No. 15-55909

IN THE
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

and

UNITE-HERE LOCAL 11,
Intervener-Defendant-Appellee

On Appeal from the United States District Court,
For the Central District of California
Honorable Andre Birotte, U.S. District Judge, Presiding
C.D. Cal. No. 14-CV-09603-AB (SS)

AMICUS BRIEF OF J. DAVID SACKMAN

SUPPORTING IN PART AND OPPOSING IN PART APPELLEE FOR AFFIRMING IN PART AND REVERSING IN PART THE DECISION BELOW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

TABLE OF AUTHORITIES

Page No.

TABLE OF AUTHORITIES

Page No.

STATE CASES

FEDERAL STATUTES

<u>National Labor Relations Act (NLRA)</u>

TABLE OF AUTHORITIES

Page No.

TABLE OF AUTHORITIES

Page No.

CALIFORNIA CONSTITUTION AND STATUTES

California Constitution

California Civil Code

California Labor Code

TABLE OF AUTHORITIES

Page No.

TEXT AND MOTION PICTURES

STATEMENT OF INTEREST

It is my position that the Living Wage ordinance at issue here is a noble and much-needed wage floor for hotel workers which should be upheld, but that the "opt-out" provision, which drops this floor from employees who have exercised their right to be represented by a union, is both wrong as a matter of policy, and as I argue below, preempted by federal labor law. It is my hope that this one bad provision will not destroy the good done by the rest of the ordinance. Workers need a higher floor of a "living wage," which should not be allowed to be bargained away.

This position is on behalf of myself only, not on behalf of any of my clients, or even the firm with which I am associated: Reich, Adell & Cvitan. But this position comes from my work of over three decades in representing workers, unions and union benefit funds as an attorney, and nearly another decade more of involvement in the Labor Movement. Since Dolores Huerta organized me to work for the United Farm Workers in 1976, I have devoted my career, indeed my entire adult life, to advancing the cause of workers in general. Attached at the end of this Amicus Brief is my Vitae, which shows more detail of my career. A brief perusal of my Vitae confirms my dedication to advancing the rights of workers.

In particular, I have devoted a good deal of my career to some of the issues involved in this case - preemption of basic labor protections by federal labor law. A large part of my practice is collecting wages and benefit contributions owed to workers by their employers. One of the most powerful tools in collecting those wages and benefits, especially in the construction industry, is the mechanic lien and related remedies deriving from the California Constitution Art. XIV § 3. But those remedies were taken away by a series of decisions from the courts, including this Court, holding those remedies preempted by federal law. *See*, *e.g.*, *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1129 (9th Cir. 1991). So I led a decade-long crusade to restore these remedies. This included successfully arguing before this court to overturn *Sturgis* and that line of cases (*see Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920 (9th Cir. 2001), drafting legislation to reduce the grounds for preemption (SB914, passed as Cal. Stats. 1999, ch. 795), and successfully arguing, as *amicus*, to the California Supreme Court that these remedies (especially after the amendments I drafted) were not preempted. *See Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 8 Cal.Rptr.3d 259, 82 P.3d 286 (2003).

Central to my successful argument to restore these remedies as not preempted, was the fact that they are basic labor standards, applying equally to

union and non-union employees, and regardless of whether employee benefit plans were used. As stated in the language I drafted, the purpose of these laws is to protect the "just pay" due workers, "without discrimination as to the manner in which the pay is allocated, whether union or nonunion, in cash or a combination of cash and benefits." Cal. Stats. 1999, ch. 795 § 9. *See also* current Cal. Civil Code § 8024(c) (purpose of law is "to give effect to the longstanding public policy of this state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which that compensation is to be paid.")

Now, I see this struggle to maintain and expand these basic labor standards for workers threatened by the "opt-out" provision in the ordinance in question here. Not only does this opt-out provision allow the floor of wages to be pulled out from workers, based on their exercise of federally-protected rights, but it pulls the floor out of the argument I successfully advanced to uphold this type of law. I fear that the entire ordinance here, which I wholeheartedly support, may be threatened by this one provision.

Therefore, I wish to argue that this opt-out provision should be considered separately from the rest of the ordinance. It should be severed, and if the Court even reaches this issue, it should not be a grounds for preempting the rest of the ordinance.

STATEMENT OF AUTHORSHIP

[Fed. R. App. 29(c)(5)]

This Amicus Brief is on my own behalf only, as an individual, and not as part of the Firm I am associated with - Reich, Adell & Cvitan - nor of any of its past or present clients. This brief has been prepared solely on my own, without any assistance from anyone else, even this Firm, other than the decades of experience I have gained practicing as an attorney in this area.

AMICUS BRIEF

I. INTRODUCTION

This appeal involves the question of whether a "Living Wage" ordinance[1/] of Defendant City of Los Angeles (City) is preempted by federal labor law. I take the position that ONLY the "opt-out" provision of the HWO, by which its protections are denied to workers covered by collective bargaining agreements, is preempted, but that is not a basis for the injunctive relief sought. But before judging whether the whole or any part of the HWO is preempted, one must understand the historical development and purposes of this type of law.

The HWO is a type of minimum wage, of which California was a pioneer in developing. The California minimum wage can be traced back to two legislative sessions over a century ago.[2/] These laws faced opposition, not only from the courts, but from a large part of organized labor.

1/ Los Angeles Municipal Code (LAMC) Ch. XVIII, Art. 6, §§ 186.00-186.13. I will refer to this as do the parties, as the "HWO."

2/ *See generally*, Lucile Eaves and J. David Sackman, *A History of California Labor Legislation: Revised and Updated Centennial Edition*, Ch. VII Looking Backward, pp. 225-231 (Queen Calafia Publishing 2012); Norris C. Hundley, *Katherine Philips Edson and the Fight for the California Minimum Wage*, 29 Pac. Hist. Rev. 271, 274 (1960).

In the courts, this was the *Lochner* era, named after a Supreme Court case which struck down a law limiting the hours of bakers to sixty per week. *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). Under the *Lochner* line of cases, "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." 198 U.S. 45, 53. So in the name of the "liberty" to contract one's labor for the lowest price, considered not even "open to question" at the time, laws to set a floor of basic labor protections were consistently struck down. *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923) (striking down D.C. minimum wage law); *see also*, *Morehead v. New York, et. rel. Tipaldo*, 298 U.S. 587, 56 S.Ct. 918, 80 L.Ed. 1347 (1936) (striking down New York minimum wage law).

In the halls of Labor, there was a split on the issue of minimum wage laws. This was resolved, at least as far as the official position of the American Federation of Labor (AFL), when Samuel Gompers told John Nolan, labor's lobbyist in Sacramento at the time, that "We want a minimum wage, but we want it established by the solidarity of the working men themselves through the economic

forces of their trade unions, rather than by any legal enactment." Gompers to John I. Nolan, as quoted in Philip Taft, *Labor Politics American Style: The California State Federation of Labor* (Harvard U. Press 1968), at 54.[3/]

These obstacles were overcome by the efforts of a few women labor activists. These included Maud Younger, the "Millionaire Waitress," who went on to be instrumental in winning national suffrage for women, and Katherine Philips Edson, a close advisor to Governor Hiram Johnson. *See* Eaves and Sackman, *supra*; Hundley, *supra*. Through their efforts, a minimum wage law was established for women and children only. Cal. Stats 1913, ch. 324 p. 632. This was followed by the establishment, by constitutional amendment, of an Industrial Welfare Commission to determine and enforce a minimum wage, one of the first constitutional referendums voted on by women, with their newly-won right to suffrage. California ACA 90 (1913), passed as Prop. 44 on the 1914 ballot to become Art. XX § 17 ½; currently in Cal. Const. Art. XIV § 1. Edson was appointed the first Commissioner of the new Industrial Welfare Commission (IWC) by Governor Johnson. Although future Supreme Court Justice Louis

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3/ This position may be explained, at least in part, by the example of a New Zealand law in 1894, which acted more as a cap, rather than a floor, to wages, and also limited the right to strike. New Zealand Statutes, 54 Victoria 1894, No. 14. p. 22; *see* Elizabeth Brandeis, Labor Legislation, in John R. Commons, ed., *History of Labor in the United States 1896-1932, Vol. III*, at p. 501-502 (MacMillan NY 1935).

Brandeis successfully argued to have California's 8-hour law for women and children upheld,[4/] the minimum wage law remained in a legal cloud until the New Deal.[5/] *See* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (upholding Washington State minimum wage law).

At about the same time these state minimum wage laws were finally upheld, Congress enacted the Fair Labor Standards Act (FLSA), which set a minimum wage for both men and women. June 25, 1938, c. 676, 52 Stat. 1060, specifically 29 U.S.C. § 206. When the FLSA was upheld, the cloud of *Lochner* and the supposed "liberty of contract" was blown away. *See* *U.S. v. Darby*, 312 U.S. 100, 125, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

There is an important distinction between the type of "living wage" laws involved in this case and those passed by the California legislature in 1913, on the one hand, and the "prevailing wage" type of minimum wage laws, designed not to undercut existing contractual wages, on the other hand. A "living wage" for women and children was pitched to the voters in the Constitutional Amendment of 1914, as "a wage that insures for them the necessary shelter, wholesome food and

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4/ *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628 (1915).

5/ A challenge to the California law was dropped, after the supposed plaintiff, Helen Gainer, revealed that she had been made a party without her knowledge. *See* Hundley, *supra*.

sufficient clothing." Argument in favor of ACA 90, Prop. 44 (Secretary of State 1914). Similarly, the FLSA was enacted for the purpose of promoting "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). As with the California minimum wage and the FLSA, the HWO at issue here is a "living wage" law, which "seeks to promote the health, safety and welfare of thousands of hotel workers by ensuring they receive decent compensation for the work they perform." HWO § 186.00.

The "Prevailing Wage" type of minimum wage law, however, is not based on establishing a floor to keep workers out of poverty, but to protect existing bargained-for standards from encroachment by contractors who "recruit labor from distant cheap-labor areas" and "to permit union contractors to compete with nonunion contractors" on public works. *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 987, 824 P.2d 643, 649 (1992). In fact, prevailing wages in California are supposed to be based on collective bargaining agreements, where available. Labor Code § 1773.

As a "living wage" rather than a "prevailing wage," California's minimum wage laws were always meant to be an absolute floor, which cannot be bargained away. From its original enactment, California's minimum wage laws provided that

the minimum wage so established could be enforced "notwithstanding any agreement to work for such lesser wage." Cal. Stats 1913, ch. 324 § 13, p. 637. This language was carried over into the first Labor Code in 1937 (Cal. Stats 1937, ch. 90 § 1194, p. 217), and survived the expansion of these laws to cover all workers,[6/] to the current Labor Code § 1194(a), which provides that:

> "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (*Emphasis added*).

The HWO here repeats the prohibition against waiver of this absolute floor of wages.[7/] However, it then removes from the protection of the HWO those employees who have exercised their right to collective bargaining:

6/ Cal. ACA 65 (1970), passed as Prop. 15, to become Art. XX § 17 ½, currently in Art. XIV § 1; and Cal. Stats.1972, ch. 1122, pp. 2152-2157.

7/ " Except for bona fide collective bargaining agreements, any waiver by a Hotel Worker of any or all of the provisions of this article shall be deemed contrary to public policy and shall be void and unenforceable. Any attempt by a Hotel Employer to have a Hotel Worker waive rights given by this article shall constitute a Willful Violation of this article." HWO § 186.10.

> "All of the provisions of this article, or any part of the article, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in that agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of all or any part of the provisions of this article." HWO § 186.08

It is this part of the HWO, and this part only, to which I object. First of all, this Court should not rule at all on this issue, because the Plaintiffs lack standing to challenge this provision. Secondly, if the Court does reach the issue of whether this opt-out provision is preempted, I argue that it *is* preempted by federal law, because it allows the floor of a living wage to be dropped only from employees who have exercised this federal right to bargain collectively. Finally, the opt-out provision is severable, so the preemption of this clause should not affect the rest of the HWO, and cannot be grounds for a preliminary injunction in any case.

II. ARGUMENT

A. THE OPT-OUT PROVISION OF THE HWO HARMS UNION EMPLOYEES, NOT EMPLOYERS, SO THERE IS AN ISSUE OF STANDING OF APPELLANTS TO RAISE THIS ARGUMENT

Both sides here rely on *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994), in support of their respective arguments as to preemption of the opt-out provision. Yet, both sides avoid the actual holding and principles laid down by the Supreme Court in that decision.

The *Livadas* case involved a policy of the California Labor Commissioner to defer enforcement of employee complaints for failure to pay wages on termination, as required by Labor Code § 203(a), if the employee is covered by a collective bargaining agreement with an arbitration clause. The Labor Commissioner argued that its policy "far from being pre-empted by federal law, is positively compelled by it, and that even if the Commissioner had been so inclined, the [Labor Management Relations Act] LMRA § 301 [29 U.S.C. § 185] would have precluded enforcement of Livadas' penalty claim." 512 U.S. 107, 121. The Supreme Court found this to be not "even a colorable argument" for preemption. 512 U.S. at 124.

The Court not only found the policy of the Labor Commissioner itself preempted, but found that it established a basis for a Civil Rights claim under 42 U.S.C. § 1983. Id. at 134-135.

The harm of this policy, according to the Supreme Court, was not to the employers, such as Plaintiffs here, but to the "union-represented employees" who lose the "basic employment guarantees and protections" of state laws. Id. at 128-129. Defendants City and Intervener UNITE-HERE Local 11, on the other hand, rely on the "narrowly drawn opt-out" statutes the Court distinguished from the case before it. Id. at 131-132. But the basis on which the Court distinguished these other statutes was that they left those employees with "the full protection of the minimum standard, absent any agreement for anything different." Id. at 131. As I argue below, the opt-out provision here cannot come within the umbrella of laws the Court distinguished in *Livadas*, because it deprives the employees of the "full protection of the minimum standard" without any requirement for bargaining for "anything different."[8/]

8/ Also as discussed below, these "opt-out" statutes must be "narrowly drawn," which this one is not. *Livadas*, 512 U.S. 107, 132.

Whatever the conclusion on the issue of preemption of the opt-out provision may ultimately be, the *Livadas* decision requires that the question must be asked from the point of view of the employees. *They* are the ones who may be harmed by the opt-out, and the distinction drawn in *Livadas* turns on the "real effect on federal rights" of those employees. Id. at 119.

This raises an issue which none of the parties has addressed - whether the Plaintiffs even have standing to raise the issue of preemption of the opt-out provision of the HWO. As to injunctive relief in particular, "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution" of the questions presented. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (*citations omitted*).

In order to establish standing, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), *quoting*, *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Plaintiffs are not directly injured by the

opt-out provision, and under *Livadas*, the issue of preemption of that provision must focus on its effect on the employees. So this Court does not have the "concrete adverseness which sharpens the presentation of" the critical "issues necessary for the proper resolution" of the questions presented. *City of Los Angeles v. Lyons*, *supra*.

I raise, but do not purport to answer, the issue of standing. The parties should be asked to address this issue. What I urge is that, either this Court decline to address the issues as to the opt-out provision for lack of standing by Plaintiffs, or if it does address the opt-out, it must do so from the point of view of the employees affected, not that of the employer Plaintiffs, the City Defendant, or Intervener UNITE-HERE.

B. THE OPT-OUT PROVISION, AND ONLY THAT PROVISION, IS PREEMPTED BY FEDERAL LABOR LAW

1. The Opt-Out Provision Is Preempted Because It Drops The Floor of Wages Only For Employees Represented By A Union, Without Requiring Anything Different

Any discussion of preemption of basic wage and hour protections must start with the recognition that "Congress is understood to have legislated against a backdrop of generally applicable labor standards" with the enactment of the National Labor Relations Act (NLRA)[9/] and its amendment with the Labor Management Relations Act (LMRA).[10/] *Livadas v. Bradshaw*, 512 U.S. 107, 124. "[T]he NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). Thus, "Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." Id. at 21 (*citations omitted*).

9/ 49 Stat 449 (1935), currently in 29 U.S.C. §§ 151-169.

10/ 61 Stat. 136 (1947). Specifically, Section 301(a) of the LMRA, 29 U.S.C. § 185(a), which is most implicated here.

It has been well-established that "No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754-55, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985). Because "there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards," Plaintiffs face an insurmountable hurdle in establishing their case that the HWO, as one of these "minimum labor standards," could possibly be preempted. 471 U.S. 724, 756.

On the other hand, as to the opt-out provision, "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." Id. The *Metro Life Ins.* case involved a Massachusetts law requiring that minimum mental health benefits be provided under certain health insurance policies. The *Fort Halifax* case involved another minimum labor standard - mandatory severance pay - with the twist of an exception for "an express contract providing for severance

pay" which does not necessarily need to be a collective bargaining agreement. *Fort Halifax*, 482 U.S. 1, 4. The Court held that this distinction did not make any difference. Id. at 22. Because the statute there established the same rule for union and non-union employees, "Any difference in the ease of establishing alternative severance payment obligations, however, flows not from the statute, but from the basic fact that a nonunion employer is freer to set employment terms than is a unionized employer." Id. at 22, n. 15.

The most important decision bearing on the "opt-out" provision here is *Livadas*, *supra*. While the LMRA "cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law," 512 U.S. 107, 123,[11/] the Court made it clear that a "state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." Id. at 116. So here, while the HWO as a whole clearly comes within these "nonnegotiable rights conferred on individual employees as a matter of state law," the opt-out provision deprives certain employees of those benefits, predicated "on refraining from conduct protected by federal labor law."

11/ *Citing* *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206, and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

None of the parties here have addressed the actual holding of *Livadas*. Plaintiffs and their *amici* dwell on the alleged effect of the HWO on their own businesses, and the advantages in bargaining it supposedly gives a union. But as *Livadas* made clear, this is the permissible basis for all such basic labor standards, as "Congress is understood to have legislated against a backdrop of generally applicable legal standards" in enacting the LMRA. 512 U.S. 107, 123 n. 17.

The City and Intervener UNITE-HERE focus on the "opt-out" statutes the Court distinguished in *Livadas*. 512 U.S. 107, 131-132. Simply reciting that they are "familiar," they fail to discuss the *basis* on which the Court distinguished those particular laws. Specifically, the Court distinguished these laws because:

> "virtually all share the important second feature observed in *[Fort Halifax Packing Company v.] Coyne*, that union-represented employees have the full protection of the minimum standard, absent any agreement for something different. These "opt out" statutes are thus manifestly different in their operation (and their effect on federal rights) from the Commissioner's rule that an employee forfeits his state-law rights the moment a collective-bargaining agreement with an arbitration clause is entered into." 512 U.S. 107, 131-132.

So the essential question which must be asked is whether, under the opt-out provision here, *do "union-represented employees have the full protection of the minimum standard, absent any agreement for something different?"* Id. This is the distinction between the "familiar and narrowly drawn opt-out provisions" distinguished by the Court, and opt-out provisions which must be preempted under the actual holding of *Livadas*.

For example, the provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o) referred to by the Court in *Livadas*, is the definition of "hours worked" for purposes of the statute. It does not deprive any employees of the protections of the FLSA, but simply refers to collective bargaining agreements to help measure those "hours worked." Another provision of the FLSA allows a menu of alternative schedules which can be adopted under a collective bargaining agreement, without incurring overtime liability. 29 U.S.C. §§ 207(b)(1) and 207(b)(2).

Similarly, various California laws allow something "different" to be negotiated in collective bargaining agreements, without giving up "the full protection of the minimum standard" provided non-union employees. For example, Cal. Labor Code § 514 allows an opt-out to the California requirement of

overtime after 8 hours a day,[12/] under a collective bargaining agreement which "provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage." As this Court noted in *Firestone v. So. Cal. Gas Co.*, 219 F.3d 1063, 1068 (9th Cir. 2000), this law "exempts only those who have bargained for an alternative overtime compensation scheme."[13/]

The essential feature of all these laws is that they are "narrowly drawn" to provide "something different" or an "alternative" schedule or way to measure compensation. None of them allow the basic labor standards to be simply given away entirely, without anything in return, no matter how "clear" the waiver may be. To allow such an opt-out without "something different" or "alternative" would destroy the underlying assumption that the collective bargaining parties "come to

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12/ Labor Code § 514 originally provided an opt-out from the entire "chapter" of labor standards. Taking to heart the statement in *Livadas* that these exceptions must be "narrowly drawn," 512 U.S. 107, 132, this was amended to clarify that the exception only applied to the overtime provisions of Labor Code §§ 510 and 511. Cal. Stats 2001 ch. 148 § 1. *See Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429, 41 Cal.Rptr.3d 482 (2nd Dist. 2006) (finding that an IWC Wage Order applying this exception to meal period standards of Labor Code § 512 was not authorized by the statutes, and therefore void.)

13/ While this Court there held that the exception of Labor Code § 514 itself was not preempted, it held that the claim of the plaintiffs was preempted, because "the collective bargaining agreement must be interpreted to determine whether the PPR document provides for overtime work and, therefore, whether California's overtime exemption applies, ..." 219 F.3d 1063, 1067.

the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21.

That is the problem with this opt-out provision. It is this "backdrop" to negotiations which employees represented by unions are denied. Whether the living wage is ultimately waived or not, employees represented by unions do not start from the same floor of negotiations as other employees. Unlike the other statutes mentioned in *Livadas*, this one is not "narrowly drawn" and does not have any requirement for negotiating "something different" or any "alternative." Rather, it allows the most basic term of employment - the minimum wage - to be waived completely, without any substitute, as long as it is "the waiver is explicitly set forth in that agreement in clear and unambiguous terms." HWO § 186.08.

So this is not even truly an "opt-out," but an unconditional waiver, by which "an employee forfeits his state-law rights." *Livadas*. 512 U.S. 107, 132. As noted in *Livadas*, such a "waiver," rather than bargaining for "something different" is at odds with state law categorically prohibiting such waiver of minimum wages - Cal. Labor Code § 1194(a). Id. at 128.[14/]

14/ The *Livadas* decision referred to the prohibition of waiver in Cal. Labor Code § 219, applicable to Labor Code §§ 201 and 203. Here it is Labor Code § 1194(a) which prohibits any agreement to waive the minimum wage applicable here; a provision which, as I pointed out earlier, was enacted with the original minimum wage law and has remained intact since then.

To put it another way, the valid "opt-out" laws merely allow the parties to move to a different place on the floor of labor standards, while the waiver provision here allows the floor to be entirely dropped out from under the employees, with nothing left to hold them up. This defeats the whole purpose of the HWO to provide a living wage "floor." By "singling out members of labor unions (or those represented by them) for disability" this provision is preempted. 512 U.S. at 129.

2. Allowing Only Union Benefits To Meet the Living Wage, Would Trigger Preemption by ERISA as Well as the LMRA

While the HWO does not require it, Intervener UNITE-HERE may argue that it can negotiate "something different" or an "alternative" to make up for the basic wage protection it has waived. What could possibly replace the most basic element of employment - the wage given the employee for her labor?

Perhaps it is suggested that a union can negotiate for benefits to replace the wage given up. Again, this is not even required by the HWO, and so it must be preempted. But if this "alternative" is read into the HWO, it would allow contributions to union benefit plans to count toward the minimum wage, but not

contributions to other benefit plans. This raises additional preemption problems, not only under the LMRA, but also under the Employee Retirement Income Security Act (ERISA) § 514, 29 U.S.C. § 1144.

This is precisely the type of "singling out" benefits under union agreements, or benefits provided through ERISA plans, which the courts had found preempted under both the LMRA and ERISA. *See, e.g.*, *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1129 (9th Cir. 1991) (finding California mechanic lien preempted to collect benefits to union ERISA funds). Only when it was pointed out that these laws treated union and non-union compensation equally, and benefits through ERISA funds and benefits provided otherwise equally, were those cases overturned. *See Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920 (9th Cir. 2001) (overturning *Sturgis*); *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 8 Cal.Rptr.3d 259, 82 P.3d 286 (2003) (finding mechanic lien remedies not preempted, in light of amendment to law discussed below). *See also*, *California Div. of Labor Standards Enforcement v. Dillingham Const.*, 519 U.S. 316, 117 S. Ct. 832, 842, 136 L. Ed. 2d 791 (1997) (apprenticeship portion of California prevailing wage law is not preempted, because it functions "irrespective of the existence of an ERISA plan").

In particular, I drafted legislation to make clear that the purpose of the

mechanic lien, stop notice and bond laws is to protect the "just pay" due workers, "without discrimination as to the manner in which the pay is allocated, whether union or nonunion, in cash or a combination of cash and benefits." Cal. Stats. 1999, ch. 795 § 9. *See also* current Cal. Civil Code § 8024(c) (purpose of law is "to give effect to the longstanding public policy of this state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which that compensation is to be paid.") Based on this amendment, and particularly this declaration of purpose, the California Supreme Court found the mechanic lien law was not preempted. *Betancourt*, *supra*. *See also*, *Standard Industrial*, *supra* (finding California stop notice and payment bond remedies not preempted, because they were part of an "integrated" statutory scheme allowing recovery of all compensation on a public works).

This Court has also dealt with this issue in the context of prevailing wages on public works jobs in California. Originally, California had a "line item" method of calculating the minimum "per diem" compensation, whereby the employer was either required to pay the entire prevailing wage in cash, or pay "line by line" specific amounts for specific benefits (health, pension, etc.), which were based on union benefit plans governed by ERISA. The Northern District of California entered an injunction against enforcing the "line item" prevailing wage. *WSB*

Elec., Inc. v. Curry, 1990 WL 251009, 1 (N.D.Cal. No.s Nos. C 90-0771 JPV, C 90-1109 JPV) (N.D.Cal.,1990). This Court dismissed an appeal of that order as moot, after a new "two-tier" approach was adopted. *J.R. Roberts Corp. v. Curry*, 972 F.2d 1340 (9th Cir. 1992) (table). Under the "two-tier" approach (still in effect), an employer can either pay the prevailing wage all in cash, or a base level of cash plus any combination of cash and allowable benefits, which do not need to be union benefits or benefits provided through ERISA plans. *See* Cal. Labor Code § 1773.1. When the case came back up, this Court found that this new approach was *not* preempted. *WSB Elec., Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). This holding turned on the finding that the "two-tier" system "does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all." 88 F.3d 788, 793.

What is suggested here is that an employer can satisfy the HWO either by paying the full living wage in cash, or by a combination of cash and contributions to union benefit funds, governed by ERISA. But contributions to non-union, non-ERISA plans cannot count towards the living wage. This would threaten to have the entire HWO preempted, for the same reasons as California's mechanic lien, stop notice and prevailing wage laws were held preempted before it was made clear

they did not "single out" union employees or ERISA plans for separate treatment. Therefore, I urge that this justification for the opt-out provision (which is not even in its explicit language) be rejected. If the City wishes to allow the living wage to be met by providing health or other benefits, it can do so by adding a non-discriminatory "two-tier" system, as was approved by this Court in *WSB*.

3. The "Unilateral Change" Rule in the Opt-Out Provision Is Preempted as "Arguably Prohibited" Under the *Garmon* Line of Preemption.

Plaintiffs attack the prohibition of "unilateral implementation" of the opt-out,[15/] as itself preempted because it supposedly places them in a "double bind." Defendant City and Intervener UNITE-HERE correctly point out that this is merely declaratory of federal law prohibiting unilateral changes in wages without bargaining. NLRA §§ 8(a)(5) and 8(d), 29 U.S.C. §§ 158(a)(5) and 158(d). But the fact that the HWO purports to regulate activity "arguably prohibited" by the NLRA itself raises additional preemption issues.

Under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), if activity is arguably prohibited or arguably

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15/ "Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of all or any part of the provisions of this article." HWO § 186.08.

protected by the NLRA, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Because the "precise conduct in controversy was arguably prohibited by federal law" *Garmon* preemption applies, "and therefore state jurisdiction was pre-empted." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 192, 98 S. Ct. 1745, 1755, 56 L. Ed. 2d 209 (1978). The City of Los Angeles simply cannot adjudicate the same issues over which the National Labor Relations Board has primary jurisdiction, even if its ordinance is supposedly parallel to federal law. "[T]he *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986).

This is another reason why the opt-out provision, and only the opt-out provision, is preempted by federal law. To avoid these issues, the opt-out provision should be severed from the rest of the HWO.

C. PREEMPTION OF THE OPT-OUT PROVISION DOES NOT SUPPORT A PRELIMINARY INJUNCTION

Finding that the "opt-out" provision of the HWO is preempted does not mean that injunctive relief should be granted as to all, or any part, of the HWO. "There is no suggestion" that federal labor law was meant to disturb much-needed "minimum labor standards" such as the HWO as a whole. *Metro. Life Ins.*, *supra*, 471 U.S. 724, 756.

Under the "Severability" clause in Section 186.13 of the HWO, "If any provision of this article is found invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect." So the opt-out provision can be easily severed, without disturbing the rest of the HWO.

Even as to a severed opt-out provision by itself, there is no basis for a preliminary injunction. A preliminary injunction requires, not only a likelihood of success, but a showing of "irreperable harm" a "balance of hardships" and the effect on the "public interest." *Winter v. Natural Resources Defense Council, Inc.*, 55 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). As discussed above, the Plaintiffs, as employers, suffer no cognizable harm at all from the opt-out provision, and thus their very standing to ask for an injunction is questionable.

Any balance of hardships must take into consideration the fact that bargaining parties have already been operating under the assumption that they can opt-out of the living wage. To retroactively impose the unexpectedly-higher wage would wreak much more havoc on the bargaining process than the HWO itself.

The public interest also calls for allowing the City and any bargaining parties to account for the living wage provided by the HWO, without the opt-out. This can be in the form of a "grandfather clause" common in such legislation that allows the parties to bargain collectively before any change goes into effect. *See*, *e.g.*, 42 U.S.C. § 18011(d), putting off certain requirements of the Patient Protection and Affordable Care Act for health plans maintained pursuant to collective bargaining agreements "ratified before March 23, 2010." The City may also want to consider a "two-tier" system of benefits allowed to meet the living wage minimum, as in California prevailing wage law. In any case, it should be up to the City to decide on its own legislative response, not the courts.

For the same reason I argue against the opt-out provision, I argue against injunctive relief. None of the workers covered by the HWO should be denied its protections. Period.

III. CONCLUSION

All of the preceding is but a long way of saying that the living wage floor should apply to ALL workers, to raise their standards from the bottom-up. The arguments I have attempted to set forth here have been more eloquently stated by Esperanza (played by Rosaura Revueltas) to her union-president husband (played by Juan Chacon) in the blacklisted movie, *Salt of the Earth* (Independent Production Company 1954), with which I conclude:

> "*I don't want anything lower than I am. I'm low enough already. I want to rise. And push everything up with me as I go ...*"

Respectfully submitted,

Dated: September 25, 2015

J. DAVID SACKMAN,

By: /s J. David Sackman
J. DAVID SACKMAN
Attorney for Amicus J. David Sackman

CERTIFICATE OF COMPLIANCE

Fed. R. App. P. 32(a); Circuit Rule 32-1

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6760 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally-spaced typeface using Word Perfect X6, with Times New Roman 14 font.

Dated: September 25, 2015 J. DAVID SACKMAN,

By: /s J. David Sackman
J. DAVID SACKMAN
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CURRENT PRACTICE:

REICH, ADELL & CVITAN (*Formerly Reich, Adell, Crost & Cvitan*)
A Professional Law Corporation: 1988 to Present

Joined as an Associate in 1988. Became a Principal in 1994.
• Representing Unions, Union Trust Funds, Individual Employees and Classes of Employees, in a variety of matters involving labor law, including the Employee Retirement Income Security Act, Fair Labor Standards Act, California Labor Code (Wage & Hour cases), and National Labor Relations Act.
• Clients have included Construction Laborers, Teamsters, Writers Guild of America, and trust funds associated with each, and advocacy groups such as Korean Immigrant Workers Advocates.
• Litigation has included pretrial and trial in Federal and State Courts (including Class Actions), Arbitrations, and Administrative Hearings and Appeals.
• Appellate work has included Appeals to California Courts of Appeals, California Supreme Court, Ninth Circuit Court of Appeals and the U.S. Supreme Court. (See Sample Decisions Argued).
• Practice also includes drafting legislation and commenting on legislative proposals (See Sample Legislative Advocacy); and presentations (in English and Spanish) to, or on behalf of, clients regarding employment rights.

PROFESSIONAL AFFILIATIONS:

Section of Labor and Employment Law, American Bar Association
Labor and Employment Law Section, California Bar Association
Labor and Employment Law Section, Los Angeles Bar Association
International Foundation of Employee Benefit Plans
AFL-CIO Lawyers Coordinating Committee
California Faculty Association

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EDUCATION:

Juris Doctor : 1982
BOALT LAW SCHOOL
UNIVERSITY OF CALIFORNIA, BERKELEY
Unpublished Graduate Thesis: *Legal Issues in "Social" Investment Strategies of Collectively-Bargained Private Pension Funds*
Research Editor, Industrial Relations Law Journal (now Berkeley Journal of Employment & Labor Law)

Bachelor of Arts : 1978
COMMUNITY STUDIES
UNIVERSITY OF CALIFORNIA, SANTA CRUZ
Just Like Other Unions? A Comparative Analysis of the United Farm Workers, United Auto Workers and Hawaiian Plantation Workers, Unpublished Senior Thesis, Highest Honors
Highest Honors in Stevenson College, Highest Honors in Community Studies Major

TEACHING AND SPEAKING EXPERIENCE:

Assistant Professor - California State University, Dominguez Hills
Labor Studies 412, Introduction to Labor Law
Televised and Web course offered annually through the Distance Learning Program, 2008-2012.
This course includes a legal history of the American labor movement, and covers federal and state laws regulating employment, collective bargaining, contract clauses, arbitration, collective actions, lockouts, unfair labor practices and fair employment practices. This course provides an introduction to what is today called "Labor and Employment Law," broadly defined as the legal relations between employer and employee. The subject is presented through the history of Labor and Labor Laws (both statutory and case law) in California. The emphasis is on California as the testing ground and bellwether of labor issues for the nation as a whole. This is an interdisciplinary course, examining the economic, social and political forces which have shaped modern labor law.

High School Teacher - Arete Preparatory Academy
U.S. History, 2012-2013; Government and Law, 2013-2014
The U.S. History class traced the history of the United States, from Conquest through approximately the first half of the Twentieth Century, with an emphasis on the competing ideas which shaped our current society. The Government and Law class explores the theoretical basis for the U.S. Government, and a practical introduction to the actual workings of government. Both classes include a mock trial and a real legislative session, in which students may alter the rules of the school.

Speaking experience also includes numerous seminars and presentations to professional groups on issues within his expertise, including presentations to*:* American Bar Association, Section of Labor & Employment Law, Employee Benefits Committee (*topics have included issues of Federal Preemption of state laws*); International Foundation of Employee Benefit Plans *(topics have included Collection of Contributions and Alter-Ego Theories)* AFL-CIO Lawyers Coordinating Committee *(topics have included ERISA Remedies and Wage & Hour Class Action Litigation).*

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PRIOR LEGAL EMPLOYMENT:

ROGER FROMMER & ASSOCIATES : 1987-1988
Los Angeles, California
Represented Union Trust Funds in collection of benefit contributions.

CALIFORNIA RURAL LEGAL ASSISTANCE : 1984-1987
MIGRANT WORKER PROJECT
El Centro, and other rural areas of California
Represented Migrant Farm Workers in Labor, Education, Immigration and Health issues. Work included impact litigation, community education, and counsel to migrant parent groups and commuter alien organization.

CARDENAS & FIFIELD : 1983-1984
El Centro, California
Represented aliens and citizens in INS deportation and exclusions hearings at the El Centro Detention Center, and represented employees in wrongful discharge and discrimination suits.

CALIFORNIA TEACHERS ASSOCIATION : 1982-1983
Burlingame and Los Angeles, California
Drafted PERB and Appellate briefs for the Legal Department

NATIONAL LABOR RELATIONS BOARD : 1981
Region 31 - Oakland, California
Field Agent

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD : 1980-1981
San Francisco, California
Law Clerk to Administrative Law Judges

SAMPLE OF OTHER EMPLOYMENT AND VOLUNTEER ACTIVITY

UNITED FARM WORKERS OF AMERICA (1976-1977)
Full-time volunteer in boycott, field offices, administration, and political activities

AMERICAN FEDERATION OF STATE COUNTY & MUNICIPAL EMPLOYEES LOCAL 1728 (1978)
Part-time, paid organizer for Local representing University of California employees

LABOR SUPPORT GROUP OF SANTA CRUZ (1977-1979)
Founder and organizer of local group to coordinate community support for various unions

WALNUT LANE HOMEOWNERS ASSOCIATION (1994 to Present)
President 1994 to Present; Treasurer 1994 to 2008

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J. DAVID SACKMAN, ESQ.

SAMPLE PUBLICATIONS:

Lucile Eaves and J. David Sackman, A HISTORY OF CALIFORNIA LABOR LEGISLATION : REVISED AND UPDATED CENTENNIAL EDITION (Queen Calafia Publishing 2012) (originally published by UC Press in 1910)

Editor and Author of additional material. For additional information, go to: www.queencalafiapublishing.com/a-history-of-california-labor-legislation.html

EMPLOYEE BENEFITS LAW (2005 through 2008 Supplements), published by BNA Books and American Bar Association, *Contributing Editor - Chapter 11*

Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds
20 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 254-285 (Summer 1999)

Peering into the Black Hole of Bankruptcy
22 EMPLOYEE BENEFITS JOURNAL No. 2 at 22 (June 1997)

Carrion Eaters: How the Bankruptcy Business Feeds on Workers and the Public
8 VILLAGE VIEW No. 2, at 4 (8/13/93)

National Origin and Alien Status Discrimination After the Immigration Reform and Control Act of 1986
5 CALIFORNIA LABOR & EMPLOYMENT LAW QUARTERLY No. 5, at 22 (Spring 1987)

WORKS IN PROGRESS:

J. David Sackman: A HISTORY OF CALIFORNIA LABOR LAW II: 1910-2010 (Queen Calafia Pub. 2015?)

A Sequel to Eaves and Sackman, supra, following the development of labor law alongside of labor history in California from the Progressive Era to the present.

VITAE

J. DAVID SACKMAN, ESQ.

SAMPLE DECISIONS ARGUED:

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 55 Cal. 4th 1083, 150 Cal.Rptr.3d 501, 290 P.3d 1116 (Cal. 2012)
(Argued as Amicus Curiae) California's little "Norris-LaGuardia Act," establishing strict requirements before courts may issue injunctions in labor cases, does not violate the First Amendment of the U.S. Constitution.

Gomez v. Rossi Concrete, Inc., 270 F.R.D. 579 (S.D. Cal. 2010)
Class action certified for failure to pay prevailing wages and for fiduciary breaches to pension plan established to meet prevailing wage requirements.

Aguilar v. Mega Lighting, Inc.,
2009 WL 940941, 14 Wage & Hour Cas.2d 1290 (C.D. Cal. 2009, Docket No. CV 08-07313 DDP)
Wage and hour complaint for mostly immigrant landscape workers sufficiently alleged jurisdiction and claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act, for fraudulent payrolls sent by employer to hide minimum and prevailing wage violations.

Trustees of the Southern California IBEW-NECA Pension Trust Fund v. Flores
519 F.3d 1045 (9th Cir. 2008)
Subcontractor working on a project covered by a Project Labor Agreement is responsible to pay benefit contributions for non-union as well as union employees, from the date work begins.

Trustees of the Southern California Bakery Drivers Security Fund v. Middleton,
474 F.3d 642 (9th Cir.), *cert. denied*, 128 S.Ct. 378 (2007)
Trustees of trust fund that received payments from another trust fund, to provide benefits to second fund's participants, were fiduciaries as to the second fund, and could not use that money for their own trust fund.

Betancourt v. Storke Housing Investors,
31 Cal.4th 1157, 8 Cal.Rptr.3d 259, 82 P.3d 286 (Cal. 2003)
(Argued as Amicus Curiae) California mechanic lien law is not preempted by federal Employee Retirement Income Security Act.

continued . . .

VITAE

J. DAVID SACKMAN, ESQ.

SAMPLE DECISIONS ARGUED (*continued*):

Park v. Korean Immigrant Workers Advocates,
2002 WL 938274 (CA 2nd Dist. 2002) (Not Officially Reported)
Complaint by restaurant owner against worker advocates who picketed restaurant for failure to pay wages should have been stricken under "Anti-SLAPP" statute, since picketing was protected speech.

Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Co.,
247 F.3d 920 (9th Cir. 2001)
California stop notice and payment bond remedies on public works not preempted by federal Employee Retirement Income Security Act.

In re World Sales, Inc.,
183 B.R. 872 (9th Cir. BAP 1995)
Benefit contributions due for work performed at time bankruptcy was filed has priority over other creditors as an administrative expense, including liquidated damages and attorney fees.

Marino v. Writers Guild of America,
992 F.2d 1480 (9th Cir.), *cert. denied*, 510 U.S. 978 (1993)
(with Mel Reich) Upheld Writers Guild arbitration for screen credits of Godfather III movie.

SAMPLE LEGISLATIVE ADVOCACY:

Comments and Advocacy before California Law Review Commission
Mechanic Lien Revision Project (SB 189), enacted as Stats 2010, ch. 697.

Drafted SB914, passed as Ch. 795, Stats 1999
Revision of Mechanic Lien statutes to include benefit contributions as part of protected compensation for laborers.

Drafted original version of "wage-theft" bills: AB1164 (Lowenthal 2013), resubmitted AB2416 (Stone 2014)
The original version would have restored wage liens for all workers in California, eliminated by Governor Brown in 1979. I did not draft, and oppose, amendments which weakened these bills.

9th Circuit Case Number(s) 15-55909

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I hereby certify that 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 appellate CM/ECF system on (date) Sep 25, 2015 .

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