

---

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE

Plaintiff-Appellant,

v.

MILWAUKEE COUNTY,

Defendant-Appellee

---

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

CASE NO. 01-C-0149

THE HONORBLE JUDGE LYNN ADELMAN

---

BRIEF FOR NATIONAL LABOR RELATIONS BOARD  
AS AMICUS CURIAE IN SUPPORT OF REVERSAL

---

ARTHUR F. ROSENFELD  
*General Counsel*

JOHN E. HIGGINS, JR  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

ABBY PROPIS SIMMS  
*Supervisory Attorney*

JASON WALTA  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2930

## TABLE OF CONTENTS

	<u>Page(s)</u>
STATEMENT OF AMICUS CURIAE’S INTEREST.....	1
BACKGROUND .....	2
A.    The NLRA Creates an Integrated Scheme for the Resolution of Representation Disputes.....	2
B.    Chapter 31 Binds Covered Employers to Participate in an Alternative Union-Recognition Scheme.....	5
ARGUMENT .....	9
CHAPTER 31 IS A REGULATORY SCHEME THAT CONFLICTS WITH NATIONAL LABOR POLICY AND IS THEREFORE PREEMPTED BY THE NLRA .....	9
A.    Applicable Preemption Principles .....	10
B.    Chapter 31 is a Regulatory Enactment, Not the Proprietary Act of a Market Participant .....	11
1.    The district court misapplied the preemption analysis by subjecting Chapter 31 to minimal scrutiny .....	16
2.    Properly scrutinized, Chapter 31 fails to serve the County’s purely proprietary interests .....	18
3.    Chapter 31 is not specifically tailored to achieve a purely proprietary purpose .....	24
C.    Stripped of Any Proprietary Immunity, Chapter 31 is Subject to Preemption Because it Conflicts with the NLRA .....	27
1.    Chapter 31 impermissibly creates additional sanctions for unfair labor practices.....	27
2.    Chapter 31 improperly conflicts with the Board’s regulation of union election procedures.....	29
3.    Chapter 31 regulates matters left deliberately unregulated for reasons of federal labor policy .....	30
CONCLUSION .....	34

## TABLE OF AUTHORITIES

Cases	<u>Page(s)</u>
<i>Bethlehem Steel Co. v. N.Y. State Labor Relations Board</i> , 330 U.S. 767 (1947).....	31
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964) .....	2
<i>Brown v. Hotel Employees</i> , 468 U.S. 491 (1984) .....	10,28
<i>Building &amp; Construction Trades Council v. Associated Builders &amp; Contractors of Mass./R.I., Inc.</i> , 507 U.S. 218 (1993).....	passim
<i>Building &amp; Construction Trades Department v. Allbaugh</i> , 295 F.3d 28 (D.C. Cir. 2002), <i>cert. denied</i> , 537 U.S. 1171 (2003).....	21,26
<i>Bus Employees v. Missouri</i> , 374 U.S. 74 (1963) .....	31
<i>Cardinal Towing &amp; Auto Repair, Inc. v. Bedford</i> , 180 F.3d 686 (5th Cir. 1999).....	14,15,16,19
<i>Chamber of Commerce v. Lockyer</i> , 364 F.3d 1154 (9th Cir. 2004) ( <i>petitions for reh'g filed May 18, 2004</i> ).....	passim
<i>Chamber of Commerce v. Reich</i> , 74 F.3d 1322 (D.C. Cir. 1996) .....	24,25
<i>Colfax Corp. v. Ill. Toll Highway Authority</i> , 79 F.3d 631 (7th Cir. 1996) .....	11,19,25
<i>Excelsior Underwear, Inc.</i> , 156 NLRB 1236 (1966) .....	29
<i>General Shoe Corp.</i> , 77 NLRB 124 (1948) .....	3
<i>Golden State Transit Corp. v. Los Angeles</i> , 493 U.S. 103 (1989) .....	10,13,31
<i>H.K. Porter Co. v. NLRB</i> , 397 U.S. 99 (1970).....	33

Cases~Cont'd:	<u>Page(s)</u>
<i>Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC</i> , 390 F.3d 206 (3rd Cir. 2004) petition for cert. filed, (04-1216) (U.S. Mar. 7, 2005) .....	16,17,19
<i>Legal Aid Society v. New York</i> , 114 F.Supp.2d 204 (S.D.N.Y. 2000) .....	20
<i>Linden Lumber Division v. NLRB</i> , 419 U.S. 301 (1974).....	31
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53 (1966).....	3
<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994) .....	10
<i>Machinists v. Wis. Employment Relations Commission</i> , 427 U.S. 132 (1976).....	11,32,33
<i>Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County</i> , 359 F.Supp.2d 749 (E.D.Wis. 2005) .....	passim
<i>Midland National Life Insurance Co.</i> , 263 NLRB 127 (1982) .....	30
<i>NLRB v. Insurance Agents</i> , 361 U.S. 477 (1960) .....	32
<i>NLRB v. Lovejoy, Indus., Inc.</i> , 904 F.2d 397 (7th Cir. 1990).....	30
<i>Peerless Plywood Co.</i> , 107 NLRB 427 (1953).....	29
<i>Pennsylvania Nurses Association v. Penn. State Education Association</i> , 90 F.3d 797 (3rd Cir. 1996) .....	28
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	10,11,28
<i>Snow &amp; Sons</i> , 134 NLRB 709 (1961), enforced, 308 F.2d 687.....	33
<i>Swaback v. American Information Techs. Corp.</i> , 103 F.3d 535 (7th Cir. 1996) .....	9

Cases-Cont'd:	<u>Page(s)</u>
<i>UAW-Labor Employment &amp; Training Corp. v. Chao</i> , 325 F.3d 360 (D.C. Cir. 2003), <i>cert. denied</i> , 541 U.S. 987 (2003).....	24
<i>Wis. Department of Industry v. Gould Inc.</i> , 475 U.S. 282 (1986).....	passim

**Statutes:**

National Labor Relations Act, as amended (29 U.S.C. § 151, <i>et seq.</i> ):	
Section 7(29 U.S.C. § 157).....	2,3,11,28
Section 8(29 U.S.C. § 158).....	3,11,28
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	27
Section 8(b)(7)(29 U.S.C. § 158(b)(7)) .....	2,31,32
Section 8(b)(1)(A)(29 U.S.C. § 158(b)(1)(A)) .....	27
Section 8(c) (29 U.S.C. § 158(c)).....	3,32
Section 8(d) (29 U.S.C. § 158(d)).....	33
Section 8(e) (29 U.S.C. § 158(e)).....	11,21
Section 8(f) (29 U.S.C. § 158(f)).....	11,21
Section 8(g) (29 U.S.C. § 158(g)).....	3,32
Section 9 (29 U.S.C. § 159).....	3,28

**Legislative Materials:**

S.842, H.R.1696, 109th Cong (2005). .....	4
S.2467, 95th Cong. (1978). .....	4
H.R.8410, 95th Cong. (1977) .....	4
S. Rep. No. 80-105 (1947) .....	32

**Miscellaneous:**

Federal Rule of Appellate Procedure 29(a) .....	2
---	---

Miscellaneous-Cont'd:	<u>Page(s)</u>
Chapter 31 of the General Ordinances of Milwaukee County.....	passim
Gen. Ord. §31.01 .....	8
Gen. Ord. §31.02(a) .....	5
Gen. Ord. §31.02(f).....	5,30
Gen. Ord. §31.02(f)(1).....	6,30
Gen. Ord. §31.02(f)(2).....	7
Gen. Ord. §31.02(f)(3).....	6,29
Gen. Ord. §31.02(f)(4).....	6
Gen. Ord. §31.02(f)(5).....	7,30
Gen. Ord. §31.02(f)(6).....	7
Gen. Ord. §31.02(f)(7).....	6,28,29
Gen. Ord. §31.02(g) .....	8
Gen. Ord. §31.03 .....	5,6,24
Gen. Ord. §31.03(a) .....	5,7,30
Gen. Ord. §31.03(b) .....	7,28
Gen. Ord. §31.04(a) .....	7
Gen. Ord. §31.04(b) .....	8
Gen. Ord. §31.05(a)(1) .....	8,28
Gen. Ord. §31.05(a)(2) .....	8
Gen. Ord. §31.05(c).....	22
Alan Hyde, <i>Beyond Collective Bargaining: The Politicization of Labor Relations</i> <i>Under Government Contract</i> , 1982 Wis. L. Rev. 1 (1982) .....	18
Julius G. Getman, et al., <i>Union Representation Elections: Law and Reality</i> (1976) .....	4
Paul C. Weiler, <i>Promises to Keep: Securing Workers' Rights to Self-Organization</i> <i>Under the NLRA</i> , 96 Harv. L. Rev. 1769 (1983) .....	4
Roger C. Hartley, <i>Non-Legislative Labor Law Reform and Pre-Recognition Labor</i> <i>Neutrality Agreements: The Newest Civil Rights Movement</i> , 22 Berkeley J. Emp. & Lab. L. 369 (2001).....	4

## STATEMENT OF AMICUS CURIAE'S INTEREST

The National Labor Relations Board (the “Board”) is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, as amended (“NLRA”), 29 U.S.C. §151 *et seq.* The Board’s statutory office is two-fold: first, to conduct secret ballot elections in which employees decide whether to be represented by a labor organization; and, second, to regulate the conduct of employers and unions that has a reasonable tendency to impair employee free choice.

As the federal agency charged with enforcing the national labor policy advanced by the NLRA, the Board respectfully submits this amicus-curiae brief to set forth its position regarding plaintiff-appellant’s federal preemption challenge to Chapter 31 of the General Ordinances of Milwaukee County (“Chapter 31”). The Board (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting) concluded that Chapter 31 is preempted by the NLRA because it is a regulatory enactment that interferes with the Board’s administration of the NLRA and trenches upon conduct that Congress intended to leave unregulated.

The Board is authorized to file an amicus-curiae brief under Federal Rule of Appellate Procedure 29(a).

## BACKGROUND

### A. The NLRA Creates an Integrated Scheme for the Resolution of Representation Disputes

The NLRA was enacted in 1935 in large part because Congress wished to promote the free flow of commerce by providing an administrative mechanism for peacefully and expeditiously resolving questions concerning union representation. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). To that end, the NLRA provides an integrated scheme of rights, protections, and prohibitions governing the conduct of employees, employers, and unions during union organizing campaigns and representation elections.

Section 7 of the NLRA, 29 U.S.C. §157, affords employees the right “to self-organization” and “to form, join, or assist labor organizations,” as well as the right “to refrain from ... such activities.” Although Section 7 generally assures employees’ rights to strike, picket, and engage in certain other forms of economic pressure, Congress has also mandated explicit limitations and exceptions with respect to those rights. *See, e.g., id.* §8(b)(7) (prohibiting certain forms of organizational picketing); *id.* §8(g) (requiring special notice before a union may strike or picket at a health care institution).

Section 8 of the NLRA, *id.* §158, creates a network of prohibitions on employer and union conduct that restrains employees in the exercise of their

Section 7 rights. However, “to encourage free debate on issues dividing labor and management,” *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966), Congress enacted Section 8(c), which provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit,” 29 U.S.C. §158(c).

Section 9 of the NLRA, *id.* §159, sets up an administrative framework governing all aspects of the union recognition process, including the election machinery for determining and certifying employees’ decisions on unionization. Pursuant to Section 9, the Board may regulate employer and union conduct that is prejudicial to a fair election, even if such conduct is not prohibited by Section 8. *General Shoe Corp.*, 77 NLRB 124, 126 (1948).

Critics of the NLRA, however, have long complained that the federal law should be amended because it allows employers an undue opportunity to influence employees to reject unionization. Among the proposals have been amendments granting unions greater access to employees<sup>1</sup> and authorizing alternatives to Board secret ballot elections as a means of obtaining

---

<sup>1</sup> Julius G. Getman, et al., *Union Representation Elections: Law and Reality* 156-59 (1976).

recognition as the employees' exclusive bargaining representative.<sup>2</sup> Various amendments were proposed to Congress in 1977 and 1978 but, after much controversy, they failed to be enacted.<sup>3</sup> Since that time, there have been efforts by unions to achieve similar goals through self-help measures. Chief among them is the movement to persuade employers to enter into so-called "union recognition agreements," in which employers pledge not to oppose the unionization of their employees and to agree to recognize a union without a Board-conducted election.<sup>4</sup>

---

<sup>2</sup> Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1805 (1983).

<sup>3</sup> Labor Reform Act of 1977, S.2467, 95th Cong. (1978); H.R.8410, 95th Cong. (1977). More recently, advocates of amending the NLRA have introduced the Employee Free Choice Act, S.842, H.R.1696, 109th Cong. (2005). Among other things, that proposed legislation would require the Board to certify a union as the collective-bargaining representative if it finds that a majority of employees in an appropriate bargaining unit have signed authorization cards designating the union as their representative.

<sup>4</sup> Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 Berkeley J. Emp. & Lab. L. 369, 374-88 (2001).

**B. Chapter 31 Binds Covered Employers to Participate in an Alternative Union-Recognition Scheme**

On September 28, 2000, the Milwaukee County Board of Supervisors enacted Chapter 31 of the General Ordinances of Milwaukee County, entitled “Responsibility of Certain County Contractors to Reduce the Likelihood of Labor Disputes,” which became effective on November 7, 2000.

Chapter 31 applies to employers providing certain human services to the County, where the aggregate value of those services is at least \$250,000. Gen. Ord. §31.02(a). County contracts with covered employers must include a term under which the employer agrees to “[e]nter into a labor peace agreement ... with a labor organization *which requests such an agreement* for the conduct of a campaign in which it seeks to represent the employer’s employees in an appropriate bargaining unit.” *Id.* §§31.03, 31.03(a) (emphasis added).

In any labor peace agreement (“LPA”) requested by a union, the employer must agree, “at minimum,” to certain specified terms. *Id.* §31.02(f). One of the required terms is that “[t]he employer and the labor organization agree to language and procedures prohibiting the employer or the labor organization from coercing or intimidating employees, explicitly or implicitly,

in selecting or not selecting a bargaining representative.” *Id.* §31.02(f)(7).

Other required terms include the employer’s agreements to:

- provide the union with “a complete and accurate list of the names, addresses and phone numbers of the employees of the employer working within the appropriate bargaining unit,” *id.* §31.02(f)(3);<sup>5</sup>
- refrain from requiring any employee, “individually or in a group, ... to attend a meeting or event that is intended to influence his or her decision in selecting or not selecting a bargaining representative,” *id.* §31.02(f)(7);
- provide to the union’s “members and representatives timely and reasonable access to the workplace for the purpose of providing employees with information about” the union, *id.* §31.02(f)(4); and
- refrain from “express[ing] to employees false or misleading information that is intended to influence the determination of employee preference regarding union representation,” *id.* §31.02(f)(1).

These requirements are intended, in part, “to accommodate a free and informed decision of the employees ... as to whether or not they wish to be represented by a labor organization.” *Id.* §31.03.

---

<sup>5</sup> For purposes of this section, the “appropriate bargaining unit” includes only “those employees whose work results from or has some tangible relationship to the provision of contractual services purchased by Milwaukee County.” Gen. Ord. §31.02(f)(3). Disputes over the “scope or composition” of the bargaining unit must be submitted to binding arbitration. *Id.*

The required LPA places conditional restrictions on the organizing union as well. The principal limitation is that a union requesting an LPA must agree “to forbear[] from economic action against the employer at the work site of an organizing drive.” *Id.* §31.02(f)(6). That no-strike pledge, however, applies “in relation to an organizing campaign *only*,” and not to strikes over “terms of a collective bargaining agreement.” *Id.* (emphasis added); *see also id.* §31.04(a) (exempting from the union’s no-strike pledge “economic action ... for purposes other than organizing the employer’s employees”). The union must also agree not to “misrepresent to employees the facts and circumstances surrounding their employment.” *Id.* §31.02(f)(2). As noted above, these restrictions apply only if the union elects to invoke Chapter 31, *id.* §31.03(a), so that a union may avoid any limitations by simply foregoing a demand that the employer negotiate an LPA.

Chapter 31 further provides that if the parties cannot agree on the terms of an LPA, they “must enter into final and binding arbitration” in which the terms of an agreement “will be imposed by an arbitrator.” *Id.* §31.03(b). “All disputes over interpretation or application” of LPAs are also subject to “final and binding arbitration.” *Id.* §31.02(f)(5).

If, through arbitration, a determination is made that a covered employer has violated Chapter 31, the County may “[t]erminate or cancel” its existing contract with the employer or “refuse to accept subsequent proposals or award a subsequent contract.” *Id.* §31.05(a)(1),(2). An arbitrator’s determination that a union has violated the terms of an LPA allows the covered employer to repudiate its own obligations under the LPA. *Id.* §31.04(b).

The ordinance disclaims any interest in “provid[ing] an advantage to either labor or management during the conduct of a union organizing campaign ... or to regulate those relations in any way.” *Id.* §31.01. Instead, Chapter 31 purports to protect the County’s “proprietary interest” in preventing disruptions in the provision of human services to residents to the extent such disruptions are caused by “labor/management conflict or consumer boycotts potentially resulting from a union organizing campaign.” *Id.* at §31.02(g).

## ARGUMENT

### CHAPTER 31 IS A REGULATORY SCHEME THAT CONFLICTS WITH NATIONAL LABOR POLICY AND IS THEREFORE PREEMPTED BY THE NLRA

The paramount issue on appeal is whether the County is free to mandate that employers accept an alternative, non-NLRA regulatory system for union recognition as a condition of receiving certain government contracts. The answer, we submit, is that the County lacks such authority. Chapter 31, while ostensibly about ensuring the uninterrupted receipt of certain services purchased by the County, is actually an impermissible regulatory attempt to substitute a local version of labor policy for long-standing federal labor policy.

This Court reviews the district court's grant of summary judgment *de novo*. *Swaback v. American Info. Techs. Corp.*, 103 F.3d 535, 540 (7th Cir. 1996). Moreover, if this Court concludes that the district court's decision was in error, it may take the additional step of ruling on the appellant's cross-motion for summary judgment and, if appropriate, directing the district court to enter judgment in the appellant's favor. *Id.* at 543-44.

## A. Applicable Preemption Principles

“It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations.” *Wis. Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986). Although the NLRA contains no express preemption provision, state laws that conflict with the NLRA’s express provisions or its underlying goals and policies are preempted on the ground that they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives” of Congress. *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984) (internal quotation marks and citation omitted); *see also Livadas v. Bradshaw*, 512 U.S. 107, 120, 134-35 (1994) (holding a state policy preempted by conflict with rights implicit in the structure of the NLRA). Thus, principles of conflict preemption ordinarily restrict state and local governments from withholding benefits from persons in commerce if they engage in conduct that is either regulated by the NLRA, *see Gould*, 475 U.S. at 286, or deliberately unregulated for reasons of federal policy, *see Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989).<sup>6</sup>

---

<sup>6</sup> Although the general preemption principles “are no less applicable in the field of labor law,” *Brown*, 468 U.S. at 501, the Supreme Court has also recognized two preemption doctrines unique to NLRA, commonly known as *Garmon* preemption and *Machinists* preemption. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (holding that “[w]hen an activity

**B. Chapter 31 is a Regulatory Enactment, Not the Proprietary Act of a Market Participant**

As the Supreme Court recognized in *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227-32 (1993) (“*Boston Harbor*”), a threshold requirement for preemption is that the challenged action constitutes *regulation* of labor relations, rather than the *proprietary action* of a government acting as an ordinary market participant. *Accord Colfax Corp. v. Ill. Toll Highway Auth.*, 79 F.3d 631, 633 (7th Cir. 1996).

In *Boston Harbor*, the Supreme Court faced a preemption challenge to a state agency’s contractual requirement that all construction firms working on the Boston Harbor cleanup project become parties to a pre-hire collective-bargaining agreement, authorized by Section 8(e) and (f) of the NLRA, 29 U.S.C. §158(e),(f), which required the contractors to recognize a union council and compelled all employees to become union members. 507 U.S. at 221-22. The harbor cleanup had been mandated by a court order requiring that construction proceed without interruption and without delays from causes such as labor disputes. *Id.* at 221. At the recommendation of its

---

is arguably subject to §7 or §8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence” of the Board); *Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 147 (1976) (prohibiting regulation of those activities that have been left by federal labor policy “to be controlled by the free play of economic forces”).

general contractor, the agency imposed the pre-hire contracting requirement, common in the construction industry, in order to ensure that the project would be completed in accordance with the court's strict deadlines. *Id.*

The *Boston Harbor* Court began its analysis by recognizing that state and local governments often “must interact with private participants in the marketplace,” and that, when acting that proprietary capacity, they are immune from pre-emption by the NLRA “because pre-emption doctrines apply only to state *regulation*.” *Id.* at 227 (emphasis in original). The Court cautioned, however, that a government may not immunize its conduct from scrutiny simply by showing that a private employer *could* have acted in the same manner. As the Court explained, “[a] private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive,” yet such an actor “would be attempting to ‘regulate’ the suppliers and would not be acting as a typical proprietor.” *Id.* at 229. Thus, while the NLRA sometimes allows private parties to act as *de facto* regulators, the Court reaffirmed that state and local governments may not do the same. *Id.*

In order to preserve the necessary distinction between a government's market participation and its *de facto* regulation, the Court concluded that a

government entity would enjoy immunity from preemption only when it “acts as a market participant with *no interest in setting policy*.” *Id.* (emphasis added).

That is, preemption may be ruled out only where the government “pursues its *purely* proprietary interests.” *Id.* at 231 (emphasis added).<sup>7</sup>

Under that exacting standard, the Court found that the prehire contracting requirement was exempt from preemption. Crucial to the Court’s analysis was its conclusion that the purpose of the agency’s contracting requirement was “to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost.” *Id.* at 232.

For that reason, the Court found “no basis on which to distinguish the incentives at work here” from those that operate elsewhere in the private

---

<sup>7</sup> In so ruling, the Court clarified the boundary between proprietary and regulatory action that had been drawn in two prior cases. The Court explained in that in *Gould, supra*, it “rejected the argument that the State was acting as proprietor rather than regulator ... when the State refused to do business with persons who had violated the NLRA ... [b]ecause the statute at issue ... addressed employer conduct unrelated to the employer’s performance of contractual obligations to the State, and because the State’s reason for such conduct was to deter NLRA violations ....” 507 U.S. at 228-29. The Court also explained that in *Golden State, supra*, it “refused to permit the city’s exercise of its regulatory power of license nonrenewal to restrict [an employer’s] right to use lawful economic weapons in its dispute with its union,” but added that “had the city... purchased taxi services ... in order to transport city employees ... [it] would not necessarily have been pre-empted from advising [the employer] that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline.” 507 U.S. at 227-28.

sector. *Id.* Furthermore, the Court found that the challenged action “was specifically tailored to one particular job.” *Id.* In assessing the tailoring of the contracting requirement, the Court drew on the dissenting opinion of then-Chief Judge Breyer in the case below and observed that the agency “act[ed] just like a private contractor would act, and condition[ed] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find.” *Id.* at 233 (citations and quotations omitted). Thus, the Court concluded that the agency’s conduct did not “‘regulate’ the workings of the market forces that Congress expected to find,” rather, “it exemplifie[d] them.” *Id.*

The ultimate teaching of *Boston Harbor* is that, when faced with an assertion of immunity under the market-participant doctrine, a court must distinguish ordinary regulation from a protected class of genuine proprietary action that, as the Fifth Circuit aptly stated, is “so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.” *Cardinal Towing & Auto Repair, Inc. v. Bedford*, 180 F.3d 686, 693 (1999). In order to make that distinction, a reviewing court must undertake a searching, two-part analysis of the

challenged action's "manifest purpose and inevitable effect." *Gould*, 475 U.S. at 291.

First, the court must determine if the challenged action serves to advance or preserve the government's "purely proprietary interests" in a project or transaction. *Boston Harbor*, 507 U.S. at 231. To satisfy a reviewing court, a government must be able to "defend[] [its action] as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291; *see also Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1163 (9th Cir. 2004) (inquiring whether challenged action "necessarily reflect[s] [an] interest in the efficient procurement of goods or services") (*petitions for reh'g filed* May 18, 2004). Whether the government "act[ed] just like a private contractor would act" is thus highly relevant. *Boston Harbor*, 507 U.S. at 233.

Second, a court must inquire whether the scope of the challenged action is "specifically tailored" to achieving the government's purely proprietary interests. *Id.* at 232. If the challenged action does not serve a purely proprietary economic interest, or if it sweeps more broadly than the asserted interest, it is vulnerable under the ordinary standards of preemption. *Lockyer*, 364 F.3d at 1162

State and local governments are entitled to *no presumption* that their actions are proprietary as opposed to regulatory. Rather, a regulatory purpose must be “safely ruled out” before an action will be insulated from preemption. *Cardinal Towing*, 180 F.3d at 693. That approach reflects the reality that lawmakers are frequently subject to pressures to engage in policy-making and are not constrained by the same market forces that motivate private actors. *See id.* at 692.

**1. The district court misapplied the preemption analysis by subjecting Chapter 31 to minimal scrutiny.**

Relying heavily on the Third Circuit’s decision *Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (2004), *petition for cert. filed*, (04-1216) (U.S. Mar. 7, 2005),<sup>8</sup> the district court gave enormous deference both to the supposedly proprietary interest asserted by the County and to the means the County used in advancing its interest. But as the preceding discussion of *Boston Harbor* makes clear, that deferential posture is contrary to the more searching analysis dictated by Supreme Court precedent.

---

<sup>8</sup> In *Sage*, the Third Circuit concluded that the City of Pittsburgh’s decision to condition a grant of tax increment financing upon the recipient’s acceptance of a labor neutrality agreement was proprietary and therefore immune from preemption by the NLRA.

In the proceedings below, the district court simply accepted the County's supposedly proprietary interest without discussion or elaboration, stating only that MMAC "does not dispute" that the County's asserted interest was purely proprietary. 359 F.Supp.2d 749, 761 (E.D. Wis. 2005). But as both the appellant's brief and the discussion below make abundantly clear, the validity of the interest advanced by Chapter 31 remains hotly contested.

Compounding its error, the district court also failed to heed the Supreme Court's explicit admonition that government action will not be exempt from preemption scrutiny unless it is "specifically tailored" to a legitimate proprietary interest. 507 U.S. at 232. Instead, the district court required the County to make the only most minimal showing "that it has a *reasonable basis* for concluding that the challenged action will serve its proprietary interest." 359 F.Supp.2d at 759 (emphasis added).

The district court's analysis, including its reliance on the Third Circuit's decision in *Sage*, demonstrates an uncritical deference to the County's efforts regulate to labor relations under the guise of the "market participant" doctrine. Such a deferential posture was

commonplace prior to the Supreme Court’s decisions in *Gould* and *Boston Harbor*. See Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 Wis. L. Rev. 1, 5-19 (1982). But, as we now show, the district court’s conclusions have no grounding in those watershed decisions.

**2. Properly scrutinized, Chapter 31 fails to serve the County’s purely proprietary interests**

Chapter 31 is not aimed at serving the County’s purely proprietary interest. Rather, it is apparent from a comparison between Chapter 31 and the typical behavior of private parties, as well as from the structure of the ordinance and its stated aims, that Chapter 31 represents a thinly-veiled attempt to regulate labor relations and promote unionization. As such, it cannot be “defended as a legitimate response to state procurement constraints or to local economic needs.” *Gould*, 475 U.S. at 291.

Typical private purchasers undoubtedly have an interest in ensuring that the services they purchase are delivered without interruption. See *Boston Harbor*, 507 U.S. at 232 (noting the state’s proprietary interest in “ensur[ing] an efficient project that would be completed as ... effectively as possible”). That generalized interest holds regardless of whether potential disruptions are caused by a labor dispute or by some other factor. Chapter 31, however, is

not a rational response to the threat—real or perceived—of strike-related disruptions, as evidenced by its failure to comport with “the ordinary behavior of private parties.” *Cardinal Towing*, 180 F.3d at 693.

The district court erroneously dismissed any comparison between Chapter 31 and the action of typical private parties. 359 F.Supp.2d at 759 n.9 (citing *Sage*, 390 F.3d at 216 n.7). This Court observed in *Colfax* that the touchstone of the market-participant analysis is that, “when acting as a proprietor, a state *may* do what a private contractor *would* do.” 79 F.3d at 634 (emphasis added). Likewise, in *Boston Harbor*, the Supreme Court looked to the conduct of private actors to determine whether there existed a “basis on which to distinguish the incentives at work” in the challenged action from those that operate elsewhere and, in so doing, found that the contractual condition at issue was one “that Congress explicitly authorized and expected frequently to find” in the private sector. 507 U.S. at 232 (citations and quotations omitted). Thus, courts should look to the “ordinary behavior of private parties” as a means of determining whether “a regulatory impulse can be safely ruled out.” *Cardinal Towing*, 180 F.3d at 693.

In the private sector, there exist efficient and widely-used mechanisms for ensuring the uninterrupted delivery of services. For example, the County

could have required contractors, in the event of an actual disruption of contracted-for services, to resume providing services by a date certain on pain of contract termination. See, e.g., *Boston Harbor*, 507 U.S. at 227-28. The County could have also taken prophylactic measures to ensure that a labor dispute would not interfere with the delivery of services. This could have been accomplished by requiring a performance bond, a contractual provision for liquidated damages, or the establishment of an alternate method for providing the contracted-for services. See, e.g., *Legal Aid Society v. New York*, 114 F.Supp.2d 204, 236-40 (S.D.N.Y. 2000) (observing that a city's distribution of business among multiple suppliers was a proper means of minimizing the impact of future labor disputes).

To be sure, as the district court noted, individual employers have sometimes entered labor peace agreements. 359 F.Supp.2d at 761. The examples cited, however, do not assist the County. For the County was acting as a *customer* purchasing transportation services, not as an *employer* providing such services, and the County has identified no pattern of customers requiring their suppliers to enter neutrality agreements like those the ordinance mandates. Chapter 31 is also of a different order than the proprietary policies considered in *Boston Harbor* and *Building & Constr. Trades*

*Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003), which both dealt with government bodies making typical commercial judgments about how best to accomplish construction projects in an economical and efficient manner. Specifically, in both of those cases, government bodies were exercising traditional options that Congress expressly authorized for private construction-industry employers under Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§158(e) and (f). See *Boston Harbor*, 507 U.S. at 229-33; *Allbaugh*, 295 F.3d at 35.

More to the point, even though some employers have entered neutrality agreements (or, in the construction industry, prehire agreements) in the absence of government coercion to do so, it is equally apparent that typical private purchasers would not attempt to secure the uninterrupted delivery of goods or services by means of a lopsided arrangement like Chapter 31. The ordinance sets up regulatory scheme that provides virtually no additional assurance of continuous services because, although a contractor must accede to an LPA if the union requests one, a union is not required either to seek an LPA or to accede to one if the employer requests it. The district court brushed aside that concern, surmising that “because unions prefer to enter into neutrality agreements, it is highly unlikely that a union

would not request one.” 359 F.Supp.2d at 763 n.18 (citation omitted). That analysis overlooks that the unions *least* likely to interrupt the employers’ services—because they lack the economic power to strike—are the *most* likely to avail themselves of the opportunity to demand an LPA. By contrast, unions *most* able to exert significant leverage against an employer by engaging in strikes, picketing, or other traditional “economic action” are the *least* likely to request an LPA. Such a result entirely defeats the County’s asserted interest in assuring the uninterrupted delivery of services.

The disconnect between the LPA requirement and legitimate proprietary concerns is further revealed by Chapter 31’s regulatory structure. *All* contractors are obliged to enter LPAs on request, but the county reserves the right to waive sanctions against violators if doing so would ensure the timely delivery of cost-effective, quality service to the public. Gen. Ord. §31.05(c). By limiting any inquiry into the actual need for LPAs to the back end of the process—after employers already have been obliged to enter them and subjected to the enforcement process—the ordinance demonstrates that LPAs are imposed for their own sake and not exclusively as a means of ensuring the cost-effective and uninterrupted delivery of services.

Two final factors demonstrate that Chapter 31 is aimed—not at ensuring the County’s purely proprietary interest—but rather at the promotion of unionization. First, the County does not assert an interest in *generally* ensuring uninterrupted delivery of the services it purchases; instead, as the district court noted, the County limits its asserted interest to the prevention of strike-related disruptions only to the extent they occur “*as the result of union organizing.*” 359 F.Supp.2d at 760 (emphasis added). Neither the record nor common-sense judgment suggests that a similarly-situated private party would take extensive measures to prevent strikes during the course of an organizing drive, yet would be willing to invite any other kind of strike. Thus, unless a party was interested in promoting unionization rather guaranteeing the delivery of services, there would be no basis to distinguish between disruptions caused by organizational strikes and disruptions caused by other kinds of labor disputes.

Second, the text of Chapter 31 admits a non-proprietary purpose. The ordinance expressly states that the LPA’s standards of conduct for employers and unions are intended in part “to accommodate a free and informed decision of the employees ... as to whether or not they wish to be represented by a labor organization,” *Id.* §31.03. Chapter 31 therefore is “quite explicitly

based” on the County’s views of proper labor policy. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

The end result is that Chapter 31 is an impermissible attempt to “adopt procurement laws or regulations that in effect choose[s] sides” in labor disputes, *id.* at 1337-78, and accordingly must answer to scrutiny under traditional preemption principles.

**3. Chapter 31 is not specifically tailored to achieve a purely proprietary purpose**

The district court also erred in concluding that Chapter 31 is adequately tailored to the County’s stated interest. Instead, the ordinance’s provisions sweep far more broadly than is permissible and reach beyond the County’s business relationships into areas of policy reserved to the Board by the NLRA. See *Lockyer*, 364 F.3d at 1163 (holding preempted state action that “by its design sweeps broadly to shape policy in the overall labor market”); *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003) (noting that action is likely to be found regulatory where it “seeks to set a broad policy”) (citations and quotations omitted), *cert. denied*, 541 U.S. 987 (2004); *Reich*, 74 F.3d at 1337-38 (relying upon “broad” and “far-reaching” impact of challenged action in finding that it is regulatory).

Chapter 31 is not a contract that applies to a single project or service. Rather, it is a general ordinance that—unlike ordinary contracting arrangements—contains detailed provisions governing the contractors’ conduct of their labor relations. The ordinance applies to a broad range of human service contracts with the County, regardless of the particular circumstances or prevailing market conditions, and is not time-limited. Furthermore, Chapter 31 makes no exception for contractors’ using less restrictive measures that would have an equal or better likelihood of achieving the government’s proprietary objectives. In all of these senses, the ordinance is not sensitive to differences among sectors of the market or to changes that may occur within the market.

Chapter 31, therefore, is unlike the contracts approved by the Supreme Court in *Boston Harbor* or this Court in *Colfax* which, like other contracts with a limited duration, were the product of the contracting parties’ judgment concerning the most favorable terms available in the particular market at the time. *Boston Harbor*, 507 U.S. at 231-32; *Colfax*, 79 F.3d at 634-35. Likewise, Chapter 31 bears no resemblance to the regulation that was upheld as proprietary in *Allbaugh*, which was market-sensitive in the sense that it “[le]ft contractors free to determine whether they will use [project labor agreement]

on government contracts, just as they may determine whether to use [them] on projects for private owner-developers that neither require nor prohibit their use.” 295 F.3d at 35. Because the central provisions of Chapter 31 sweep broadly into regulatory territory governed by the NLRA, the ordinance lacks the specific tailoring required to pass muster under *Boston Harbor*. See *Lockyer*, 364 F.3d at 1163.

\* \* \*

For all of these reasons, Chapter 31, while couched in terms of conditions on which the County will do business with private contractors, cannot “plausibly be defended as a legitimate response to state procurement restraints or to local economic needs.” *Gould*, 475 U.S. at 291. Instead, the County is seeking to reshape labor policy on a local level, and in so doing has impermissibly assumed a regulatory role that Congress reserved solely for the Board.

**C. Stripped of Any Proprietary Immunity, Chapter 31 is Subject to Preemption Because It Conflicts with the NLRA**

**1. Chapter 31 impermissibly creates additional sanctions for unfair labor practices**

As the Supreme Court concluded in *Gould*, one of the primary aims of preemption is to eliminate any state or local regulation that “functions ... as a supplemental sanction for violations of the NLRA” because such enactments “conflict[] with the Board’s comprehensive regulation of industrial relations.” 475 U.S. at 288.

Section 8(a)(1) of Act, 29 U.S.C. §158(a)(1), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce” employees in the exercise of their statutory rights to join or refrain from joining a union. Section 8(b)(1)(A), *id.* §158(b)(1)(A), is a cognate provision that prohibits the same conduct on the part of unions. Chapter 31 improperly supplements these NLRA prohibitions by requiring the parties to agree to—or else have an arbitrator impose—“language and procedures prohibiting the employer or the labor organization from coercing or intimidating employees, explicitly or implicitly, in selecting or not selecting a bargaining representative.” Gen. Ord. §§31.02(f)(7), 31.03(b).<sup>9</sup>

---

<sup>9</sup> To the extent these LPA provisions purport to govern Board-regulated

The conflict between Chapter 31 and the NLRA is made all the more acute by the “essentially punitive rather than corrective nature” of the County’s supplemental remedy. *Gould*, 475 U.S. at 288 n.5. Under Chapter 31, any employer’s violation of the prohibition against coercion or intimidation may result in debarment from future contracts. Gen. Ord. §31.05(a)(1). Such “[p]unitive sanctions are inconsistent ... with the remedial philosophy of the NLRA.” *Gould*, 475 U.S. at 288 n.5.

---

conduct that is not arguably protected by Section 7 or prohibited by Section 8, *see Garmon*, 259 U.S. at 245, they are preempted nonetheless. That is so because ordinary principles of conflict preemption “are no less applicable in the field of labor law,” and local regulation that obstructs the Board’s ability under Section 9 to regulate conduct that is prejudicial to a fair election “creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.” *Brown*, 468 U.S. at 502. *See also Pennsylvania Nurses Ass’n v. Penn. State Educ. Ass’n*, 90 F.3d 797, 802-03 (3d Cir. 1996) (holding state tort claims preempted because the Board has authority under Sections 8 and 9 of the NLRA to govern such “core activities” as resolving disputes among competing unions and ensuring employee free choice, including by invalidating an election).

2. **Chapter 31 improperly conflicts with the Board’s regulation of union election procedures**

Chapter 31 is also preempted because it conflicts with the Board’s established and comprehensive policies for effectuating free and fair choice by employees with respect to union representation. Drawing upon its statutory mandate and specialized expertise, the Board has crafted its election policies in a manner that balances the interests of employers, unions, and employees in a fair, free, and informed choice regarding representation. Yet, Chapter 31 attempts to supplant the NLRA by providing its own comprehensive scheme for representation which conflicts with the Board’s rules regarding the dissemination of employee information,<sup>10</sup> permissible campaign practices,<sup>11</sup>

---

<sup>10</sup> *Compare Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966) (requiring the employer to provide the union with employees’ names and addresses prior to a Board election, but only when the parties have either consented to an election or the Board has directed one), *with* Gen. Ord. §31.02(f)(3) (providing that any LPA must require the employer to provide the union with employees’ telephone numbers, not just their names and addresses, and may be required before the union’s organizing campaign has begun).

<sup>11</sup> *Compare Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953) (holding that either party to an organizing campaign may deliver “captive audience” speeches to employees, provided that the speech is non-coercive and does not take place within 24 hours of a Board election), *with* Gen. Ord. §31.02(f)(7) (mandating that neither party may require employees, “individually or in a group ... to attend a meeting or event that is intended to influence his or her decision in selecting or not selecting a bargaining representative”).

and the regulation of campaign speech.<sup>12</sup> Because Chapter 31 regulates (and, in some instances, effectively nullifies) many of the rights and protections afforded by the Board's election rules and policies, it is preempted.

**3. Chapter 31 regulates matters left deliberately unregulated for reasons of federal labor policy**

Chapter 31 also trenches upon an employer's unfettered right to insist on a Board-conducted representation election, by allowing an arbitrator, upon a union's demand for an LPA, to impose "language and procedures" for the employer's recognition of a union as the employees' exclusive collective-bargaining representative. Gen. Ord. §§31.02(f), 31.03(a). Congress, the Supreme Court, and the Board all regard secret-ballot elections as the preferred (though not exclusive) method for resolving representational disputes in the manner that best ensures free and informed employee choice.

*Linden Lumber Div. v. NLRB*, 419 U.S. 301, 307 (1974). On its face, then,

---

<sup>12</sup> Compare *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (holding that the Board will not "probe into the truth or falsity of the parties' campaign statements, and ... will not set elections aside on the basis of misleading campaign statements") and *NLRB v. Lovejoy, Indus., Inc.*, 904 F.2d 397, 399 (7th Cir. 1990) ("The Board no longer gives close scrutiny to the electioneering tactics of either side. Petty wrangles of this kind do not justify undoing the outcome of an election.") (citing *Midland*), with Gen. Ord. §§31.02(f)(1),(5) (providing that parties must agree to, or an arbitrator must impose, terms requiring that neither party express "false or misleading information that is intended to influence the determination of employee preference regarding union representation").

Chapter 31 improperly encumbers the decision—which the Board and the Supreme Court have left entirely in the employer’s own hands—whether or not to insist upon a secret ballot election. See *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774-75 (1947) (holding preempted state regulation of matters that the Board has determined should be left unregulated for affirmative policy reasons).

In addition, Chapter 31 attempts to regulate both a union’s ability to strike and the employer’s ability to resist a strike in support of union recognition. These are both matters that Congress intended to leave to the play of economic forces, and the Supreme Court has explicitly declared that state or local conduct regulating such matters is generally preempted. *Golden State*, 475 U.S. at 613; *Bus Employees v. Missouri*, 374 U.S. 74, 82 (1963).

Although the County contends that it is merely attempting to protect vulnerable elderly or disabled residents from strike-related disruptions, Congress has already determined the extent to which those interests must be balanced against employees’ right to strike in such contexts. Specifically, in 1959 Congress amended the NLRA to prohibit certain forms of picketing in support of a union’s attempt to gain recognition from an employer. 29 U.S.C. §158(b)(7). Later, Congress amended the NLRA again in 1974 to

establish special notice requirements before a union may strike or picket at a health care institution. *Id.* §158(g). Under the standard principles of preemption, the County cannot attempt to create a different regulatory balance.

Chapter 31 also runs afoul of the NLRA because it attempts to diminish the scope of employer and union rights under Section 8(c), *id.* §158(c), to express or disseminate “any views, argument, or opinion,” as long as “such expression contains no threat of reprisal or force or promise of benefit.” Section 8(c)—which Congress enacted “in order to insure both to employers and labor organizations full freedom to express their views to employees on labor matters,” S. Rep. No. 80-105, at 23-24 (1947)—exemplifies “the concept of activities ‘protected’ because Congress meant them to be ‘unrestricted by any governmental power to regulate.’” *Machinists*, 427 U.S. at 145 (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)). As the Ninth Circuit recently concluded, given the policy of “open and robust advocacy” embodied in Section 8(c), the NLRA preempts state regulation such as Chapter 31 because it “directly targets and substantially affects open employer discussion about unionization.” *Lockyer*, 364 F.3d at 1165, 1167.

Finally, under Chapter 31, if a union requests an LPA, the covered employer must enter into negotiations for such an agreement; and if the parties cannot reach agreement, an arbitrator will impose a settlement that includes, at the very least, the numerous substantive terms governing the recognition process set out in Chapter 31. Such regulation is preempted because Congress made it “abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are ... inconsistent with the federal regulatory scheme.” *Machinists*, 427 U.S. at 153. To be sure, employers generally may agree to policies and procedures regarding union recognition that are different from those to which the employer would be entitled under the Board’s rules, *Snow & Sons*, 134 NLRB 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962), but the NLRA does not permit the government to “impose its own views of a desirable settlement,” *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970); *see also* 29 U.S.C. §158(d) (forbidding the Board from forcing a party to a collective-bargaining relation “to agree to a proposal or ... mak[e] ... a concession”).

## CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that this Court reverse the judgment of the district court and find Chapter 31 preempted by the NLRA.

\_\_\_\_\_/s/\_\_\_\_\_  
ABBY PROPIS SIMMS  
*Supervisory Attorney*

\_\_\_\_\_/s/\_\_\_\_\_  
JASON WALTA  
*Attorney*  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2930

ARTHUR F. ROSENFELD  
*General Counsel*

JOHN E. HIGGINS, JR.  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

National Labor Relations Board  
April 2005

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 6,933 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 proportionately spaced typeface using Microsoft Office Word 2003 in Goudy Old Style 14 point.

April 25, 2005

\_\_\_\_\_  
Date

/s/

\_\_\_\_\_  
Attorneys for National Labor Relations  
Board

METROPOLITAN MILWAUKEE	)	
ASSOCIATION OF COMMERCE	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 05-1531
	)	
MILWAUKEE COUNTY,	)	
	)	
Defendant-Appellee	)	
	)	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the National Labor Relations Board’s Amicus Curiae Brief In Support of Plaintiff-Appellant and In Support of Reversal have this day been served by overnight mail upon the following persons listed below:

Jonathan O. Levine, Esq. Michael Best & Friedrich LLP 100 East Wisconsin Avenue Suite 3300 Milwaukee, WI 53202-4108 (Counsel for Plaintiff Metropolitan Milwaukee Association of Commerce)	Marianne Goldstein Robbins, Esq. Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. 1555 N. RiverCenter Drive, #202 Milwaukee, WI 53212 (Counsel for Defendant Milwaukee County)
--	--

Dated: Washington, DC  
April 25, 2005

/s/  


---

MARGERY E. LIEBER  
Assistant General Counsel  
for Special Litigation  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2930