ORIGINAL

FAXED

FILED
ALAMEDA COUNTY
JAN 27 2012
CLERK OF THE SUPERIOR COURT
By [signature]

DAVID A. ROSENFELD, Bar No. 058163
CAREN P. SENCER, Bar No. 233488
LISL R. DUNCAN, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORP., d/b/a AB TRUCKING, and DOES 1 through 20, inclusive,

Defendants.

Case No. RG08379099

PLAINTIFFS'NOTICE OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER CLASS CERTIFICATION ORDER, AMEND, MODIFY OR DECERTIFY A CLASS ACTION; CCP § 1008 AND CAL. RULES OF COURT, RULE 3.764

Date: February 9, 2012
Time: 2:00 p.m.
Dept.: 20
Judge: Hon. Robert B. Freedman
Reservation Number: R-1249926

Trial Date: February 14, 2012

EXHIBIT	**AUTHORITY**
A	*Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184
B	*Day-Brite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421

Dated: January 26, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: [signature]
LISL R. DUNCAN
Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

118212/653237

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Exhibit A

Exhibit A

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION; LINDEMAN BROTHERS, INC.; YUBA TRUCKING, INC., Plaintiffs-Appellants, v. ROBERTA E. MENDONCA; LLOYD W. AUBRY, JR.; JAMES W. VAN LOBEN SELS; CALIFORNIA DEPARTMENT OF TRANSPORTATION; CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; CALIFORNIA DEPARTMENT OF LABOR, Defendants-Appellees, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, Intervenor-Defendant-Appellee.

No. 97-16026

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

152 F.3d 1184; *1998 U.S. App. LEXIS 20483*; *136 Lab. Cas. (CCH) P58,456*; *4 Wage & Hour Cas. 2d (BNA) 1483*; *98 Daily Journal DAR 9055*

April 13, 1998, Argued, Submitted, San Francisco, California
August 21, 1998, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied April 5, 1999, Reported at: *1999 U.S. LEXIS 2508.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-96-03430-MHP. Marilyn H. Patel, District Judge, Presiding.

DISPOSITION: District court's judgment dismissing Dump Truck's complaint under *Fed. R . Civ. P. 12(b)(6)* affirmed. District court's decision granting IBT's motion to intervene as of right pursuant to *Fed. R. Civ. P. 24(a)* affirmed.

COUNSEL: Ellis Ross Anderson, Anderson, Donovan & Poole, San Francisco, California, for the plaintiffs-appellants.

Miles E. Locker, Irene B. Moy, Department of Industrial Relations, San Francisco, California, for the defendants-appellees.

Mary Lynne Werlwas, Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the intervenor-defendant-appellee.

JUDGES: Before: Joseph T. Sneed, and Stephen S. Trott, Circuit Judges, and Evan J. Wallach, * Judge. Opinion by Judge Sneed.

* Honorable Evan J. Wallach, Judge of the United States Court of International Trade, sitting by designation.

OPINION BY: JOSEPH T. SNEED

OPINION

[*1185] OPINION

SNEED, Circuit Judge:

[**2] The issue before us is whether the Federal Aviation Administration Authorization Act of 1994, *49 U.S.C. § 14501 et seq.* ("FAAA Act") preempts enforcement of California's Prevailing Wage Law, *Cal. Lab. Code §§ 1770*-80 ("CPWL"). We hold that it does not do so.

The language and structure of the FAAA Act does not evidence a clear and manifest intent on the part of Congress to preempt the CPWL. Although CPWL is not entirely unrelated "to a price, route or service of . . . motor carriers," the teachings of recent Supreme Court cases make clear that a state law dealing with matters traditionally within its police powers, and having no more than an *indirect, remote, and tenuous* effect on motor carriers, are not preempted. Such is the case here. Thus, we affirm the district court's dismissal of plaintiffs' complaint.

[*1186] I.

Exhibit A

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Californians for Safe & Competitive Dump Truck Transportation, Lindeman Brothers, Inc. and Yuba Trucking, Inc. (collectively "Dump Truck") [1] are public works contractors who provide transportation-related services on publicly-funded projects within California. The defendants (collectively [**3] "Mendonca") are several California agencies and their agents in whom the State of California vests the statutory authority to enforce CPWL.

1 Plaintiff Californians for Safe & Competitive Dump Truck Transportation is a nonprofit association of approximately eleven individuals and entities operating as motor carriers in California or utilizing the transportation services of motor carriers. Plaintiffs Lindeman Brothers, Inc. and Yuba Trucking, Inc. are motor carrier enterprises incorporated in California which are engaged in the transportation of property in intrastate and interstate commerce.

Since 1937, when CPWL was enacted, California has required contractors and subcontractors who are awarded public works contracts to pay their workers "not less than the general prevailing rate . . . for work of a similar character in the locality in which the public work is performed." See *Cal. Lab. Code § 1771.* [2] Failure to pay prevailing wages results in the assessment of penalties against the contractor. *See Cal.* [**4] *Lab. Code § 1775.* Mendonca assessed Dump Truck various penalties after it failed to pay its workers the prevailing wage.

2 The CPWL essentially adopted the provisions of the 1931 Davis-Bacon Act, 46 Stat. 1494, as amended, *40 U.S.C. §§ 276a to 276a* - 5, which required that wages paid on federal public works projects equal wages paid in the project's locale on similar, private construction jobs.

On September 20, 1996, Dump Truck filed suit in the district court seeking both declaratory and injunctive relief. Dump Truck claimed that enforcement of CPWL violated the *Supremacy Clause* because the FAAA Act preempted CPWL. Jurisdiction was based on the existence of federal questions and the Declaratory Judgment Act, *28 U.S.C. §§ 2201, 2202.*

On October 18, 1996, Mendonca filed a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, and, in late 1996, the International Brotherhood of Teamsters ("IBT") sought leave to intervene as a defendant. Dump Truck opposed both motions. [**5] The district court granted IBT's motion to intervene and, thereafter, granted Mendonca's motion to dismiss after the district court concluded that CPWL was not preempted. The district court entered final judgment, and Dump Truck timely appeals the district court's ruling on the preemption issue as well as its decision to grant IBT's motion to intervene.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal under *28 U.S.C. § 1291.* A district court's decision regarding preemption is reviewed de novo. *Gee v. Southwest Airlines, 110 F.3d 1400, 1404* (9th Cir.), *cert. denied, 139 L. Ed. 2d 232, 118 S. Ct. 301 (1997).*

III.

DISCUSSION

Part 1: The District Court's Dismissal of the Complaint

Dump Truck contends that the plain meaning of the FAAA Act's preemption clause, the intent of Congress, and the Supreme Court's "broad interpretation" of the ADA's preemption clause, compel a conclusion that the FAAA Act preempts CPWL. Dump Truck therefore asserts that the district court erred by dismissing its complaint under *Fed. R. Civ. P. 12(b)(6).*

We commence with the assumption that state laws dealing [**6] with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest. *See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947).* The Supreme Court has indicated that CPWL is an example of state action in a field long regulated by the states. *See California Div.* [*1187] *of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 117 S. Ct. 832, 835, 840, 136 L. Ed. 2d 791 (1997).* Thus, the crux of this case is whether Congress exhibited a clear and manifest intent to preempt CPWL.

Nonetheless, to determine Congressional intent, we first must consult the text of the FAAA Act, as well as its structure and purpose. We are mindful of the Supreme Court's admonition that "preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992).*

1. *The Text of the FAAA Act*

On January 1, 1995, Section [**7] 601 of the FAAA Act became federal law. As a general matter, this

section preempts a wide range of state regulation of intrastate motor carriage. It provides:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision *having the force and effect of law related to a price, route, or service of any motor carrier* . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1)(1997) (emphasis added). Paragraphs (2) and (3) exempt a number of types of state regulations and controls. *See 49 U.S.C. § 14501(c)(2), (3).* None of the exemptions, however, apply here. Beyond this, the text offers little else in the way of definition or direction as to the FAAA Act's preemptive scope.

2. *The Legislative History of the FAAA Act*

Congress apparently regarded the preemption clause of the FAAA Act as a way of solving two major problems facing interstate commerce. First, Congress believed that across-the-board deregulation [**8] was in the public interest as well as necessary to eliminate non-uniform state regulations of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

Second, by enacting a preemption provision identical to an existing provision deregulating air carriers (the Airline Deregulation Act ("ADA")), Congress sought to "even the playing field" between air carriers and motor carriers. *Id.* at 85, 1994 U.S.C.C.A.N. at 1757, 1759. This imbalance arose out of this court's decision in *Federal Express Corp. v. California Pub. Utils. Comm'n, 936 F.2d 1075 (9th Cir. 1991).* By holding that Federal Express fit within the ADA's definition of "air carrier," this court concluded that California's intrastate economic regulations of the carrier's shipping activities were preempted. As a result, air-based shippers gained a sizeable advantage over their more regulated, ground-based shipping competitors. By preempting the states' authority to regulate motor carriers, [**9] Congress sought to balance the regulatory "inequity" produced by the ADA's preemption of the states' authority to regulate air carriers. *See* H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759.

It is revealing to note that Congress identified forty-one jurisdictions which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in these areas. *See* H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Of the ten jurisdictions which Congress found *did not* regulate intrastate prices, routes and services, seven of these jurisdictions had, and continue to have, general prevailing wage laws substantially similar to CPWL. [3]

> 3 The seven jurisdictions with prevailing wage laws similar to the CPWL are: Alaska, Delaware, the District of Columbia, Maine, Maryland, New Jersey, and Wisconsin. *See, e.g.,* Alaska Stat. § 386.05.010 et seq. (Michie 1996); *Del. Code Ann. tit. 29, § 6960* (1997); 40 U.S.C. § 276(a) (1994) (making the Davis-Bacon Act applicable to the District of Columbia); *Me. Rev. Stat. Ann. tit. 26, § 1304* (West 1997); *Md. Code Ann., State Finance and Procurement § 17-201* (1997); N.J. Stat. Ann. § 11-56.26 (West 1997); Wis. Stat. § 66.293 (West 1998).

[**10] [*1188] This portion of the legislative history constitutes indirect evidence that Congress did not intend to preempt CPWL. This perception is reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power. *See Travelers, 514 U.S. 645 at 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695.*

3. *Recent Cases Interpreting the "Related To" Language*

While this legislative history counsels against preemption in this case, we draw additional support from recent Supreme Court cases interpreting the preemptive scope of the ADA and ERISA preemption clauses. To repeat, these cases instruct that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted.

The Supreme Court's first encounter with the ADA's preemption clause was *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992).* There the Court held that a state law may "relate to" the ADA, and therefore run afoul of the ADA's preemption clause, even [**11] though such law has only an indirect effect on the rates, routes, or services of an air carrier. *See id. at 385-86.* [4] It was acknowledged, however, that some state action may affect an air carrier's fares in "too tenuous, remote, or peripheral a manner" to have preemptive effect. *Id. at 390* (citation omitted). Moreover, *Morales* "expressed no views about where it would be appropriate to draw the line." *Id.* [5]

4 *In Morales,* the Court referred to the preemption test found in ERISA's preemption clause "since the relevant language of the ADA is identical. . . ." *Morales, 504 U.S. at 384.* The Court thus adopted ERISA's preemption test and declared that "state enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are preempted under 49 U.S.C. App. § 1305(a)(1)." *Id.*

5 In the FAAA Act's legislative history, Congress endorsed the "broad preemption interpretation" adopted by the Court in Morales. *See* H.R. Conf. Rep. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1755.

[**12] In *American Airlines, Inc. v. Wolens, 513 U.S. 219, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995),* the Court again confronted the issue of where to draw the line in interpreting the ADA's preemptive scope. Although the two minority opinions in *Wolens* advocated either "minimal preemption" or "total preemption," *see id.* M 234, the majority took the "middle course" and held that state action was preempted to the extent that it imposed its substantive standards on the prices, routes, or services of an air carrier. *See id. at 232.* The majority further held that the ADA's preemption clause did not bar states from enforcing contract terms which the airline had voluntarily undertaken. *Id. at 232-33.* While adhering to its holding in *Morales,* the Court recognized that "principles seldom can be settled on the basis of one or two cases, but require a closer working out." *Id. at 234-35* (citation omitted).

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995),* a unanimous Supreme Court read the *Morales* ruling [**13] narrowly, and held that traditional state regulation having no more than an *indirect effect* on ERISA plans were not "related to" such plans within the meaning of ERISA's preemption clause. *See id. at 661-62.* The Court acknowledged, however, that a state law might produce "acute, albeit indirect, economic effects . . . that such a state law might indeed be preempted. . . ." *Id. at 668.*

In *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997),* the Supreme Court confronted an ERISA preemption challenge to CPWL based on the contention that it "related to" and had a "connection with" ERISA plans because CPWL increased costs of providing certain benefits, thereby affecting the choices made by ERISA plans. *See 117 S. Ct. at 840.* Rejecting this argument, a unanimous Court held that it "could not hold pre-empted a state law in an area of traditional state regulation based on so *tenuous* a relation" to ERISA plans. *See id.* [*1189] *at 842* (emphasis added). In determining whether the a state law had the forbidden connection, the [**14] Court looked to the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the *effect* of the state law on ERISA plans.

Dillingham, 117 S. Ct. at 838 (citation omitted) (emphasis added).

Clearly the Court in these cases is attempting to preserve the proper and legitimate balance between federal and state authority. Of particular note is Justice Scalia's concurrence in *Dillingham.* He stressed that the Court's "first take on this statute was wrong" and that the "'relate to' clause of the preemption provision is meant, not to set forth a *test* for preemption, but rather to identify the field in which ordinary *field pre-emption* applies. . . ." *Id. at 843* (emphasis in original). Justice Scalia further stated that "applying the 'relate to' provision according to its terms was . . . doomed to failure, since . . . everything is related to everything else." *Id.*

4. *CPWL is not "Related To" Prices, Routes or Services*

It is against the backdrop of *Dillingham, Travelers,* and *Wolens* that we now confront Dump Truck's preemption argument. Dump Truck [**15] contends that the FAAA Act preempts CPWL because it directly affects, and therefore is "related to," the prices, routes, and services of Dump Truck's motor carrier enterprises. It argues that CPWL increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, Dump Truck alleges that its rates for "services" are based on: (1) costs, including cost of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, *including prevailing wage requirements.*

While CPWL in a certain sense is "related to" Dump Truck's prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous. *See Dillingham, 117 S. Ct. at 842.* We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition. *See Travelers, 514 U.S. at 668.* Nor can it be said, borrowing from Justice Scalia's concurrence in *Dillingham,* that CPWL falls into the "field of laws" regulating prices, routes, or services. *See Dillingham, 117 S. Ct. at 843.* [**16] [6] Accordingly, we hold that CPWL is not "related to" Dump Truck's prices, routes, and services within the meaning of the FAAA Act's preemption clause. The FAAA Act thus does not preempt CPWL.

6 The test for ordinary "field preemption" was set forth in *Rice v. Santa Fe Elevator Corp., 331 U.S. at 236* (test is whether Congress has declared it policy with respect to the matter on which the state asserts the right to act). To repeat, nowhere in the FAAA Act do we find any mention of Congress's intent to occupy the field of general prevailing wage laws.

Part II: The Granting of IBT's Motion to Intervene

Dump Truck also contends that the district court erred by granting IBT's motion to intervene as of right because, in Dump Truck's view, IBT failed to meet the test for intervention under *Fed. R. Civ. P. 24(a)*. We disagree.

A district court's decision concerning intervention as of right pursuant to *Fed. R. Civ. P. 24(a)* is reviewed de novo. *See Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993).* [**17] We apply a four-part test under *Fed. R. Civ. P. 24(a)*:

> (1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; (4) the applicant's interest must be inadequately represented by the parties to the action.

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995) (citation omitted).

Here, IBT satisfied each of the elements of *Rule 24(a)*. First, it is uncontested that IBT timely sought to intervene. Second, its [*1190] members had a "significant interest" in receiving the prevailing wage for their services as opposed to a substandard wage. Moreover, California's law guaranteeing prevailing wages, the CPWL, was the subject of Dump Truck's preemption suit. Third, in the event Dump Truck prevailed, it would have clearly impaired IBT's members' right to receive the prevailing wage. Fourth, because the employment interests of IBT's members were [**18] potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate. *See Id.* Accordingly, the district court did not err by granting IBT intervention as of right.

IV.

CONCLUSION

The district court's judgment dismissing Dump Truck's complaint under *Fed. R . Civ. P. 12(b)(6)* is affirmed. Additionally, the district court's decision granting IBT's motion to intervene as of right pursuant to *Fed. R. Civ. P. 24(a)* is affirmed.

AFFIRMED.

Exhibit B

Exhibit B

DAY-BRITE LIGHTING, INC. v. MISSOURI

No. 317

SUPREME COURT OF THE UNITED STATES

342 U.S. 421; *72 S. Ct. 405*; *96 L. Ed. 469*; *1952 U.S. LEXIS 2708*; *21 Lab. Cas. (CCH) P66,796*

January 10, 1952, Argued
March 3, 1952, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF MISSOURI.

Appellant was convicted in a Missouri state court of a violation of Mo. Rev. Stat., 1949, § 129.060. The Supreme Court of Missouri affirmed. *362 Mo. 299, 240 S. W. 2d 886*. On appeal to this Court, affirmed, p. 425.

DISPOSITION: *362 Mo. 299, 240 S. W. 2d 886*, affirmed.

SUMMARY:

A Missouri statute which provides that an employee may absent himself from employment for four hours on election day between the opening and closing of the polls without penalty or deduction of wages was held constitutional by seven members of the Supreme Court, whose opinion was delivered by Douglas, J.

Frankfurter, J., concurred in the result.

Jackson, J., wrote a dissenting opinion.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §469

due process -- equal protection -- requiring employer to pay wages for voting time. --

Headnote:[1]

A state statute which provides that an employee may absent himself from employment for four hours on election day between the opening and closing of the polls without penalty or deduction of wages does not deny due process or the equal protection of the laws.

[***LEdHN2]

COURTS §103

wisdom or policy of legislation not a question for. --

Headnote:[2]

The Supreme Court of the United States does not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.

[***LEdHN3]

COURTS §115

promotion of public welfare as matter for legislative judgment. --

Headnote:[3]

State legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional provisions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

[***LEdHN4]

CONSTITUTIONAL LAW §855

police power -- scope. --

Headnote:[4]

Exhibit B

The police power extends to all the great public needs.

[***LEdHN5]

PUBLIC POLICY §2

legislative determination. --

Headnote:[5]

Debatable issues as respects business, economic, and social affairs are to be left to legislative decision.

SYLLABUS

Missouri Rev. Stat., 1949, § 129.060, which provides that any employee entitled to vote may absent himself from his employment for four hours between the opening and closing of the polls on election days and that any employer who deducts wages for that absence is guilty of a misdemeanor, does not violate the Due Process or *Equal Protection Clause of the Fourteenth Amendment* or the Contract Clause of Art. I, § 10, of the Federal Constitution. Pp. 421-425.

COUNSEL: Henry C. M. Lamkin argued the cause for appellant. With him on the brief were William H. Armstrong and Louis J. Portner. Thomas H. Cobbs was also of counsel.

John R. Baty, Assistant Attorney General of Missouri, for appellee. With him on the brief was J. E. Taylor, Attorney General. Arthur M. O'Keefe, Assistant Attorney General, was also of counsel.

J. Albert Woll, Herbert S. Thatcher and James A. Glenn filed a brief for the American Federation of Labor, as amicus curiae, supporting appellee.

JUDGES: Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINION BY: DOUGLAS

OPINION

[*421] [**406] [***471] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

[***LEdHR1] [1]Missouri has a statute, Mo. Rev. Stat., 1949, § 129.060, first enacted in 1897, which was designed to end the coercion of employees by employers in the exercise of the franchise. It provides that an employee may absent himself [*422] from his employment for four hours between the opening and closing of the polls without penalty, and that any employer who among other things deducts wages for that absence is guilty of a misdemeanor. [1]

1 "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty; provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

[**407] Appellant is a Missouri corporation doing business in St. Louis. November 5, 1946, was a day for general elections in Missouri, the polls being open from 6 A. M. to 7 P. M. One Grotemeyer, an employee of appellant, was on a shift that worked from 8 A. M. to 4:30 P. M. each day, with thirty minutes for lunch. His rate of pay was $ 1.60 an hour. He requested four hours from the scheduled work day to vote on November 5, 1946. That request was refused; but Grotemeyer and all other employees on his shift were allowed to leave at 3 P. M. that day, which gave them four consecutive hours to vote before the polls closed.

Grotemeyer left his work at 3 P. M. in order to vote and did not return to work that day. He was not paid for the hour and a half between 3 P. M. and 4:30 P. M. Appellant was found guilty and fined [***472] for penalizing Grotemeyer in violation of the statute. The judgment was affirmed by the Missouri Supreme Court, *362 Mo. 299, 240* [*423] *S. W. 2d 886*, over the objection that the statute violated the Due Process and the *Equal Protection Clauses of the Fourteenth Amendment* and the *Contract Clause* of Art. I, § 10.

[***LEdHR2] [2] [***LEdHR3] [3]The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner v. New York, 198 U.S. 45*, which invalidated a New York law prescribing maximum hours for work in bakeries; *Coppage v. Kansas, 236 U.S. 1*, which struck down a Kansas statute outlawing "yellow dog" contracts; *Adkins v. Children's Hospital, 261 U.S. 525*, which held unconstitutional a federal statute fixing

minimum wage standards for women in the District of Columbia, and others of that vintage. Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits, as *Tot v. United States, 319 U.S. 463*, holds. But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided. That is the essence of

[***LEdHR4] [4]*West Coast Hotel Co.* v. *Parrish, 300 U.S. 379*;*Nebbia v. New York, 291 U.S. 502*;*Olsen v. Nebraska, 313 U.S. 236*;*Lincoln Union v. Northwestern Co., 335 U.S. 525*; and *California Auto. Assn.* v. *Maloney, 341 U.S. 105.*

West Coast Hotel Co. v. *Parrish, supra*, overruling *Adkins v. Children's Hospital, supra*, held constitutional a state law fixing minimum wages for women. The present statute contains in form a minimum wage requirement. There is a difference in the purpose of the legislation. Here it is not the protection of the health and morals of the citizen. Missouri by this legislation has sought [*424] to safeguard the right of suffrage by taking from employers the incentive and power to use their leverage over employees to influence the vote. But the police power is not confined to a narrow category; it extends, as stated in *Noble State Bank v. Haskell, 219 U.S. 104, 111*, to all the great public needs. The protection of the right of suffrage under our scheme of things is basic and fundamental. [2]

2 Decisions contrary to that of the Missouri Supreme Court in this case have been rendered by the Court of Appeals of Kentucky in *Illinois Central R. Co.* v. *Commonwealth, 305 Ky. 632, 204 S. W. 2d 973*, and by the Supreme Court of Illinois in *People v. Chicago, M. & St. P. R. Co., 306 Ill. 486, 138 N. E. 155*. But cf. *Zelney v. Murphy, 387 Ill. 492, 56 N. E. 2d 754*. The Appellate Division of the Supreme Court of New York in *People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. 2d 697*, and the Appellate Department of the Superior Court of California in *Ballarini v. Schlage Lock Co., 100 Cal. App. 2d 859, 226 P. 2d 771*, held in accord with Missouri. For a review of legislation in this field, see 47 Col. L. Rev. 135.

[**408] [***LEdHR5] [5]The only semblance of substance in the constitutional objection to [***473] Missouri's law is that the employer must pay wages for a period in which the employee performs no services. Of course many forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. See *Queenside Hills Co.* v. *Saxl, 328 U.S. 80*;*California Auto. Assn.* v. *Maloney, supra.*Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, [*425] and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner, Coppage*, and *Adkins* cases.

The classification of voters so as to free employees from the domination of employers is an attempt to deal with an evil to which the one group has been exposed. The need for that classification is a matter for legislative judgment (*American Federation of Labor v. American Sash Co., 335 U.S. 538*), and does not amount to a denial of equal protection under the laws.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

DISSENT BY: JACKSON

DISSENT

MR. JUSTICE JACKSON, dissenting.

The constitutional issue in this case, if not very vital in its present application, surely is a debatable one. Two state courts of last resort, the only ones to consider similar legislation, have held it unconstitutional. [1] Only unreviewed decisions of intermediate courts [2] can be cited in support of the Court's holding.

1 *Illinois Central R. Co.* v. *Commonwealth, 305 Ky. 632, 204 S. W. 2d 973*; *People v. Chicago, M. & St. P. R. Co., 306 Ill. 486, 138 N. E. 155*. Cf. *Zelney v. Murphy, 387 Ill. 492, 56 N. E. 2d 754.*

2 *People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. 2d 697*; *Ballarini v. Schlage Lock Co., 100 Cal. App. 2d 859, 226 P. 2d 771.*

[*426] Appellant employed one Grotemeyer, under a union contract, on an hourly basis at $ 1.60 per hour for each hour worked. He demanded a four-hour leave of absence, with full pay, on election day to do campaigning and to get out the vote. It is stipulated that his residence was 200 feet from the polling place and that it actually took him about five minutes to vote. Appellant closed the day's work for all employees one and one-half hours earlier than usual, which gave them the statutory four hours before the polls closed. For failure to pay something less than $ 3 for this hour and a half which Grotemeyer did not work and for which his contract did not provide that he should be paid, the employer is convicted of crime under the statute set forth in the Court's opinion.

[**409] To sustain this statute by resort to the analogy of minimum wage [***474] laws seems so farfetched and unconvincing as to demonstrate its weakness rather than its strength. Because a State may require payment of a minimum wage for hours that are worked it does not follow that it may compel payment for time that is not worked. To overlook a distinction so fundamental is to confuse the point in issue.

The Court, by speaking of the statute as though it applies only to industry, sinister and big, further obscures the real principle involved. The statute plainly requires farmers, small service enterprises, professional offices, housewives with domestic help, and all other employers, not only to allow their employees time to vote, but to pay them for time to do so. It does not, however, require the employee to use any part of such time for that purpose. Such legislation stands in a class by itself and should not be uncritically commended as a mere regulation of "practices in the business-labor field."

Obtaining a full and free expression from all qualified voters at the polls is so fundamental to a successful representative government that a State rightly concerns itself [*427] with the removal of every obstruction to the right and opportunity to vote freely. Courts should go far to sustain legislation designed to relieve employees from obligations to private employers which would stand in the way of their duty as citizens.

But there must be some limit to the power to shift the whole voting burden from the voter to someone else who happens to stand in some economic relationship to him. Getting out the vote is not the business of employers; indeed, I have regarded it as a political abuse when employers concerned themselves with their employees' voting. It is either the voter's own business or the State's business. I do not question that the incentive which this statute offers will help swell the vote; to require that employees be paid time-and-a-half would swell it still more, and double-time would do even better. But does the success of an enticement to vote justify putting its cost on some other citizen?

The discriminatory character of this statute is flagrant. It is obvious that not everybody will be paid for voting and the "rational basis" on which the State has ordered that some be paid while others are not eludes me. If there is a need for a subsidy to get out the vote, no reason is apparent to me why it should go to one who lives 200 feet from his polling place but not to a self-employed farmer who may have to lay down his work and let his equipment idle for several hours while he travels several miles over bad fall roads to do his duty as a citizen. If he has a hired man, he must also lose his hand's time and his pay. Perhaps some plan will be forthcoming to pay the farmer by requiring his mortgagee to rebate some proportion of the interest on the farm mortgage if he will vote. It would not differ in principle. But no way occurs to me by which the doctor can charge some patient or the lawyer some client for the call he could not receive while he was voting.

[*428] I suppose a State itself has considerable latitude to offer inducements to voters who do not value their franchise enough to vote on their own time, even if they seem to me corrupting or discriminating ones. Perhaps my difficulty with today's decision is that I cannot rise above an old-fashioned valuation of American citizenship which makes a state-imposed pay-for-voting system appear to be a confession of failure of popular representative government.

It undoubtedly is the right of every union negotiating with an employer to bargain for voting time without loss of pay. It is equally the right of any individual employee to make that part of his hire. I have no reason to doubt that a large number of voters already have voluntary arrangements which make their absence for voting without [***475] cost. But a constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent.

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 27 2012, I served the following documents in the manner described below:

PLAINTIFFS' NOTICE OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER CLASS CERTIFICATION ORDER, AMEND, MODIFY OR DECERTIFY A CLASS ACTION; CCP § 1008 AND CAL. RULES OF COURT, RULE 3.764

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

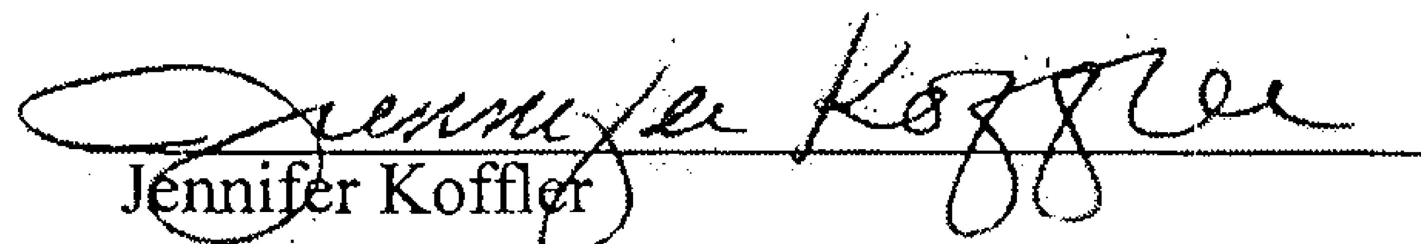
☑ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jkoffler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Guy A. Bryant
Bryant & Brown
476 3rd Street
Oakland, CA 94607
(510) 836-7564 (fax)
guybryant@bryantbrownlaw.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 27, 2012, at Alameda, California.



Jennifer Koffler

118212/651241

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001