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NLRA Preempts Worker Retention Laws Because They Interfere with Successor Employers' Established Right to Hire Whomever They Want

By Tyler M. Paetkau

Introduction

The Supreme Court of California, in *California Grocers Association v. City of Los Angeles*, recently held, by a 6-to-1 vote, that the National Labor Relations Act (“NLRA”)¹ does not preempt a local worker retention ordinance, despite the law’s obvious effects on “successor” employers’ traditional rights.² The majority acknowledged that “the closer question is whether . . . the Ordinance is preempted because its indirect effects impermissibly intrude on successorship determinations that Congress intended to leave free of local regulation.”³ However, it ultimately determined that the government-imposed requirement that successor employers hire *all* of the predecessor’s employees (albeit only for 90 days) did not seriously interfere with successor employers’ established right not to enter into *any* employment contracts with the predecessor’s employees.

Justice Elizabeth Grimes, sitting by designation, dissented and invited United States Supreme Court review. Relying on longstanding Supreme Court and National Labor Relations Board (“NLRB” or

¹ 29 U.S.C. § 151.

² 52 Cal. 4th 177 (2011).

³ 52 Cal. 4th at 204.

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By Tyler M. Paetkau

(Continued from page 1)

“Board”) authority confirming the rights of successor employers not to hire any of the predecessor’s employees, Justice Grimes stated:

The very different question presented here is whether the NLRA evinces an intent to prohibit regulations that interfere with an employer’s freedom to choose whether to enter into *any employment relationship at all* with a particular employee or bloc of employees. In my view, the absence of high court precedent saying in so many words that the intent of the NLRA is to preserve the freedom of choice for employees and employers alike to decide whether to form an employment relationship does not mean states and municipalities are free to enact so-called worker “retention” ordinances. Rather, the high court has not yet had occasion to address this truly extraordinary intrusion upon the freedom of contract, one that threatens to upend the very foundation of our national labor laws and policies. Perhaps this case will offer the high court the occasion to address the question now.⁴

California Grocers Association (“California Grocers”) has filed a petition for *writ of certiorari* with the Supreme Court, seeking review of the NLRA *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission* (“*Machinists*”)⁵ preemption issue. This article reviews the NLRA successorship and the *Machinists* preemption doctrines, summarizes the *California Grocers* case, and argues that Justice Grimes got it right in her lone but spirited and well-reasoned dissent. Specifically, that the NLRA preempts state and local worker retention laws, because such laws impermissibly intrude on successorship determinations that Congress intended to leave unregulated.

⁴ 52 Cal. 4th at 230.

⁵ 427 U.S. 132, 140, 147 (1976).

The NLRA “Successorship” Doctrine

Under the NLRA, a new company may be considered the “successor” of a prior company for the purpose of compelling legal obligations to the predecessor’s employees, including the duty to recognize and bargain with the union representing the former company’s employees, the duty to remedy unfair labor practices, or the duty to arbitrate.⁶ The determination of whether a new company is a successor focuses on whether there is “substantial continuity” between the enterprises.⁷ If the new company “operates essentially the same business without substantial change and hires a majority of its employees from the predecessor, it is generally deemed a successor under federal labor law.”⁸

In its long line of successorship cases, the United States Supreme Court has sought to balance the right of employers to rearrange their businesses and make independent hiring decisions – so long as they do not discriminate in hiring or retention on the basis of union membership or activity – with avoidance of industrial strife and protection for employees from sudden changes in the terms and conditions of their employment in the transition from one employer to another.⁹ In *NLRB v. Burns Int’l Sec. Servs., Inc.* (“*Burns*”), the Court held that “perfectly clear” successor employers have a duty to bargain with the union representing employees of the predecessor employer, but are not bound to the terms of the prior collective bargaining contract.¹⁰

According to the *Burns* Court, the NLRB has never held that the NLRA requires that a new employer who purchases a business’s assets or wins a bid for a service contract is “obligated” to hire all of the predecessor’s

⁶ *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 264 n.9 (1974).

⁷ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

⁸ *United Steelworkers v. St. Gabriel’s Hosp.*, 871 F. Supp. 335, 338 (D. Minn. 1994).

⁹ *John Wiley & Sons v. Livingston*, 376 U.S. 543, 548-50 (1964); *Howard Johnson*, 417 U.S. at 261-64.

¹⁰ 406 U.S. 272, 281-82 (1972).

employees, although such an obligation may be assumed by the employer.¹¹ Thus, in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, the Court held that there was no substantial continuity between businesses where the new employer had purchased the assets of a franchisee, but hired only a small fraction of the franchisee's employees.¹² Such a holding is compelled if the "protection afforded employee interests in a change of ownership . . . is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force."¹³

The *Burns* Court also noted that successor employer obligations might inhibit the free transfer of capital, and that new employers must be free to make substantial changes in the operation of the enterprise:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.¹⁴

On the other hand, the Court noted, it may also be advantageous to a union not to be bound to the terms of a collective bargaining agreement with the predecessor employer as it may have been willing to make "concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm."¹⁵ The *Burns* Court thus concluded that the "congressional policy manifest in the [NLRA] is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities."¹⁶

The "Machinists" Preemption Doctrine

Congress enacted the NLRA to establish fundamental fairness between labor and management in their treatment of one another, in their collective bargaining

negotiations, and in their use of economic forces to their own advantage, without political processes favoring one side over the other. In *Chamber of Commerce v. Brown*, the United States Supreme Court emphasized the broad and powerful scope of NLRA preemption.¹⁷ In general, the NLRA preempts a state or local law that interferes with the labor-management relationship pursuant to the Supremacy Clause of Article VI of the United States Constitution. State and local worker retention laws, which unions often sponsor, impermissibly interfere with labor-management relations, tipping the delicate balance set by Congress in favor of labor unions.

The Supreme Court has articulated two types of preemption mandated by the NLRA to implement uniform federal labor policy¹⁸: (1) "*Garmon* preemption"¹⁹ prevents states from interfering with the NLRB's interpretation and enforcement of the NLRA by prohibiting state regulation of activities that "the NLRA protects, prohibits, or arguably protects or prohibits"²⁰; and (2) "*Machinists* preemption"²¹ prevents states and the NLRB from regulating "conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces."²²

Courts have invalidated several state statutes as preempted under the NLRA because they intruded upon successorship rights.²³ Worker retention laws seek to accomplish the same result as the successorship statutes at issue in those cases through indirect methods that are just as impermissible. Rather than imposing an express "successorship" clause, as unsuccessfully tried in those cases, worker retention laws require a

¹⁷ *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

¹⁸ *Brown*, 554 U.S. at 65.

¹⁹ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

²⁰ *See Brown*, 554 U.S. at 65 (quoting *Wis. Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986)).

²¹ *Machinists*, 427 U.S. 132 (1976).

²² 427 U.S. at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); *Brown*, 554 U.S. at 65.

²³ *See, e.g., United Steelworkers v. St. Gabriel's Hosp.*, 871 F. Supp. 335, 338 n.3 (D. Minn. 1994); *Commonwealth Edison Co. v. International Brotherhood of Electrical Workers*, 961 F. Supp. 1169 (N.D. Ill. 1997). The *California Grocers* majority also cited *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 618 (1986), which addressed regulation of the economic weapons in the bargaining process and concluded that the City of Los Angeles was preempted from conditioning renewal of a taxicab company's operating license on the company's settling a labor dispute. 52 Cal. 4th at 206 n.17.

¹¹ *Burns*, 406 U.S. at 280-81 n.5.

¹² 417 U.S. at 264-65.

¹³ *Howard Johnson*, 417 U.S. at 264-65 (emphasis added) (discussing the recognition of "the rightful prerogative of owners independently to rearrange their businesses" in *John Wiley*, 376 U.S. at 549).

¹⁴ *Burns*, 406 U.S. at 287-88.

¹⁵ *Burns*, 406 U.S. at 287-88.

¹⁶ *Burns*, 406 U.S. at 287-88.

subsequent employer to employ the prior company's employees for a limited period of time, making it extremely likely, if not totally certain, that the subsequent contractor will be deemed a successor, since substantial continuity of employment is a key factor in the NLRA successorship analysis.

Thus, worker retention laws intrude into NLRA successorship rights by regulating the economic weapons that are part and parcel of the collective bargaining process. Indeed, worker retention laws *are* economic weapons that the legislatures (with labor unions' sponsorship and advocacy) improperly placed in the hands of unions to tilt the collective bargaining process in labor's favor. By imposing on a new and separate employer an obligation to hire its predecessor's employees, worker retention laws regulate an important economic and bargaining weapon that the United States Supreme Court and the Board's longstanding successorship doctrine has granted to the employer: the right not to become a successor by not hiring any of the prior company's employees. Such a result is contrary to the Supreme Court's justification for imposing successorship status where the successor *voluntarily* elects to hire a majority of the seller's employees.²⁴ Unions should not be able to accomplish through legislation what they might not have been able to accomplish through the voluntary collective bargaining process.²⁵

²⁴ See *Howard Johnson*, 417 U.S. at 264.

²⁵ The *Garmon* preemption doctrine also invalidates worker retention laws. *Garmon*, 359 U.S. at 244-45; *Cannon v. Edgar*, 33 F.3d 880, 884-85 (7th Cir. 1994). Section 8(d) of the NLRA sets forth the obligation of parties to bargain collectively and "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Contrary to Section 8(d)'s protections, worker retention laws impose restraints on the ability of a subsequent employer to bargain freely with its employees by requiring certain terms and conditions of employment (retention of prior employer's employees, performance appraisals, "just cause" discharge standard), and by requiring the subsequent employer to retain the prior employer's employees, thereby fulfilling the major indicia of successorship status under the NLRA. *St. Gabriel's Hosp.*, 871 F. Supp. at 341; *Burns*, 406 U.S. at 287 ("This *bargaining freedom* [under Section 8(d)] means that both parties *need not make any concessions as a result of Government compulsion* and that they are *free from having contract provisions imposed upon them against their will.*") (emphasis added). In certain instances, courts have exempted some state and local laws from *Garmon* preemption if "the regulated activity is (1) merely of peripheral concern to federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility." *Cannon*, 33 F.3d at 884 (citing *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983)). But those exceptions to *Garmon* preemption have usually been general

The California Grocers Decision

In December 2005, the City of Los Angeles (the "City") adopted the Grocery Worker Retention Ordinance (the "LA Ordinance").²⁶ The LA Ordinance is similar to other worker retention laws adopted elsewhere.²⁷ For grocery stores of a specific size (15,000 square feet or larger) that undergo a change of ownership, the LA Ordinance vests current employees with certain individual rights during a 90-day transition period. First, the incumbent owner is to prepare a list of non-managerial employees with at least six months' employment as of the date of transfer in ownership, and must hire from that list during the transition period.²⁸ Second, during that same period, the hired employees may be discharged only for cause.²⁹ Third, at the conclusion of the transition period, the successor employer must prepare a written evaluation of each employee's performance. The LA Ordinance does not require that anyone be retained, but if an employee's performance is satisfactory, the subsequent employer must "consider"

state laws, such as criminal and tort laws. See, e.g., *Farmer v. United Bhd. of Carpenters and Joiners*, 430 U.S. 290 (1977) (union member could sue his union for state tort of intentional infliction of emotional distress that was unrelated to bargaining process); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (NLRA does not preempt state law trespass action). Worker retention laws do not fall within any exception to *Garmon* preemption. They squarely address the terms and conditions of employment to be applied to the retention of a prior employer's employees (otherwise analyzed under the successorship doctrine under the NLRA), such that its impact is much more than a "peripheral concern to federal labor law." *Cannon*, 33 F.3d at 884 (citing *Belknap, Inc.*, 463 U.S. at 498). Moreover, there is no deep-rooted local interest; the possibility of layoffs is not unique to certain industries (e.g., grocers, janitors, etc.), particularly in this poor economy. *Cannon*, 33 F.3d at 885 (Illinois Burial Rights Act did not arise from deep local issues since every community faces burials).

²⁶ L.A. Ord. No. 177,231, adding ch. XVIII, L.A. Mun. Code § 181.00 et seq.

²⁷ See, e.g., Displaced Janitor Opportunity Act ("DJOA"), Cal. Lab. Code §§ 1060-1065.

²⁸ L.A. Mun. Code § 181.02.

²⁹ L.A. Mun. Code § 181.03(A)-(C).

offering continued employment.³⁰ If the workforce is unionized, however, the union and the employer may agree on terms that supersede the LA Ordinance.³¹

The plaintiff, California Grocers, filed a complaint against the City seeking to enjoin enforcement of the LA Ordinance on the grounds that the California Health and Safety Code, the California Labor Code, and federal labor law preempted it, and that it violated the equal protection provisions of the state and federal Constitutions. After a two-day bench trial, the trial court entered a judgment enjoining enforcement of the LA Ordinance, declaring it void on two of the four asserted grounds. The trial court concluded that the LA Ordinance affected health and sanitation standards for retail food establishments, an area fully occupied by state law and was, on that basis, preempted. The court further concluded that the LA Ordinance violated equal protection because there was no rational basis for its differential treatment of grocery stores smaller than 15,000 square feet, or its permitting employers and unions to contract around the LA Ordinance's terms.

A divided Court of Appeal affirmed. The majority agreed with the trial court that the California Retail Food Code³² fully occupied the field of health and sanitation standards for retail food establishments, and that the LA Ordinance had the impermissible purpose and effect of regulating in the same area. It further concluded, contrary to the trial court, that the NLRA also preempted the LA Ordinance, because federal labor law guaranteed successor employers the right to pick and choose whom they wished to employ, free of local regulation.³³

In reversing the appellate court, a majority of the Supreme Court of California relied on *Washington Service Contractors Coalition v. District of Columbia* (“*Washington Service*”),³⁴ a divided opinion declining to find that *Machinists* preemption applied to a contractor retention statute entitled the Displaced Workers Protection Act (“DWPA”).³⁵ In *Washington Service*, the court speculated that the compulsory

retention requirements on new contractors under the DWPA did not automatically lead to successorship status: the NLRB *might* exclude the period of compulsory retention of the previous contractor's employees required by the DWPA from its determination that the new contractor was a successor.³⁶ It then leaped to the conclusion that if the NLRB did not exclude the DWPA's compulsory retention period from its determination, and the NLRB found successorship status, the DWPA did not conflict with the aims of the NLRA.³⁷ The *Washington Service* Court embraced a no-harm, no-foul rule without realizing that the DWPA set the terms of the game in the first instance. The *Washington Service* majority also reasoned that employers are not free to refuse to hire employees on the basis of union membership and, therefore, no employer freedom was compromised by the ordinance. But this simplistic and flawed analysis ignores the fact that employers are free under established federal labor law *not to hire* a predecessor's employees for other reasons.

The *California Grocers* majority disagreed with the dissent's premise that successor employers enjoy an unfettered right to hire whomever they choose. The majority stated that such an assumption “cannot withstand historical scrutiny” as Congress, in enacting the NLRA, “defied” decades of Supreme Court edicts invoking employer freedom of contract to strike down employee-protective legislation, such as attempted bans on “yellow-dog contracts.”³⁸ The majority further noted that the Supreme Court ultimately “acceded to this judgment, reversing course and holding that both Congress and the several states could constrict an employer's freedom to hire without violating liberty of contract.”³⁹ Therefore, the majority stated, “[t]o

³⁰ L.A. Mun. Code § 181.03(D).

³¹ L.A. Mun. Code § 181.06.

³² Cal. Health & Safety Code § 113700 et seq.

³³ The majority did not address the trial court's further equal protection conclusions. In contrast, the dissent argued that the Ordinance was neither preempted nor inconsistent with equal protection principles.

³⁴ 54 F.3d 811 (D.C. Cir. 1995).

³⁵ 41 D.C. Reg. 1011, D.C. Code Ann. § 36-1501 et seq.

³⁶ *Washington Service*, 54 F.3d at 817.

³⁷ 54 F.3d at 817.

³⁸ *California Grocers*, 52 Cal. 4th at 203, citing *Adair v. United States*, 208 U.S. 161, 174 (1908) (holding a federal ban on yellow-dog contracts, which condition hiring on an agreement not to join a union, unconstitutional because “it is not within the functions of government . . . to compel any person in the course of his business and against his will to accept or retain the personal services of another . . .”); see also *Coppage v. Kansas* (1915) 236 U.S. 1, 9-21 (1915) (invalidating a state ban on identical grounds); 29 U.S.C. § 158(a)(3) (prohibiting yellow-dog contracts).

³⁹ *California Grocers*, 52 Cal. 4th at 203, citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-46 (1937) (rejecting liberty of contract challenge to the NLRA); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 534-537 (1949) (rejecting *Adair* and *Coppage* and upholding a state's right similarly to regulate employer hiring).

start from the premise that the NLRA is founded upon employer liberty of contract, as the dissent does, is to stand history on its head.”

The majority in *California Grocers* also rejected the employer’s argument that worker retention laws impermissibly force successor obligations on subsequent employers, despite the Board’s consistent findings of successor obligations compelled by worker retention laws. The majority reasoned that while the NLRB has not “formally spoken to the effect of a 90-day retention ordinance on the successorship inquiry,” decisions from several administrative law judges (“ALJ’s”) indicate that a successor employer “will be obligated” to bargain with a union only if it retains the predecessor’s employees beyond the mandatory retention period or if it offers permanent employment to such employees prior to expiration of the retention period.⁴⁰ Based thereon, the majority concluded that “retention ordinances like the Ordinance here do not dictate the outcomes of the successorship inquiry in any way that would call for *Machinists* preemption” because until expiration of the mandatory period, “the predecessor’s employees are essentially probationary” and there is no reason to conclude that they will ultimately be hired – “one of the prerequisites of a successorship bargaining obligation”⁴¹

In finding *Machinists* preemption applicable and agreeing with the decision of the court of appeal in

⁴⁰ *California Grocers*, 52 Cal. 4th at 205, citing, Rhode Island Hospitality Assn. v. City of Providence, 775 F. Supp. 2d 416 (D. R.I. 2011) (summarizing the importance of these ALJ decisions), affirmed by, 2011 U.S. App. LEXIS 23915 (Dec. 2, 2011); United States Services Industries, Inc., No. 5-CA-24575, 1995 NLRB Lexis 1151, at *11-13 (Dec. 13, 1995) (imposing a bargaining obligation on a new employer based on substantial business continuity; rejecting employer’s argument that it should not succeed to the predecessor’s bargaining obligation because its initial hiring was dictated by a temporary retention ordinance because there was no Board precedent differentiating between voluntary and involuntary initial hiring); M&M Parkside Towers LLC, No. 29-CA-27720, 2007 NLRB Lexis 27 (Jan. 30, 2007) (finding an obligation to bargain where the new employer permanently retained the successor’s employees – initially hired pursuant to a 90-day retention ordinance - despite the employer’s argument that absent the ordinance it would not have hired the predecessor’s employees, as the employer failed to offer a lawful, nondiscriminatory reason for why it would not have hired the employees).

⁴¹ *California Grocers*, 52 Cal. 4th at 205, citing, (*Fall River*, 482 U.S. at 47; *Burns*, 406 U.S. at 278; *Rhode Island Hospitality*, 775 F. Supp. 2d at 433; *Washington Service*, 54 F.3d at 816-17.

California Grocers, Justice Grimes’ lengthy and direct dissent relies heavily on the United States Supreme Court’s long line of successorship case law. The dissent concludes that the LA Ordinance “intrudes on the collective bargaining process in an extraordinary and fundamental way” by removing from the new employer and shifting to itself the determination of the specific individuals who will comprise the new employer’s workforce and the benefits they will be entitled to for the first 90 days of operation.⁴²

Although recognizing the need for minimum employment standards, including restrictions on hiring and firing and prohibitions on unlawful discrimination, and that employers have “no absolute right to choose their own workforce, Justice Grime asserts that under federal labor law the government cannot require an employer to hire either a specific worker or a particular group of workers, as that choice is reserved to employer and employee – “that is, to the free play of economic forces. This has been clear,” the dissent notes, since 1937 when the Supreme Court, in *NLRB v. Jones & Laughlin Steel Corporation*, first upheld the constitutionality of the NLRA and found that it “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.”⁴³

The dissent also takes issue with the majority’s failure to recognize in the cited successorship cases – which presented no preemption issues – that “Congress intended in the NLRA to prevent states and localities from interfering with the employer’s right to choose its employees.”⁴⁴ Justice Grime asserts that “these cases show that the employer’s free selection of employees has always been a fundamental part of national labor policy.”⁴⁵ For example, the dissent observes that *John Wiley* states that the “‘*objectives of national labor policy*, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses’ be balanced ‘by some protection to the employees from a sudden change in the employment relationship.’”⁴⁶ Similarly, the dissent notes, *Howard Johnson* explains that “the high court in *John Wiley* was ‘concern[ed]

⁴² *California Grocers*, 52 Cal. 4th at 211.

⁴³ *California Grocers*, 52 Cal. 4th at 211-212, quoting, *Jones & Laughlin*, 301 U.S. at 45.

⁴⁴ *California Grocers*, 52 Cal. 4th at 224.

⁴⁵ *California Grocers*, 52 Cal. 4th at 224.

⁴⁶ *California Grocers*, 52 Cal. 4th at 224, citing, *John Wiley*, 376 U.S. at 549.

with affording *protection to those employees who are in fact retained in the transition from one corporate organization to another from sudden changes in the terms and conditions of their employment . . .*”⁴⁷

Machinists Preemption Applies to Invalidate Worker Retention Laws that Impermissibly Regulate the Economic Weapons of the Collective Bargaining Process and the Successorship Doctrine

The NLRA arguably preempts worker retention laws under the *Machinists* doctrine because they impermissibly regulate the economic weapons of the collective bargaining process. The “*Machinists* preemption” is premised on the intent of Congress to strike “a balance of protection, prohibition, and *laissez-faire* in respect to union organization, collective bargaining, and labor disputes.”⁴⁸ Pursuant to this principle, “states cannot regulate the economic weapons that are part and parcel of the collective bargaining process because [r]esort to economic weapons is the right of the employer as well as the employee and the ‘State may not prohibit the use of such weapons or add to an employer’s federal legal obligations in collective bargaining any more than in the case of employees.’”⁴⁹

Worker retention laws fundamentally disrupt the balance of labor-management relations, impermissibly interfering with the collective bargaining process, and improperly intruding into areas that Congress reserved for free market forces.⁵⁰ Worker retention laws expressly interfere with subsequent employers’ established “successor” employer legal rights. Under the

⁴⁷ *California Grocers*, 52 Cal. 4th at 224, citing, *Howard Johnson*, 417 U.S. at 264 (internal citations omitted).

⁴⁸ *Brown*, 554 U.S. at 65.

⁴⁹ *St. Gabriel’s Hosp.*, 871 F. Supp. at 340 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 147 (1971)).

⁵⁰ *Machinists v. Wisconsin Employment Rel. Comm’n*, 427 U.S. 132 (1976); *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (no state law may stand “as an obstacle to the accomplishment and execution of the full purposes and objectives” of Congress in enacting NLRA); *Brown*, 554 U.S. at 65 (“*Machinists* preemption is based on the premise that Congress struck a balance of protection, prohibition, and *laissez-faire* in respect to union organization, collective bargaining, and labor disputes”). *Brown* concerned a California statute that prohibited a recipient of state funds from promoting or deterring union activity. The Supreme Court found NLRA preemption without specific evidence of any particular union activity or organizational drive at issue. The scope of the statute was sufficiently intrusive into labor-management relations as to require NLRA preemption. *Brown*, 554 U.S. at 73-74.

typical worker retention law, a subsequent company is not free to determine whether it wants to hire any of the prior company’s employees (or utilize only its existing employees) – it *must* hire from the prior company’s employees by seniority to fill its labor needs. In addition, a subsequent employer is not free to determine the length of employment for new hires – it must employ the prior company’s employees for a certain minimum period of time, absent “cause” for termination. Moreover, a subsequent employer is not free to determine the discharge standard – it must adhere to a for “cause” standard in terminating retained employees, even if they were previously employed “at-will” and/or the applicable collective bargaining agreement does not contain any “cause” provision. Under typical worker retention laws, the subsequent employer is also not free to determine whether and when to conduct a performance appraisal – it must conduct a performance appraisal of the retained employees at the end of the mandatory retention period.⁵¹

In sum, worker retention law provisions about whom to hire, for how long and under what terms, smack of precisely the kind of legislative intrusion into labor-management relations that the United States Supreme Court has sought to protect against with its *Machinists* preemption doctrine.

The *California Grocers* majority cited one *Machinists* preemption case, *Golden State Transit Corp. v. Los Angeles*, (“*Golden State Transit*”) that addressed regulation of the economic weapons in the bargaining process.⁵² In *Golden State Transit*, the Supreme Court concluded that the City of Los Angeles (the “City”) was preempted from conditioning renewal of a taxicab company’s operating license on the company’s settling a labor dispute. The taxi drivers were permitted under the NLRA to strike in order to pressure the taxi company, and the taxi company was permitted to resist that pressure and seek to outlast the drivers. The Court found that the City, by requiring the taxi company to settle in order to keep operating, was effectively placing a time limit on the company when none was contemplated and was imposing an obligation to agree where the text and legislative history of the NLRA contemplated only an obligation to bargain, thereby interfering with the company’s use of permitted

⁵¹ See, e.g., L.A. Ord. No. 177,231, adding ch. XVIII, L.A. Mun. Code § 181.00 et seq.; DJOA, Cal. Lab. Code §§ 1060-1065.

⁵² 475 U.S. 608, 618 (1986).

economic weapons.⁵³ The *California Grocers* majority, however, seemingly ignored the fact that worker retention laws similarly require subsequent employers to risk successor status by virtue of the government-imposed requirement that they hire all of the prior company's employees. Indeed, worker retention laws are even more intrusive than the local law regulating the renewal of taxicab licenses in *Golden State Transit*, as they impose an obligation on subsequent employers to hire the prior company's employees (and concomitant successor obligations to bargain with and recognize the incumbent union), where the text and legislative history of the NLRA contemplated that the subsequent employer would be free to hire whomever it wants.

The implications of allowing partisan-sponsored worker retention laws, rather than economic forces, to regulate the collective bargaining process are profound and far-reaching. The Ninth Circuit aptly expressed its fear of the consequences of such a deviation from the NLRA framework established by Congress in *Chamber of Commerce v. Bragdon*:

A precedent allowing this interference with the free play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. *This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies.* This could invoke the defensive action by employers seeking to obtain caps on wages in various businesses or industries. This could be justified as an exercise of police power on community welfare grounds of lowering construction costs to attract business to the area or lowering costs to consumers so as to make products or services more available to the general public. *This substitutes the free-play of political forces for the free play of economic forces that was intended by the NLRA.*⁵⁴

The fact that worker retention laws apply equally to union and non-union employees is of no moment.⁵⁵ And contrary to the *California Grocers* majority's conclusion, worker retention laws are not "minimum labor standards" that survive NLRA preemption. Examples of valid minimum labor standards include broadly applicable minimum wage requirements, basic payroll practices on the timing of wage payments or the form of paystubs, and various anti-discrimination provisions under state and local law that apply to most, if not all, employers, and set minimum expectations.⁵⁶ Unlike laws of general applicability that courts have recognized as "minimum labor standards," worker retention laws target certain industries (e.g., grocery stores, janitorial services), certain types of employers within that industry, and only certain sized employers.⁵⁷ Moreover, where, as here, a state law seeks to impose greater damages than warranted under the circumstances, the law is not a legitimate "minimum labor standard."⁵⁸

Unions argue that a new employer who wins a service contract or buys the assets of a predecessor company is a "successor" employer under the NLRA, with obligations to recognize and bargain with the Union over terms and conditions of employment. Unions use worker retention laws as an economic weapon in the

⁵⁵ See *Bragdon*, 64 F.3d at 502 (NLRA preempted prevailing wage ordinance that applied only to particular workers in a particular industry); 520 South Michigan Ave. Assocs. v. Shannon, 549 F.3d 1119, 1126, 1133 (7th Cir. 2008) (facially neutral meal and rest period requirements that did not have general applicability, but instead applied to only one occupation in one industry in a single county, were subject to NLRA *Machinists* preemption).

⁵⁶ See, e.g., *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724, 750 (1985) (NLRA did not preempt state law requiring all insurance policies to provide mental health coverage); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22 (1987) (NLRA and ERISA did not preempt state statute requiring all employers to provide one-time severance payment to employees in event of plant closing).

⁵⁷ See, e.g., DJOA, Cal. Lab. Code § 1061.

⁵⁸ 520 South Michigan, 549 F.3d at 1135 (no minimum labor standard where statute imposed treble normal back pay and payment of attorneys' fees and costs); *Bechtel Constr., Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220, 1226 (9th Cir. 1987) (minimum wage scale for apprentices was not minimum labor standard); *Bragdon*, 64 F.3d at 503-04 (prevailing wage law for certain types of private industrial construction projects was not minimum labor standard). See, e.g., Cal. Lab. Code § 1062(a), (c) (DJOA provides for substantially enhanced back pay, plus attorneys' fees and costs).

⁵³ *Golden State Transit*, 475 U.S. at 615-17.

⁵⁴ 64 F.3d 497, 504 (9th Cir. 1995), *abrogated in part by* *Fortuna Enters. v. City of Los Angeles*, 673 F. Supp. 2d 1000, 1011 (C.D. Cal. 2008).

collective bargaining process to attempt to force the successor employer to hire all of the prior (unionized) employer's employees.⁵⁹ Employers, for their part, argue that the NLRA preempts the state and local worker retention laws because such laws impermissibly intrude on an area of labor-management relations that Congress intended to be left to the free play of economic – not political – forces, and because such laws impermissibly interfere with the successor employer's established right under the NLRA not to hire *any* of the predecessor employer's employees.

Conclusion

Worker retention laws' requirement that an employer who takes over a service contract or purchases all the assets of a company hire its predecessor's employees impermissibly interferes with a successor employer's recognized legal right under the NLRA to hire whomever it wants. Congress enacted the NLRA to protect the labor-management arena from such political interference and to, instead, allow for the free play of economic forces. Worker retention laws impermissibly substitute the free play of *political* for economic forces. A law obligating the winning bidder on a services contract or the new owner of a company's assets to hire its predecessor's employees impermissibly imposes upon the subsequent employer a compulsory successorship obligation that is contrary to longstanding federal labor law, which holds that the subsequent contractor should only assume such successor obligations through a *voluntary* decision to hire its predecessor's employees.

Organized labor's unabashed effort to use its own sponsored worker retention laws to attempt to force

subsequent employers to recognize unions as alleged "successor" employers only by reason of the worker retention laws' compulsory retention requirements, rather than the traditional collective bargaining and market forces intended for that purpose, underscores the Ninth Circuit's concern in *Bragdon*. If the United States Supreme Court adopts the reasoning and holdings of *Washington Service* and *California Grocers*, it will sanction a dramatic shift in the collective bargaining framework. In enacting the NLRA, Congress specifically sought to prevent such an outcome. Unions will continue to use worker retention laws' compulsory retention requirements to claim that subsequent employers are "successor" employers under the NLRA. Thus, unions will attempt to do through legislation what they might not be able to accomplish through the voluntary collective bargaining process.

The issue of whether a state or local worker retention law can abrogate or undermine the NLRA's fundamental protection of the labor-management arena and of subsequent employers' rights to hire whomever they want without political interference is vitally important to all employers. Preemption is particularly appropriate in light of unions' attempts to use worker retention laws to force successor employers to recognize and bargain with incumbent unions – a paradigmatic example of the sort of political favoritism of one side in the collective bargaining process that the NLRA prohibits.⁶⁰

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⁵⁹ Unions and organized labor hope to use the political process to impose successor obligations on employers in other industries if the Supreme Court does not rule that the NLRA preempts such worker retention laws.

⁶⁰ See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972); *Machinists*, 427 U.S. at 140, 147; *Howard Johnson*, 417 U.S. at 262 (subsequent employer's established "right not to hire" employees of its predecessor).