reprinted in*, 2 Leg.Hist. at 1815; *id*. at 8222 (remarks of Rep. Thompson), *reprinted in*, 2 Leg.Hist. at 1816.

developers. Congress perceived the employers involved in this "pattern of collective bargaining" to include only those who: (1) submit bids or proposals to construct improvements to real property; (2) enter into prime construction contracts (with owner-developers) or construction subcontracts (with prime contractors); and (3) perform work requiring the employment of "skilled craftsmen." Private owner-developers rarely, if ever, engage in these activities.

In the present case, the Milwaukee ordinance ranges far beyond the construction industry in its mandate of neutrality, representation procedures, and collective bargaining requirements. The ordinance expressly applies to private employers providing care or treatment services and transportation services for the elderly and/or persons with disabilities. It is undeniable that such employers are outside the narrowly permitted scope of Sections 8(e) and 8(f).

Had the district court applied the two-part preemption test derived from *Boston Harbor* that was set forth in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999), and in *Chamber of Commerce v. Lockyer*, 364 F. 3d. 1154 (9th Cir. 2003), then the Milwaukee ordinance would plainly have been found to be preempted. In *Cardinal Towing*, the Fifth Circuit adopted the following preemption standard:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

The Milwaukee ordinance fails to satisfy the *Cardinal Towing* exemption standard "by comparison with the typical behavior of private parties in similar

circumstances." As noted above, no private party would be permitted under the NLRA to force a non-construction employer to recognize and/or enter into a collective bargaining agreement with any union.

The Milwaukee ordinance is also not at all "narrow in its scope" under the *Cardinal Towing* test. Rather, the ordinance broadly imposes union requirements on non-construction industry employers and employees for reasons having nothing to do with any specific proprietary interest or specific project of the City. Moreover, by imposing its labor neutrality requirements in the form of a statute, rather than on an individual contract basis as in *Boston Harbor*, Milwaukee acted in a presumptively regulatory manner, contrary to the finding of the district court.

In these respects, the Milwaukee ordinance is factually quite similar to, though much more onerous than, the California statute struck down in *Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir. 2003), *petition for rehearing en banc pending*. In *Lockyer*, the state enacted a law forbidding government contractors from using state funds to advocate for or against unions. This is of course one of the provisions of the Milwaukee ordinance also, though even California did not go so far as to create its own regulatory scheme for union organizing and collective bargaining in direct conflict with the NLRA, as Milwaukee has done. The Ninth Circuit properly found the California law preempted by federal labor law, holding inter alia as follows:

> [T]he statute by its design sweeps broadly to shape policy in the overall labor market. *** The statute's scope indicates a general state position, not a narrow attempt to achieve a specific goal. Thus, there is no question but that [the statutory provisions] are designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.

The same analysis applies to the Milwaukee ordinance, only more so, in view of the much more onerous provisions of the ordinance that are clearly designed to have a "broad social impact" with regard to union organizing.

Instead of following the Ninth Circuit's *Lockyer* precedent, however, the district court relied on the subsequent decision of the Third Circuit in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F. 3d 206 (3d Cir. 2004), *petition for certiorari pending* (U.S. 2005). The Third Circuit there upheld a Pittsburgh ordinance imposing a labor neutrality agreement on a narrow class of economic development projects that benefited from government-sponsored tax increment financing (TIF). The *Sage* case is distinguishable from the present facts and was wrongly decided in any event. The district court should not have relied on the Third Circuit's opinion, and neither should this Court.

As noted, *Sage* did not involve an ordinance or statute imposing union neutrality requirements on an entire class of private employers engaged in government contracting. Rather, the case dealt only with tax increment financing, a device by which governments develop specific projects in economically depressed areas, and which the Third Circuit held established a proprietary interest of the government similar to that involved in a *Boston Harbor*-type construction project. The Pittsburgh ordinance at issue in *Sage* also contained none of the detailed regulatory requirements present in the Milwaukee ordinance that conflict directly with union representation proceedings under the NLRA.[4]

[4] Even if it were not so readily distinguishable, the *Sage* opinion is overly permissive of local government action that could plainly interfere with rights protected under the NLRA., and the Third Circuit's decision should not be followed. In particular, the *Sage* court erred in failing to compare challenged government activity with private actions in accordance with the holding of *Boston Harbor*, and in failing to examine the motivations of the government actors.

Milwaukee's ordinance, to an extent far exceeding the limited provisions of the Pittsburgh ordinance upheld in *Sage*, conflicts broadly and directly with the NLRB's established policies for effectuating free and fair choice by employees with respect to union representation. The Milwaukee ordinance also conflicts directly with Congress' purpose in making the NLRB the exclusive forum available to employees, employers, and unions who are caught up in resolving questions concerning representation. Contrary to the finding of the district court in this case, because the Milwaukee ordinance is directed at employers hired to staff the operations of health care and transportation operations – as opposed to construction industry employers – there is no exception from preemption doctrine that would even arguably allow the City of Milwaukee to intrude on federal labor policy. The ordinance is regulatory in its scope and effect and must be deemed preempted by the NLRA.

CONCLUSION

For each of the reasons set forth above and in the brief of Plaintiff-Appellant, the decision of the district court should be reversed and the Milwaukee Ordinance should be declared preempted by federal labor law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(A)(7)

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because it contains 3,322 words, excluding the parts of the brief exempted by the Rule.

This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6), in that it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 12 pt.

_____ _____

Date Maurice Baskin, Attorney for the Amici

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief Amici Curiae were served on the following, by first class mail and electronically, this ___ day of April, 2005:

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