No. 15-55909

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee,

UNITE HERE LOCAL 11,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California,
Case No. 2:14-cv-09603-AB-SS

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF APPELLANTS AND REVERSAL

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") and the Coalition for a Democratic Workplace ("CDW") respectfully submit this amici curiae brief to highlight the critical importance of the issues presented in this case and to further underscore why Los Angeles' Citywide Hotel Worker Minimum Wage Ordinance, No. 183241 (the "Ordinance"), is preempted by federal labor law.

The Chamber is the world's largest federation of businesses. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber is actively involved in litigating issues at the intersection of local law and federal labor law, *see, e.g., Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), and is a regular contributor to the ongoing conversation regarding the important issues implicated here, *see, e.g.*, U.S. Chamber of Commerce, *Labor's Minimum Wage Exemption: Unions as the "Low-Cost" Option* (2014), http://bit.ly/1Evb112 ("Chamber, Minimum Wage Exemption").

CDW, which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor law reform.

CDW has advocated for its members on several important labor law questions exactly like this one. Like the Chamber, CDW is a regular contributor to debates about the minimum wage and federal labor law.

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Ordinance is a flatly impermissible attempt to compel employers to agree to collective bargaining and put a thumb on the scale in favor of unions in any bargaining that results. By freeing employers from its heightened wage requirements only if a union expressly and unequivocally waives the right to those wages in a collective bargaining agreement, the Ordinance impermissibly imposes a penalty on employers that do not acquiesce in unionization efforts. As a result, the Ordinance is preempted.

ARGUMENT

I. Los Angeles' Efforts To Compel Collective Bargaining And Skew Bargaining In Unions' Favor Are Preempted By Federal Labor Law.

In crafting the National Labor Relations Act (the "NLRA"), "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 n.4 (1976) ("*Machinists*"). One of the critical attributes of that carefully constructed balance is free and unfettered collective bargaining. Indeed, "'[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (citation omitted).

The defining characteristic of free collective bargaining (as the term itself suggests) is that it is left to the parties. The only relevant requirement imposed by the NLRA is that an employer and a union "bargain in good faith." *Id.* at 616. That good-faith requirement does not mandate that a bargain be struck or "'compel either party to agree to a proposal or require the making of a concession.'" *Id.* (quoting 29 U.S.C. § 158(d)); *see NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the [NLRA] is that free opportunity for negotiation … may bring about the adjustments and agreements which the [NLRA] in itself does

not attempt to compel"). Once the parties are at the bargaining table, they are left to their own devices.

Inherent in this approach is the immutable principle that government—local, state, and federal—must remain neutral when it comes to bargaining. In other words, the government is prohibited from forcing the parties to agree and from tilting the playing field in favor of one party or another when it comes to striking an agreement. Under the NLRA, governments "are without authority to attempt to ' introduce some standard 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.'" *Machinists*, 427 U.S. at 149-150 (quoting *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 497, 500 (1960) ("*Insurance Agents*")). Relatedly, governments are forbidden from "regulat[ing] what economic weapons a party might summon to its aid" in the bargaining process. *Id.* at 143. That is, governments may not impose penalties on parties—whether employers, employees, or unions—for supporting or resisting unionization within the parameters allowed by the NLRA. Were it otherwise, the government "would be in a position to exercise considerable influence upon the substantive terms on which the parties contract," *Insurance Agents*, 361 U.S. At 490, and "control" "the results of negotiations," *Machinists*, 427 U.S. at 143,

which is antithetical to the free collective bargaining that is the bedrock of the federal labor law system.[1]

In recognition of these foundational principles, courts have repeatedly held that state and local efforts to coopt federal labor law or "upset the balance that Congress has struck between labor and management" are preempted. *Metro. Life Ins. v. Massachusetts*, 471 U.S. 724, 751 (1985) ("*MetLife*"); *see, e.g., Brown*, 554 U.S. at 77; *Golden State*, 475 U.S. at 615; *Machinists*, 427 U.S. at 143. That is so irrespective of whether the law at issue favors employers, unions, or employees— at least in this respect, the NLRA is party neutral. *See Machinists*, 427 U.S. at 136 (finding state action favoring an employer in a labor dispute preempted); *id.* at 147 (both employers and unions "may properly employ economic weapons Congress meant to be unregulable"); *Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm.*, 685 F. Supp. 718, 725 (N.D. Cal. 1988) ("It is clear that a state cannot penalize an employer for not becoming a party to a collective bargaining agreement, in whole or in part, which it did not voluntarily negotiate."), *aff'd*, 891 F.2d 719 (9th Cir. 1989).

[1] The Congress that enacted the NLRA expressly addressed these issues, noting that the NLRA fully intended to leave "[d]isputes about wages, hours of work and other working conditions" "to be resolved by the play of competitive forces," not state regulation. S. Rep. No. 74-573, at 2 (1935).

Los Angeles is not exempt from these prohibitions and requirements[2] and, in light of well-established neutrality principles, the Ordinance's treatment of collective bargaining is irreconcilable with federal law and thus preempted. Employers that are the object of the Ordinance's heightened wage requirements can only avoid those requirements if there is a collective bargaining agreement in place. Ordinance, § 186.08. That means employers that currently employ a non-unionized workforce will have a very strong—if not dispositive—incentive to actually promote unionization even if doing so is contrary to their non-wage related best interests. Stated conversely, any covered employer that successfully urges its employees to reject unionization will be subject to a substantial economic penalty under the Ordinance. It is hard to imagine a more gross violation of the neutrality principle or a more brazen disregard for "the balance that Congress has struck between labor and management" when it comes to bargaining. *MetLife*, 471 U.S. at 751. The Ordinance's imposition of a penalty on employers who resist unionization is no less problematic, and no less preempted than a special tax on any employee who supports unionization.

Indeed, this case is all but controlled by the Supreme Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). In *Golden*

[2] *See Golden State*, 475 U.S. at 614 n.5 ("Our pre-emption analysis is not affected by the fact that we are reviewing a city's actions rather than those of a State.").

State, the Supreme Court held that the City of Los Angeles could not condition the renewal of Golden State's taxicab franchise on whether Golden State settled its labor disagreement with unionized employees. As the Court observed, both Golden State and the union "employed permissible economic tactics" during the course of their negotiations: the union sought concessions from Golden State through work stoppage and Golden State resisted "in an attempt to obtain bargaining concessions from the union." *Id.* at 615. "The parties' resort to economic pressure was a legitimate part of their collective-bargaining process." *Id.* However, Los Angeles was not content to let the collective-bargaining process play out without interference; rather, the Council "threaten[ed] to allow [Golden State's] franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters." *Id.* at 611 (internal quotation marks omitted). The Court held that the neutrality principle precluded the imposition of a penalty on Golden State for failure to reach a collective bargaining agreement because "[a] local government" "lacks the authority to introduce some standard of properly balanced bargaining power," *id.* at 619 (internal quotation marks omitted), and that it is entirely improper for a city to affect "the substantive aspects of the bargaining process," *id.* at 616 (internal quotation marks omitted). That is exactly what happened here. Just as Los Angeles imposed a penalty on Golden State (the denial of a license) for its failure to reach a collective bargaining agreement under the normal bargaining process, the Ordinance imposes

a penalty on covered employers that fail to reach a collective bargaining agreement in the normal course. Both penalties recalibrated the bargaining power between employers and unions in a manner that no economically rational employer can ignore. And both penalties are equally preempted by federal labor law.

To make matters worse, the Ordinance goes beyond simply penalizing employers who fail to adopt a collective bargaining agreement. In order to benefit from the Ordinance's union escape clause, the union must expressly waive the employer's obligation to comply with the Ordinance in "clear and unambiguous" terms. Ordinance, § 186.08. This clear statement rule both alters the normal interpretive principles governing collective bargaining agreements and gives unions an extremely valuable bargaining chip. Both of these distortions violate the neutrality principle and flout the "[f]ree collective bargaining" that "is the cornerstone" of the NLRA. *Golden State*, 475 U.S. at 619.

A review of the Supreme Court's decision in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), further underscores the Ordinance's fatal flaws. In *Brown*, the Supreme Court held that a state statute prohibiting recipients of state funds from "using the funds 'to assist, promote, or deter union organizing'" was preempted by federal labor law. *Id*. at 62. That was because federal law recognizes the value of "uninhibited, robust, and wide-open" discussion of labor matters and expressly "encourage[s] free debate on issues dividing labor and management." *Id*. at 67-68.

But allowing the Ordinance to survive plaintiffs' challenge would allow Los Angeles to burden "free debate" even more directly than in *Brown*. The Ordinance makes it highly unlikely that there will be "uninhibited, robust, and wide-open" discussion about the desirability of union organizing because of the dire consequences employers face in terms of increased wages should they cross the union. And there is nothing to stop a union from demanding an even more expansive curtailment of employer speech than that struck down in *Brown* as part of the quid pro quo for agreeing to an express waiver of the increased minimum wage. *See* Chamber, Minimum Wage Exemption 4 (discussing union-promoted neutrality agreements).

Indeed, a union could wield the waiver power granted to it by the Ordinance to do far more than circumscribe employer speech and circumvent *Brown*, further underscoring the strong case for preemption. A union could force an employer to consent to a card check agreement whereby the employer recognizes the union based simply on employees' signatures on authorization cards rather than through the normal secret ballot election process. A union could also attempt to leverage its waiver power to force organizing concessions at employer locations outside Los Angeles. Concessions of this sort "are highly prized by organized labor," Chamber, Minimum Wage Exemption 4, and there is good reason to believe that unions will actively and aggressively seek such concessions. The hotel union in Los Angeles

has already attempted to use its newly-granted coercive power to prevent Los Angeles hotels from joining this lawsuit. *See* R642 (Michael Czarcinski Decl. ¶ 42).

II. The Ordinance Is Not A Neutral Regulation Of Minimum Labor Standards.

A straightforward application of longstanding federal labor law and preemption principles mandates a finding of preemption in this case. While Los Angeles will surely argue otherwise, there is nothing special about its particular efforts to circumvent federal labor law requirements that counsels in favor of a different outcome. As the foregoing discussion should make plain, the Ordinance is much more than a "neutral" law, *Machinists*, 427 U.S. at 156 & n.* (Powell, J., concurring), or a law setting "minimal substantive requirements on contract terms negotiated between parties to labor agreements" that could, at least under some circumstances, comport with federal labor law, *MetLife*, 471 U.S. at 754. A state or local law is not "neutral" if it is "directed toward altering the bargaining positions of employers or unions" or "reflect[s] an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining." *Machinists*, 427 U.S. at 156 & n.* (Powell, J., concurring). Here, in both purpose and effect, the Ordinance clearly enhances "the bargaining positions" of unions, and the evidence that the Ordinance's treatment of collective bargaining was an "accommodation of the special interests of" unions is manifest, *see* Appellants' Opening Br. 7-9. Even

without that proof, it is readily apparent that the Ordinance is not a mere "minimum labor standard"—the Ordinance does not "affect union and nonunion employees equally" and the Ordinance clearly "encourage[s]" collective bargaining, in derogation of the NLRA. *MetLife*, 471 U.S. at 755. The Ordinance is thus quite unlike state and local laws that, while in some tension with federal labor law, have nonetheless survived challenge because they have, at most, an "indirect" or "inadvertent[]" effect on "the[] interests implicated in the NLRA." *Id.*; *see Chamber of Commerce v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995) (distinguishing between the generally applicable laws upheld in *MetLife* and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), that tangentially impacted labor relations and laws that "affect[] the bargaining process in a much more invasive and detailed fashion"). Here, the impact on interests implicated by the NLRA—*viz*. collective bargaining free from governmental interference—is direct and undeniable.[3] Los Angeles has "directly interfered with the bargaining process," which the NLRA does not allow. *Golden State*, 475 U.S. at 618 n.8.

[3] In all events, even a state or local law setting "minimal substantive requirements on" negotiated contract terms must be "[]compatible with the[] general goals of the NLRA" to survive scrutiny, and the Ordinance is manifestly incompatible with the NLRA. *MetLife*, 471 U.S. at 754-55. The Ordinance upsets the "balance of power" between labor and management. *Golden State*, 475 U.S. at 619.

Although legally beside the point, any argument that the Los Angeles public interest favors an outcome in conflict with federal labor law gets things exactly backwards. The Ordinance's union escape clause is a thinly veiled attempt "to encourage unionization by making a labor union the potential 'low-cost' alternative to" Los Angeles' increased minimum wage, which "raises serious questions about whom" the escape clause is "actually intended to benefit." Chamber, Minimum Wage Exemption 3. It is not at all obvious that this compelled unionization will benefit the employees that are unionized by force. Most obviously, those employees will receive a lower wage in exchange for benefits accrued by the union which may never trickle down to local membership. *Id.* at 4. Moreover, employers are likely to wind up wedded to a labor agreement they otherwise would not have signed and workers could find themselves enrolled in a union they never wanted to join and that might not have been recognized but for the short circuiting the Ordinance enables. *Id.* at 23. In short, "there is really only one unambiguous winner" under the Ordinance—unions. *Id.* at 5. *See also* R666 (Zev Eigen Decl. ¶ 50) (stating that the Ordinance "will have the unavoidable outcome of applying a coercive pressure to the labor relations policies of non-unionized hotels").

Available evidence supports the view that minimum wage laws with a union exemption are an unalloyed boon to unions and unionization efforts. UNITE HERE Local 11, which represents hotel workers in Los Angeles, California, saw its

membership and revenues jump after the Ordinance's escape clause became public. Local 11's membership increased from 13,626 in 2007 to 20,896 in 2013, while its revenue increased from approximately $7.5 million per year to nearly $12.7 million. Chamber, Minimum Wage Exemption 5. In Long Beach, California, which is also covered by Local 11, two Hyatt hotels that had long been the targets of organizing campaigns finally capitulated after the passage of a minimum wage ballot measure that included a union exemption. *Id.* After San Francisco, California, enacted a citywide minimum wage ordinance with a union exemption in late 2003, membership in UNITE HERE Local 2 increased significantly from 8,000 in 2004 to more than 14,000 in 2013. *Id.* These increases are all the more dramatic because they stand in stark contrast to the national trend of declining union participation and revenues. Union density nationally decreased from 12.9 percent of the workforce in 2003 to 11.3 percent in 2013. *Id.* (citing U.S. Department of Labor, Bureau of Labor Statistics data).

CONCLUSION

For the foregoing reasons, as well as those stated in Appellants' opening brief, the order of the district court should be reversed and the district court should be directed to issue a preliminary injunction.

Respectfully submitted,

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August 13, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 3,026 words as determined by the word counting feature of Microsoft Word 2013 in 14-point, Times New Roman typeface.

s/H. Christopher Bartolomucci
H. Christopher Bartolomucci

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/H. Christopher Bartolomucci
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