17-1849(L)

17-3476(XAP)

United States Court Of Appeals for the Second Circuit

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

Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF NEW YORK, 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 of *Amici Curiae* Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace, and the National Federation of Independent Business Small Business Legal Center

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29, the Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace, and the National Federation of Independent Business Small Business Legal Center each certify that it has no outstanding shares or debt securities in the hands of the public, and that it has no parent corporation.[1]

[1] All parties have consented to the filing of this brief. No party, party's counsel, or person other than the *amici*, their members, and their counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three 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 regularly files *amicus* briefs in National Labor Relations Act ("the NLRA" or "the Act") preemption cases and has been a party-plaintiff in leading NLRA preemption cases, including *Chamber of Commerce of the United States of America v. City of Seattle*, No. 17-35640 (9th Cir.), and *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

The National Federation of Independent Business Small Business Legal Center ("the NFIB") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses — advocating for the right of individuals to own, operate, and grow their businesses.

The Coalition for a Democratic Workplace ("CDW") is a business association comprised of hundreds of organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW members are joined by their mutual concern over recent changes and proposed changes to labor law that threaten entrepreneurs, other employers, employees, and economic growth.

Together, the *amici* support the District Court's conclusion that the NLRA — under the *Machinists* doctrine — prohibits a local law that favors a particular labor-relations status. Appellant/Cross-Appellee the City of New York ("the City") enacted such a regulation in Local Law 62, N.Y.C. Admin. Code §§ 20-539-546, 24-529 ("the Car Wash Law"), which favors unionized employment covered by a labor agreement that expressly provides a procedure for resolving disputes about wages. *Id.* § 20-542(a)-(b). All other employers must pay a penalty or submit to burdensome monitoring. Thus, the Car Wash Law penalizes employers: (1) whose employees have chosen not to unionize, as only unionized employers can escape the heightened regulatory burden; (2) who refuse to agree to a union's bargaining demands, as only unionized employers with a current labor agreement can escape the heightened regulatory burden; and (3) who exercise alternative economic weapons instead of agreeing to a dispute-resolution procedure, as only unionized employers with such an agreement escape the heightened regulatory burden.

The *amici* ask this Court to confirm the scope of the *Machinists* doctrine established by the Supreme Court, by confirming that the Car Wash Law impermissibly regulates labor relations in each of the above three ways.

The *amici* are authorized to file this brief under Rule 29 of the Federal Rules of Appellate Procedure based upon the consent of the parties.

INTRODUCTION

The City claims regulatory authority to favor employers that have recognized a union, signed a labor agreement, and agreed to a specific type of dispute-resolution procedure in that contract. The Car Wash Law requires all covered employers to obtain a surety bond. N.Y.C. Admin. Code. § 20-542(a)-(b). As enacted, this bond requirement has two tiers. Employers qualify for the less burdensome tier — which requires them to obtain a $30,000 bond — only if they have recognized a "collective bargaining representative," entered into a current "bona fide collective bargaining agreement," and agreed to "an expeditious process to resolve disputes concerning nonpayment or underpayment of wages." *Id.* § 20-542(b)(1). All other employers — including all nonunionized employers, all unionized employers without a current labor agreement, and all unionized employers without a contractual dispute-resolution procedure — must either obtain a $150,000 bond, *id.* § 20-542(a), or obtain a $30,000 bond and also enter into a "settlement" with a "governmental agency" and be subjected to "monthly monitoring," *id.* § 20-542(b)(2).

Applying the well-established *Machinists* doctrine, the district court correctly rejected this attempt to regulate labor relations. Based on the understanding that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes," *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008), the *Machinists* doctrine prohibits "regulation concerning conduct that Congress intended to be unregulated," *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) ("*Golden State I*").

The briefs of the City and its *amicus* the State of New York ("the State") reference four irrelevant concepts and rest on one inapposite doctrine. The Car Wash Law is a regulation, *cf. Building & Constr. Trades Council v. Associated Builders & Contractors of Mass. IR. I., Inc.*, 507 U. S. 218 (1993) ("*Boston Harbor*"), which no federal statute allows, *cf. N.Y. Tel. Co. v. N.Y. State Dep't of Labor,* 440 U.S. 519 (1979) ("*New York Telephone*"), that relates to the primary employment relationship, *cf. Belknap, Inc. v. Hale*, 463 U.S 491 (1983), and that does not prohibit criminal or tortious conduct, *cf. Sears v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978) (collecting cases). Thus, the argument of the City and State boils down to their theory that the two-tiered bond requirement is a "minimum labor standard" like those approved in *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985) ("*MetLife*") and *Fort Halifax Co. v. Coyne*, 482 U.S. 21 (1987).

But the City's employment regulation is not analogous to either the mandatory healthcare benefits in *MetLife* or the baseline severance benefits in *Fort Halifax*. Unlike the laws in those cases, the two-tiered bond requirement is not neutral towards labor-relations status. And as the Supreme Court has explained, local regulation of employment may not discriminate based on whether employees are "represented," the "act of signing" a labor agreement, or the presence of "an arbitration clause." *Livadas v. Bradshaw*, 512 U.S. 107, 131, 134 (1994). The City seeks authority to do all three, and its regulation is prohibited by the NLRA for those three same reasons.

First, because employers may resist unionization, *Linden Lumber Division v. NLRB*, 419 U.S. 301, 312-13 (1974), the City may neither penalize employers for opposing unionization, *Brown*, 554 U.S. at 69 (2008), nor treat "employers differently based on whether they employ unionized workers," *see Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85 (2d Cir. 2015).

Second, because a license cannot be withheld because a unionized employer lacks a current labor agreement, *Golden State I*, 475 U.S. at 616, and regulation cannot penalize unionized employees because they are covered by a labor agreement, *Livadas,* 512 U.S. at 131, it must follow that the City cannot penalize unionized employers who lack a labor agreement.

Third, particularly because federal labor law assumes that employers will receive a no-strike agreement in exchange for a binding arbitration agreement, *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 407-08 (1976), *Teamsters v. Lucas Flour Co.,* 369 U.S. 104-06 (1962), the City may not favor unionized employers with a contractual dispute-resolution procedure, *Livadas*, 512 U.S. at 131, *Golden State I*, 475 U.S. at 616.

In each of these ways, the City's regulation intrudes upon a "zone protected and reserved for economic freedom." *Brown*, 554 U.S. at 66 (quoting *Boston Harbor,* 507 U.S. at 217). And this Court should affirm the scope of the *Machinists* doctrine, by confirming that the City may not discriminate in any of these ways.

ARGUMENT

I. The City And State Ignore The Broad Scope Of The *Machinists* Doctrine Established By The Supreme Court.

Contrary to what the City and State believe, their police powers do not entitle them to regulate labor relations at employers covered by the NLRA. Through two well-established doctrines, the NLRA bars local regulation of conduct that the Act arguably or actually prohibits, arguably or actually protects, or intentionally leaves unregulated regarding union organizing, collective bargaining, and the resolution of labor disputes. *Brown*, 554 U.S. at 65 (citing *Int'l Assoc. of Machinists v. Wis. Employment Rel. Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*")).

The State, therefore, is plainly mistaken that this Court should "start with the assumption" that the NLRA does not preempt regulation "in the area of labor law." (NYS[2] 8.) The State, editing a quote from *Fort Halifax*, ignores that it references regulation "provid[ing] protections to individual union and nonunion workers alike, and thus neither encourag[ing] nor discourag[ing] the collective-bargaining processes that are the subject of the NLRA." 482 U.S. at 21. And quoting a decision rejecting an antitrust-preemption argument, *California v. ARC Am. Corp.*, 490 U.S. 93 (1989), the State ignores that it was viewed, even at that time, as "commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986).

The Supreme Court first articulated the *Garmon* doctrine, which is not at issue here and "is intended to preclude state interference with the National Labor Relations Board's active enforcement of the integrated scheme of regulation established by the NLRA." *Brown*, 554 U.S. at 65 (emphasis added). To this end, it prohibits local regulation protecting conduct that is arguably or actually protected by Section 7 of the Act, 29 U.S.C. § 157, local regulation prohibiting conduct that is arguably or actually prohibited by Section 8 of the Act, 29 U.S.C. § 158, and any local "regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986).

[2] The City's brief is cited to as "NYC__;" the State's brief, as "NYS___."

The *Machinists* doctrine protects the Act's "framework for self-organization and collective bargaining," *MetLife*, 471 U.S. at 751, and the "interest in being free of governmental regulation" that the NLRA "conferred on employers and employees." *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 112 (1989) ("*Golden State II*"). *Machinists* recognized that "a particular activity might be 'protected' by federal law not only when it fell within Section 7, but also when it was an activity that Congress intended to be unrestricted by any governmental power to regulate." 427 U.S. at 141. Thus, the doctrine is based on the understanding that "Congress determined both how much the conduct of unions and employers should be regulated and how much it should be left unregulated." *MetLife*, 471 U.S. at 751.

Contrary to the suggestion by the City and State that the doctrine is only concerned with protecting the use of "economic weapons" during bargaining, the *Machinists* doctrine applies throughout the Act's framework and to any intentionally unrestricted conduct. *Machinists* itself protected unrestricted conduct in the context of negotiating collective bargaining agreements. 427 U.S. at 141. But *Brown* applied the doctrine to protect intentionally unrestricted conduct in the context of union organizing, 554 U.S. 60, and *Livadas* applied the doctrine to protect intentionally unrestricted conduct related to the resolution of disputes arising under collective bargaining agreements, 512 U.S. 107.

Where the government is acting as a regulator, the doctrine prohibits any form of governmental interference with intentionally unrestricted conduct. In *Machinists*, a state court impermissibly enjoined certain conduct. In *Golden State I*, a city's licensing policy impermissibly "in effect imposed a positive durational limit" on bargaining. 475 U.S. at 615. In *Livadas*, a state agency's application of that state's wage law impermissibly penalized employees covered by a collectively bargained arbitration provision. 512 U.S. at 134. And in *Brown*, a state law impermissibly regulated "speech about unionization" by prohibiting recipients from using state funds "to assist, promote, or deter union organizing." 554 U.S. at 62, 69.

Turning the Supreme Court precedent on its head, the City wrongly suggests that the analysis involves a search for an "explicit direction to leave [conduct] unregulated." (NYC 34. n.7.) The City cites *Brown*. But the *Brown* Court found that the protection of noncoercive speech was "implicit," both in the Act's prohibition of coercive speech and in its protection of employees' right to refrain from choosing collective bargaining. 554 U.S. at 68. And further, *Brown* emphasizes that an "explicit direction" is not typical, let alone required: "Under *Machinists*, congressional intent to shield a zone of activity from regulation is usually found only 'implicitly in the structure of the Act,' drawing on the notion that 'what Congress left unregulated is as important as the regulations that it imposed.'" *Id.* (quoting *Livadas*, 512 U.S. at 117 n.7, and *Golden State II*, 493 U.S. 110).

What conduct states and localities may regulate is established by federal law and, therefore, is not based on a "balancing of state and federal interests." *MetLife*, 471 U.S. at 749 n.27. A "federal statute will contract the preemptive scope of the NLRA if it demonstrates that Congress has decided to tolerate a substantial measure of diversity in the particular regulatory sphere." *Brown* 554 U.S. at 75 (citing *New York Telephone*). Otherwise, the inquiry is "an analysis of the federal labor law to determine whether certain conduct was meant to be unregulated." *MetLife*, 471 U.S. at 749 n.27.

Contrary to the City's claim that it has done so three times, the Supreme Court has never rejected application of *Machinists* because a government was "acting pursuant to its traditional police powers." (NYC 50 n.12.) The City cites one decision that does not inform the scope of the *Machinists* doctrine at all, as it discusses a limit to the *Garmon* doctrine. *See Sears v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978). In that decision, the Supreme Court explained that it has allowed application of state laws prohibiting certain crimes and torts where "aspects of the challenged conduct were arguably prohibited" by the Act, because those laws of general applicability were "deeply rooted in local feeling and responsibility." *Id.* at 195 (collecting cases). Here, the issue is what unrestricted conduct the Act implicitly protects from governmental interference, not whether the City may enforce a law against conduct that the Act affirmatively prohibits.

The City also cites *New York Telephone*, which underscores the City's fundamental error in claiming that the "critical inquiry" involves a weighing of its interests. (NYC 50.) In that decision, the Supreme Court reasoned that given the particular legislative histories of the NLRA and the Social Security Act, the omission of any direction in either statute regarding payment of unemployment benefits to strikers implied that "Congress intended that the States be free to authorize, or to prohibit, such payment." *Brown* 554 U.S. at 75 (quoting *New York Telephone*, 440 U.S. at 544). Thus, as the Court subsequently explained, *New York Telephone* turned on "the policies underlying a distinct federal statue" making a "straightforward NLRA preemption analysis" "inappropriate," *Livadas* 512 U.S. at 118 n.12, and, therefore, does not allow states or municipalities "to override federal labor law in other settings," *Brown*, 554 U.S. at 75.

The City finally cites *Belknap, Inc. v. Hale*, 463 U.S 491 (1983), which only underscores that the analysis focuses on what is implied by the structure of the Act. In that decision, the Supreme Court reasoned that because the Act is concerned with conduct of "the employer and union against one another" and not against "innocent third parties," workers hired to replace strikers may pursue certain state-law tort claims against the employer. *Id.* at 500. Thus, as the Court subsequently explained, *Belknap* can raise "no issue" where, as here, the regulation relates to "the relationship between the employer and the union." *Golden State I*, 475 U.S. at 617 n.7.

The minimum labor standards doctrine inappropriately relied on by the City is grounded in similar reasoning as *Belknap*. Contrary to the suggestion of the City (NYC 50), the *MetLife* Court explained that the doctrine rests on the understanding that the Act is not "concerned" with the "particular substantive terms" determined through its processes. 471 U.S. at 753. Thus, the Court rejected application of *Machinists* to a state law establishing mandatory minimum healthcare benefits that could not be modified through bargaining. *Id.* at 755. And the *Fort Halifax* Court logically concluded: "If a statute that permits *no* collective bargaining on a subject escapes NLRA preemption, surely one that permits such bargaining cannot be preempted." 482 U.S. at 22 (emphasis in original).

But because the Act is concerned with protecting its processes from governmental interference, "minimum labor standards" must be neutral as to whether there is a union, whether there is a labor agreement, and whether there is an arbitration clause. *Livadas*, 512 U.S. at 130-131, 134. Contrary to the suggestion of the City (NYC 50), the Supreme Court has drawn that distinction. *MetLife* emphasizes that regulation must "affect union and nonunion employees equally," 471 U.S. at 755, while *Fort Halifax* explains that regulation must provide "protections to individual union and nonunion workers alike," 482 U.S. at 21. And both cases hold that regulation may "neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.*

If *MetLife* and *Fort Halifax* left any doubt that "minimum labor standards" cannot discriminate among employees based on labor-relations status, the *Livadas* Court erased it. Under the state regulation at issue in that case, the employee was entitled to a penalty-payment from the employer for non-payment of wages. 512 U.S. at 111. Under the enforcement policy of the state agency, the employee could not enforce that state-law right because her union had entered into a labor agreement with an arbitration clause. *Id.* at 117. *Livadas* distinguishes *Fort Halifax*, explaining that employment protections may not be altered by "the mere act of signing" a collective bargaining agreement. *Id.* at 130-32, 131 n. 26. And *Livadas* applies *Golden State*, holding that just as a city may not penalize an employer's failure to complete the collective-bargaining process by agreeing to a union's demands, so too a state may not penalize employees for their union agreeing to a labor agreement providing for arbitration. *Id.* at 133-35.

In sum, the *Machinists* doctrine that is relevant here boils down to the distinctions drawn by *Livadas*. States and localities may allow unions to "contract out" of minimums, including by agreeing to "different terms." *Id.* at 130-32, 131 n. 26. But the NLRA prohibits employment regulation that discriminates based on "whether [the employees] are represented by a labor organization," based on "the mere act of signing [a] collective bargaining agreement," or based on whether the labor agreement includes "an arbitration clause." *Id.* at 131, 134.

II. The City's Regulation Is Prohibited Under The *Machinists* Doctrine.

A. The City's Argument Admits The Car Wash Law Is Preempted.

The City acknowledges that the bond requirement has two tiers based on its policy judgment that employees with a collectively-bargained dispute-resolution procedure need less protection from employers than those without one. According to the City, such collectively bargained agreements "mitigate the risk" to employees because they are "mechanisms in place enabling employees to collect unpaid wages." (NYC 29, 43.)

The City's argument admits that its law is preempted. Contrary to what the City claims (NYC 37), it may not use its own regulations to "restore the equality of bargaining power between employees and employers." 29 U.S.C. § 151. The entire premise of the *Machinists* doctrine is that "Congress struck a balance of protection, prohibition, and laissez-faire" to further that purpose. *Brown*, 554 U.S. at 65. Thus, just as the NLRB's remedies cannot exceed what the "present Act" allows, *H. K. Porter Co. v. NLRB,* 397 U.S. 99, 109 (1970), the City's regulations cannot encourage unionization or any of the Act's processes, *Fort Halifax*, 482 U.S. at 21, irrespective of a party's "economic weakness," *Machinists*, 427 U.S. at 149, particularly when they are based on the City's judgment that "represented employees are less 'in need,'" *Livadas* 512 U.S. at 129, and "unequivocally" if they attempt to supplement the Act's state purpose, *Brown* 554 U.S. at 68-69.

The City can only show such favoritism when it is not acting as a regulator. This is underscored by the cases cited by the State that apply the "market participant" doctrine. (NYS 9, 24.) Under that doctrine, if the City were purchasing labor services, it arguably could behave as a private employer could act under the NLRA. *Boston Harbor*, 507 U.S. at 229. As the Supreme Court has explained, just as a private contractor may condition its purchasing of construction services on a subcontractor signing a project labor agreement, so too a state agency supervising a project may require that contractors abide by a labor agreement applicable to that project. *Id*. at 229, 232.

But the two-tiered bond requirement at issue is pure regulation. The City unabashedly is not acting as a market participant. *Cf. Johnson v. Rancho Cmty. Coll Dist.*, 623 F.3d 1011, 1026 (9th Cir. 2010) (allowing locality's action because it did "not reward or sanction private parties for their conduct in the private market" and addressed "only how construction contractors and subcontractors will perform work on the [the locality's] projects"); *N. Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (allowing action because the state "limited its condition to the project financed by the subsidy" and therefore had "not engaged in 'regulation'").

B. The Regulation Is Prohibited Because It Penalizes Unionized Employers For Lacking A Dispute-Resolution Procedure.

Although the Act requires parties to bargain in good faith over disputes arising under labor agreements, Congress left it for the parties to decide how to resolve such disputes. 29 U.S.C. § 158(d). The union may exercise its right to strike over a dispute arising under a labor agreement, unless it has bargained away the right to strike. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). The employer may refuse to arbitrate the dispute and force the union to strike, unless the employer has agreed to arbitrate the dispute. *Litton Fin. Printing Div., Inc. v. NLRB*, 501 U.S. 190, 201 (1991). Thus, the employer's unrestricted decision whether to agree to a binding arbitration clause covering disputes arising under a labor agreement is inextricably intertwined with the union's unregulated right to strike over such disputes.

Federal labor law presumes that an employer will only agree to arbitrate disputes if the union agrees not to strike over them. *Teamsters v. Lucas Flour Co.,* 369 U. S. 104-06 (1962). Thus, even without an express no-strike agreement, courts may enjoin strikes over arbitrable disputes, "since the "*quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike." *Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO.*, 428 U.S. 397, 407-08 (1976). In contrast, even when a strike violates an express no-strike agreement, courts may not enjoin the strike if "neither its causes nor the issue underlying it was subject to the settlement procedures." *Id*.

The two-tiered bond requirement, therefore, must be preempted. Because the City may not "place [its] weight on one side or the other of the scale of economic warfare," it may not penalize employers for not agreeing to arbitrate disputes. *See Livadas*, 512 U.S. at 129. Although states have some authority to regulate "*substantive terms*" of employment, that is "[i]n contrast to their inability to regulate the bargaining process." *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85 (2d. Cir. 2015) (emphasis in original). And that process includes how to resolve disputes, *Livadas*, 512 U.S. at 134.

Indeed, none of the cases relied upon by the City and State involved regulation concerning the process for resolving disputes about agreed upon substantive terms; they all involved substantive terms. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958 (9th Cir. 2016) (compensation); *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77 (2d. Cir. 2015) (same); *Assoc. Builders & Contrs. of S. Cal. v. Nunn*, 356 F.3d 979 (9th Cir. 2004) (same); *Rondout Elec., Inc. v. N.Y. State Dep't of Labor*, 335 F.3d 162 (2d Cir. 2003) (same); *R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17 (1st Cir. 2011) (job protection); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000) (same); *Wash. Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995) (same); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1996) (hours); *Nat'l Broad. Corp. v. Bradshaw*, 70 F.3d 69, 71-72 (9th Cir. 1995) (overtime pay).

C. The Regulation Is Prohibited Because It Penalizes Unionized Employers For Not Agreeing To A Labor Agreement.

The City also attempts to treat employers differently based on whether their employees are covered by a labor agreement, which also violates the precepts of the *Machinists* doctrine. In *MetLife* and its progeny, the same standard applied without regard to whether there was a labor agreement, since the protections could not be waived through collective bargaining. In *Fort Halifax* and its progeny, the same standard applied unless the union specifically waived the minimum standard. And *Livadas* held that regulation cannot treat employees differently based upon the "act of signing" a labor agreement. 512 U.S. at 134.

Although the City and State again purport that decisions from several courts of appeals support the Car Wash Law, none of those decisions approved a two-tiered regulation based upon whether there was a collective bargaining agreement in place. In each of the cases cited, there was only different treatment if there was an affirmative and specific agreement to an alternative arrangement. *See Am. Hotel & Lodging Ass'n*, 834 F.3d at 962 (union could "opt out" by "clear and unambiguous" waiver); *St. Thomas-St. John Hotel & Tourism Ass'n*, 218 F.3d at 242-46 (law applied "[u]nless modified by union contract"); *Viceroy Gold Corp.*, 75 F.3d at 485-86 (waiver of hours regulation required agreement that "expressly" covered "hours of work"); *Nat'l Broad. Corp*, 70 F.3d at 71-72 (waiver of overtime regulation required agreement on "premium wage rate for overtime work").

Here, the employer is subjected to a heightened regulatory burden for not having an agreement at all. If a license cannot be withheld because an employer does not have a labor agreement, *Golden State I*, 475 U.S. at 616, and employees cannot be penalized because they are covered by a labor agreement with an arbitration clause, *Livadas* 512 U.S. at 131, an employer seeking a license to operate a car wash cannot be penalized in this way for not having a labor agreement.

D. The Regulation Is Prohibited Because It Penalizes Employers Whose Employees Are Not Represented By A Union.

Finally, by placing a heightened regulatory burden on nonunionized employers, the two-tiered bond requirement upsets the balance of the Act's framework for organization. *See Brown*, 554 U.S. at 69. The City is wrong that regulation imposing an "additional cost on non-union employers" has been approved by this Court. (NYC 49.) The City cites *Rondout Elec., Inc. v. N.Y. State Dep't of Labor*, 335 F.3d 162 (2d Cir. 2003), which approved a "prevailing rate" regulation that imposed the same requirement on all employers and permitted any of them to pay an additional amount in cash instead of into a benefit plan. *Id.* at 168-69. Employers choosing the cash option incurred some indirect taxes, which the City claims allows its discrimination here. *Id* at 168. But this Court merely recognized that nonunion employers were more likely to choose that option. And unlike the regulation in *Rondout*, the City's regulation does not provide an avenue for nonunion employers to avoid the heightened regulatory burden.

If there were ever any doubt, this Court confirmed such regulation is impermissible in *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77 (2d Cir. 2015). That decision emphasizes that a minimum labor standard is allowed when it "neither distinguishes between unionized and non-unionized [employees], nor treats employers differently based on whether they employ unionized workers." *Id.* at 85. Further, this Court distinguished a separate portion of the law that "arguably treat[ed] union and nonunion employees differently," suggesting that it would have found NLRA preemption had the issue been raised on appeal. *Id.* at 85 n. 7.

Indeed, no court has allowed regulation that discriminates among employment relationships based upon whether there is a recognized union. The City and State rely upon cases that demonstrate only that minimum labor standards have been allowed despite discriminating among employers based on their size, location, and industry. *See Am. Hotel & Lodging Ass'n*, 834 F.3d at 961-62 (applied only to hotels of particular size); *R.I. Hosp. Ass'n*, 667 F.3d at 32-33 (same) *Assoc. Builders & Contrs. of S. Cal.*, 356 F.3d at 980 (applied only to state-registered apprentices); *Viceroy Gold Corp.*, 75 F.3d at 485, 490 (applied only to mining and smelting industries); *Nat'l Broad. Corp.*, 70 F.3d at 71-72 (applied only to broadcast industry); *Wash. Serv. Contractors Coalition*, 54 F.3d at 817 (applied only to contractors of a particular size in particular industries).

At bottom, the City's argument must be rejected because it rests on the false premise that the Act does not include a "process" for "*employers* to effect unionization." (NYC 46.) To be sure, employees have the right to choose collective bargaining, 29 U.S.C. § 157, and employers must bargain with a union chosen by "the majority," 29 U.S.C. §§ 158(a)(5), 159(a). Likewise, because employees have the "right to refrain" from choosing collective bargaining, 29 U.S.C. § 157, employers may not form unions, 29 U.S.C. § 158(a)(2), or recognize and bargain with a union that lacks majority support, *Linden Lumber Division v. NLRB*, 419 U.S. 301, 313 n. 2 (1974) (citing *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-738 (1961)).

But the Act leaves certain conduct unrestricted by governmental interference. Employers may remain neutral or may campaign against unionization "so long as the communications do not contain threat of reprisal or force or promise of benefit." *Brown*, 554 U.S. at 65. In addition, when a union presents "convincing evidence of majority support," employers may either recognize the union or "refuse to recognize the union." *Linden Lumber Division v. NLRB*, 419 U.S. 301, 312-13 (1974). And employers cannot be ordered to bargain if majority support is not "demonstrable by the means prescribed by the statute." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). *Accord NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-16 (1969) (collective bargaining must be "sentiment" of the majority).

Thus, just as California could not "indirectly regulate" anti-union speech by imposing spending restrictions on the use of state funds, the City may not regulate employers that wish to oppose and resist unionization by imposing a heightened regulatory burden if those efforts are successful. *Brown*, 554 U.S. at 69. As *Brown* explains, both by prohibiting certain employer conduct in opposition to unionization, and by emphasizing employees' right to refrain from collective bargaining, the Act implicitly prohibits such governmental interference. *Id.* at 68.

CONCLUSION

Ultimately, this case is controlled by well-established Supreme Court precedent. For each of the three reasons detailed above, the NLRA prohibits the Car Wash Law's two-tiered bond requirement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(b) because it contains contains 5,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 28, 2018

/s/ Marshall Babson

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 2018, I electronically filed a true and correct copy of the foregoing brief using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

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