

Nos. 03-55166; 03-55169

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**THE CHAMBER OF COMMERCE OF THE UNITED STATES,
Plaintiffs – Appellees,**

v.

**BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendants – Appellants,**

and

**AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS and CALIFORNIA LABOR FEDERATION, AFL-CIO,
Intervenors – Appellants.**

**ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

**BRIEF FOR NATIONAL LABOR RELATIONS BOARD
AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES AND
IN SUPPORT OF AFFIRMANCE**

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD AND SOURCE OF AUTHORITY TO FILE

The National Labor Relations Board was established by Congress (1) to conduct secret ballot elections in which employees may vote whether they wish to be represented by a labor organization and (2) to regulate the conduct of employers and unions that has a reasonable tendency to impair employee free choice.¹

Congress determined that the Board's centralized administration of the NLRA is necessary to obtain uniform application of national labor policy and to avoid conflicts likely to result from a variety of local laws or procedures. The Board² submits that sections 16645.2 and 16645.7 of the California Statute are preempted by the National Labor Relations Act (NLRA) and are therefore invalid. The purpose and likely effect of the California Statute's financial incentives and

¹ The five-Member Board primarily acts as a quasi-judicial body in deciding cases on formal records. Unlike most federal agencies, the Board's General Counsel has independent and final authority over the investigation and prosecution of alleged violations of the statute. 29 U.S.C. § 153(d).

² The issue of whether the California Statute is preempted was recently raised before the Board in a consolidated unfair labor practice and representation proceeding. The Board, however, did not reach the issue because the employer's alleged unlawful activity occurred before the statute went into effect. ATC/Vancom of California, L.P., 338 NLRB No. 180, slip op. at 1, fn. 2 (May 7, 2003). Thereafter, the Board voted 3-2 (Chairman Battista and Members Schaumber and Acosta; Members Liebman and Walsh dissenting) to authorize the General Counsel to take the position in this proceeding that Sections 16645.2 and 16645.7 of the California statute are preempted by the NLRA, leaving to his discretion to formulate and express the arguments to be made against the California law.

enforcement mechanism is to regulate private employer speech that Congress intended to be unregulated. Unless invalidated, the statute would alter the manner in which Board representation elections are conducted in California.

The Board is authorized to file an amicus-curiae brief under FRAP Rule 29(a).

STATEMENT

1. The California Statute

The preamble of Cal. Gov. Code §§ 16645 – 16649 (“California Statute”) declares:

It is the policy of the state not to interfere with an employee’s choice about whether to join or be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization”

§ 16645 (Historical Note), Section 1 of Stats. 2000, c. 872 (A.B. 1889).

Under the statute, private employers who are grant recipients and private employers receiving state funds on account of participation in a state program, are prohibited from using state funds to “assist, promote, or deter union organizing.”

§§ 16645.2, § 16645.7. By that language, California intended to cover “any attempt by an employer to influence the decision of its employees” regarding “[w]hether to support or oppose” a labor organization. § 16645 (a)(1)

(Definitions). Expressly exempted, however, are employer expenses incurred in addressing grievances or negotiating or administering a collective bargaining agreement, or “[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.” § 16647 (a), (d) (Exemptions).

The California Statute construes as prohibited expenditures any payment for legal or consulting fees, or for salaries of supervisors or employees, incurred for preparation, planning or carrying out of an activity to assist, promote or deter union organizing. § 16646(a). The statute requires employers to maintain and provide upon request records “sufficient to show that state funds have not been used” for prohibited purposes. The statute also requires that employers certify that no state funds will be used for prohibited purposes. §§ 16645.2(c), 16645.7(c). The California Statute presumes that state funds are commingled and spent on prohibited activities, unless an employer can satisfy the burden of demonstrating otherwise. §§ 16646(a), (b).

Employers who violate these provisions are subject to fines and penalties, which include the return of the state funds used for the prohibited purposes, and a penalty twice the amount of the returned funds. §§ 16645.2(d); 16645.7(d). Suspected violators may be sued by the State Attorney General or any private taxpayer. § 16645.8. Prevailing plaintiffs, as well as prevailing taxpayer intervenors who make a substantial contribution, are “entitled to recover

reasonable attorney’s fees and costs.” § 16645.8(d). There is no reciprocal provision for prevailing employer defendants.

**THE CALIFORNIA STATUTE IS A REGULATORY SCHEME
THAT CONFLICTS WITH NATIONAL LABOR POLICY
AND IS THEREFORE PREEMPTED**

1. Introduction

The NLRA was enacted in 1935 in large part because Congress wanted to provide an administrative mechanism to peacefully and expeditiously resolve questions concerning representation.³ NLRA Section 7 affords employees the right "to self-organization" and "to form, join, or assist labor organizations," and "to refrain from . . . such activities." 29 U.S.C § 157. Section 8 creates a network of prohibitions on employer and union conduct that has a reasonable tendency to interfere with employees' Section 7 rights. 29 U.S.C. § 158. Section 8 also contains an explicit "free speech" exemption, 29 U.S.C. § 158(c), which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, 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." Section 9 establishes election machinery for determining and certifying employees' decisions on unionization. 29 U.S.C. § 159. Pursuant to Section 9, the Board may

³ American Federation of Labor v. NLRB, 308 U.S. 401, 405, 409-11 & nn. 2-3 (1940); Boire v. Greyhound Corporation, 376 U.S. 473, 476-79 (1964).

regulate employer and union conduct that is prejudicial to a fair election, even if not prohibited by Section 8. General Shoe Corporation, 77 NLRB 124, 126 (1948). Congress and the Supreme Court regard a secret ballot election conducted under the Board's auspices as the preferred method for resolving representational disputes in the manner that best ensures employee free and informed choice. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969).

Critics of the NLRA have long complained that the statute allows employers an undue opportunity to influence employees to reject unionization and that federal labor law should be amended. Proposed changes have included giving unions greater access to employees,⁴ and authorizing card check or other alternatives to Board secret ballot elections as a means of obtaining a government certification as the employees' bargaining representative.⁵ Various amendments were proposed to Congress in 1977 and 1978 but, after much controversy, they failed of enactment.⁶ Since that time, there have been widespread union efforts to achieve similar goals

⁴ Julius G. Getman, Stephen B. Goldberg, and Jeanne B. Herman, UNION REPRESENTATION ELECTIONS: LAW AND REALITY, 156-159 (1976).

⁵ Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L.REV. 1769, 1805 (1983).

⁶ See Labor Law Reform Act of 1977-1978, which was passed by the House of Representatives but successfully filibustered in the Senate, thereby preventing enactment. See H.R.REP.NO. 95-637, 95th Cong., 1st Sess. 69 (1977) (accompanying H.R. 8410); S. REP. NO. 95-628, 95th Cong., 2d Sess. 23-26 (1978) (accompanying S. 2467).

through self-help measures. Chief among them is the movement to persuade employers to enter into so-called “neutrality agreements” in which employers pledge not to oppose their employees’ unionization and to agree to recognize a union without a Board-conducted election.⁷

The California Statute is one state’s legislative response to these efforts. It provides financial and other regulatory pressures for employers to remain “neutral” during union organizing. It is explicitly premised on the view that partisan employer speech for or against unionization is inherently an interference with employee free choice. The statute’s preamble announces that “[i]t is the policy of the state not to interfere with an employee’s choice” regarding union representation and that “[f]or this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing.” The statute’s assumption that partisan employer speech interferes with free choice is contrary to the federal policy, expressed in NLRA Section 8(c), “to insure both to employers and labor organizations full freedom to express their views to employees on labor matters.” S. Rep. No. 105, 80th Congress, 1st Sess., pp. 23-24 (1947).

⁷ 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, 374-388 (2001); Adrienne E. Eaton and Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 43, 46-48 (2001).

The issue here is whether states are free to use their spending power to pressure employers to adopt neutrality policies. The answer, we submit, is that under established federal preemption principles, they are not. The California Statute, while nominally about state spending decisions, is really an impermissible regulatory attempt to substitute California labor policy for existing federal labor policy. Unlike California, Congress generally favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice.

2. General Preemption Principles

The doctrine of preemption arises from the Supremacy Clause of the Constitution and operates to invalidate state law that “either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created,” or stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Nash v. Florida Indus. Comm’n, 389 U.S. 235, 240 (1967) (quotation marks and citations omitted). The federal preemption doctrine has long been applied to preclude enforcement of state regulations that threaten interference with national labor policy established under federal law. See Lodge 76, Intern. Ass’n of Machinists and Aerospace Workers v. Wisconsin

Employment Relations Comm’n, 427 U.S. 132 (1976) (“Machinists”); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (“Garmon”).

Under Machinists preemption, on which the District Court relied, the Supreme Court held that the NLRA evinces a Congressional intent that certain areas of labor relations be left unregulated. Machinists, 427 U.S. at 140. Machinists preemption “preserves Congress’ intentional balance between the uncontrolled power of management and labor to further their respective interests,” and “create[s] a zone free from all regulations, whether state or federal.” Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./Rhode Island, Inc., 507 U.S. 218, 226 (1993) (“Boston Harbor”) (quotation marks and citations omitted).

Garmon preemption principles, on which we also rely, protect the Board's jurisdiction from interference by the states. The regulatory responsibilities that Congress assigned to the Board would be frustrated if states were free to bring conflicting or additional regulations to bear on the same conduct that Congress determined should be governed by uniform federal law. 359 U.S. at 244.⁸

A threshold element to NLRA preemption is a finding that the state action in question constitutes regulation of labor relations between employers and employees. Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1413

⁸ Categories of preemption “of course . . . are not ‘rigidly distinct.’” Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 n.6 (2000) (citation omitted).

(9th Cir. 1996). The principles of NLRA preemption apply only when the state is “regulating within a protected zone,” whether it be a zone reserved for the free play of economic forces, or for NLRB jurisdiction. They do not apply when it is acting as a mere proprietor or market participant. Boston Harbor, 507 U.S. at 226-27.

3. The California Statute Is A Regulatory Scheme, Not The Act Of A Market Participant

The District Court properly applied Boston Harbor in finding that California is regulating employer activity, and not acting as a market participant to control the use of state funds. Boston Harbor distinguishes between “government as regulator” and “government as proprietor,” and states that the NLRA preemption doctrines do not preempt “all legitimate state activity that affects labor,” such as activity undertaken in a state’s role as a market participant. 507 U.S. at 227-228. To illustrate the distinction, Boston Harbor contrasted the illegitimate regulatory action of a city’s refusing to renew an employer’s taxi license if it did not settle a strike, with the possibly legitimate proprietary action of the city’s notifying a taxi company upon which it relied to transport city employees that the city “would hire another company if the labor dispute were not resolved and services resumed by a specific deadline.” Id. In other words, as the Fifth Circuit has recognized, Boston Harbor suggests that one way of testing whether government action is proprietary rather than regulatory is to ask the question, “[D]oes the challenged action essentially reflect the entity’s own interest in its efficient procurement of needed

goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances?” Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

The California Statute fails the “efficient procurement of needed goods and services” test for proprietary action. The actual expenditure of California funds would be the same regardless whether an employer says: (1) “I take a position of neutrality with respect to all questions concerning representation, consistent with the policy of California”; (2) “I have found the union seeking to be your representative to be a responsible partner that crafts win-win solutions for employees and employers alike”; or (3) “Government records show that the union seeking representation is corrupt and has consistently harmed the employers and employees who have dealt with it.” Since the expenditure of state money is identical, California’s content-based limitations on only the two partisan statements cannot plausibly be justified on the ground that the state is merely acting as a proprietor to safeguard its funds.

Nor can California’s funding restrictions on partisan election speech be justified on the theory that the State is merely interested in ensuring that program and grant monies are expended solely for the delivery of services. On its face, the funding scheme expresses no such rule of general application. On the contrary, the statute explicitly recognizes that part of the overhead cost for delivering services to

the public is the labor relations cost to the employer. It allows state grant and program funds to be used by the employer to deal with employee grievances or negotiate and administer a collective bargaining agreement. It even subsidizes the non-neutral activity of negotiating voluntary recognition agreements with unions, thereby bypassing the Board's secret ballot election proceedings. § 16647(a), (d). Only the cost of the employer's speaking out on representation issues facing employees is restricted. The logical inference is that partisan employer campaign speech is the real subject of this statute.

For the foregoing reasons, California's professed proprietary concern masks a regulatory decision similar to that found preempted in Wisconsin Dept. of Industry Labor and Human Relations v. Gould, 475 U.S. 282 (1986) ("Gould"). In Gould, the Supreme Court struck down a state's program of refusing to purchase goods and services from persons with three prior NLRA violations, because that punitive debarment sanction conflicted with the NLRA's remedial policies. The Court rejected Wisconsin's argument that NLRA preemption principles were inapplicable to state spending decisions. The Court found that, on its face, the Wisconsin statute "serves plainly as a means of enforcing the NLRA" and thus "the point of the statute is to deter labor law violations and to reward "fidelity to the law.'" 475 U.S. at 287. The Court determined that the statute would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those

prescribed by the NLRA. Id. Because the Court “was not faced with a statute that can even plausibly be defended as a legitimate response to state procurement restraints,” the Court rejected Wisconsin’s assertion that the exercise of its spending power precluded a finding of preemption. Id. at 291.

Here, California is using its spending power to deter the exercise of federal free speech rights that reflect Congress’ and the Board’s judgment that robust debate fosters informed employee choice. The same partisan speech that Congress sought to safeguard, California disapproves as “interference” with employee free choice.⁹ For that reason, if private employers covered by the statute should exercise their federal free speech rights, they are subjected to California’s regulatory presumption that state funds are being used for a forbidden purpose. See §§ 16646 (a), (b). Even if these employers fund their speech with private resources, they must bear the burden to prove to any challenger, whether governmental or private, who objects to their partisan message that they have not spent state funds. Furthermore, the California Statute imposes a substantial risk of penalties and prosecution for any perceived violation. By contrast, private employers willing to voice the state-approved message of neutrality may use state funds to express that message and to negotiate collective bargaining and voluntary

⁹ See California Statute preamble, above at p. 2.

recognition agreements with unions and are free of any regulatory sanctions for their speech. See §§ 16647(a), (d).

The “carrot and stick” incentives in California’s funding scheme are an attempt to promote the State’s view of how private employers should conduct themselves when faced with union organizing. The State’s “goal may be laudable,” as the Supreme Court stated with respect to the Wisconsin initiative (Gould, 475 U.S. at 291). But, in seeking thus to change national labor policy, the State has impermissibly assumed a regulating role that is reserved for Congress and the Board. Id. Moreover, Wisconsin at least was attempting to enforce compliance with existing national labor policy. California, by contrast, is using its spending powers to handicap employer speech rights that Congress believed were a positive force in informing employee choice. Accordingly, the case for preemption is even more compelling here than in Gould.

As the District Court recognized, Boston Harbor and Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 992 (2003) (“Allbaugh”) are distinguishable. See Chamber of Commerce v. Lockyer, 225 F.Supp.2d 1199, 1205 and n. 5 (C.D. Cal. 2002). In both of those cases, governmental bodies were exercising options that Congress specifically permitted 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 229-233; Allbaugh, 295 F.3d at 35.

In Boston Harbor, the Massachusetts Authority was found to be acting as a proprietor, not a regulator, when it entered into a pre-hire union contract in order to meet a court-imposed construction deadline that the Authority believed could not be met unless it could avoid labor stoppages. 507 U.S. at 220-22, 232. In that context, the Court found that the Authority did no more than restrict participation in the particular project in the same manner as is permitted for private construction industry employers under NLRA Sections 8(e) and (f). Id. at 229-233.

Consistent with Boston Harbor, the Allbaugh Court reasoned that the relevant inquiry is whether the government “acts just [as] a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find.” 295 F.3d at 34 (*citing* Boston Harbor, 507 U.S. at 233). The Allbaugh Court noted that, under the construction industry provisions of the NLRA, employers have the option to require that contractors enter a project labor agreement with local area construction unions but they can also decline to do so. Id. at 35. Accordingly, the Allbaugh Court concluded, the Federal Government acted consistently with the NLRA by exercising its spending authority, as a private employer might, to refuse to permit its agents either to require or forbid such union agreements on federally funded

projects. Id. The Allbaugh Court emphasized that the contractors bidding on the jobs were free to enter into union contracts if they found it economically advantageous to do so. Id. at 30.

Here, unlike Boston Harbor and Allbaugh, it cannot reasonably be said that the speech limitations California imposed are of a type “that Congress explicitly authorized and expected frequently to find.” To the contrary, the California Statute discourages private employers from exercising federal speech rights that Congress thought enhanced employee free choice. For that reason, here, as in Gould, the spending statute at issue cannot “plausibly be defended as a legitimate response to state procurement restraints or to local economic needs.” 475 U.S. at 291. Instead, the statute represents California’s labor policy-driven decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model. For all practical purposes, this spending scheme “is tantamount to regulation.” Gould, 475 U.S. at 289. It may well be that, for economic and social reasons, private employers may lawfully pressure other private employers to adopt a posture of neutrality in Board representation elections.¹⁰ But the NLRA “treats state action differently from private action not merely because they frequently take different forms, but also because in our system

¹⁰ See generally, Hartley, *supra* note 7 at 387-395. But see *id.* at 403-404 (noting that some of these private arrangements may be vulnerable to attack as illegal secondary boycott agreements).

States simply are different from private parties and have a different role to play.” Id. at 290. Indeed, no private employer can match the enforcement powers granted by California, when it authorized state citizens to sue offending employers and to seek penalties and attorney's fees.

4. The California Statute Is Preempted Because It Regulates Employer Speech that Congress Intended To Be Unregulated

As discussed above, Machinists preemption principles preclude states from regulating matters that Congress deliberately left unregulated. Machinists, 427 U.S. at 140. The California Statute offends Machinists preemption principles in two different ways. It regulates employer speech that Congress intended to be unregulated, with the result that a Board election in California is less likely to serve its intended purpose of enabling employees to make a free and informed choice regarding union representation. In addition, the California Statute interferes with Congress’ policy of free collective bargaining.

Among the factors that tend to impede a free and reasoned choice in a Board election is “a lack of information with respect to one of the choices available.” Excelsior Underwear Inc., 156 NLRB 1236, 1240 (1966). For that reason, the Board early recognized that the rights guaranteed to employees by Section 7 include “full freedom to receive aid, advice and information from others concerning [their self-organization] rights.” Harlan Fuel Co., 8 NLRB 25, 32 (1938). To reinforce the employees’ right to receive information bearing on the

decision to choose or reject union representation, Congress added Section 8(c) to the NLRA in 1947, which protects “[t]he expressing of any views, argument, or opinion” against being found to be an unfair labor practice “if such expression contains no threat of reprisal or force or promise of benefit.” Congress added Section 8(c) to the NLRA in the Taft-Hartley Act amendments “in order to insure both to employers and labor organizations full freedom to express their views to employees on labor matters.” S. Rep. No. 105, 80th Congress, 1st Sess., pp. 23-24 (1947). As the Supreme Court has recognized, Section 8(c) manifests Congress’ intent “to encourage free debate on issues dividing labor and management.” Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 62 (1966).

Working at cross-purposes with these policies, the California Statute seeks to impede the flow of information to employees that federal law has been designed to foster. In a Board representation election, “the employees may select a ‘good’ labor organization, a ‘bad’ labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative.” Alto Plastics Mfg. Corp., 136 NLRB 850, 851 (1962). Among the possible disadvantages of unionization that an employer might want to convey is that the particular union seeking to represent the employees may have a

record of corruption,¹¹ racial discrimination,¹² violence,¹³ bribery,¹⁴ or misrepresentation.¹⁵ Even labor organizations, in their capacity as employers, have recognized such dangers and the importance of speaking out when, in their view, their employees may be about to make an unwise choice of a bargaining representative.¹⁶

However, for those private employers covered by the California Statute, “any attempt by [the] employer to influence the decision of its employees” regarding “[w]hether to support or oppose” that labor organization is regulated by the state. § 16645 (a)(1) (Definitions) (emphasis supplied). Even in the extreme

¹¹ Alto Plastics Mfg. Corp., 136 NLRB at 851-52.

¹² Handy Andy, Inc., 228 NLRB 447, 454-56 (1977).

¹³ Sonoco of Puerto Rico, 210 NLRB 493, 494 (1974); Steak House Meat Co., 206 NLRB 28, 28-29 (1973).

¹⁴ General Cable Corp., 170 NLRB 1682, 1682-83 (1968); Owens-Illinois, Inc., 271 NLRB 1235, 1235-36 (1984); Mailing Services, 293 NLRB 565, 565-66 (1989).

¹⁵ NLRB v. Winchell Processing Corp., 451 F.2d 306, 310 (9th Cir. 1971); NLRB v. G.K. Turner Assoc., 457 F.2d 484, 489 (9th Cir. 1972). Employers might also point out the costs to employees of union dues and fees. Allied/Egry Business Systems Inc., 169 NLRB 514, 514, 520-21 (1968).

¹⁶ See, e.g., Retail Store Employees Union, Local 444, Retail Clerks Int'l Ass'n, 161 NLRB 1358, 1359 (1966) (union employer complains that potential representative of its employees is a communist organization out to embarrass union employers); Int'l Ladies Garment Workers' Union, 142 NLRB 82, 104-108 (1963), enforced, as modified, Fed. of Union Rep. v. NLRB, 339 F.2d 126 (2d Cir. 1964) (union employer objects to “a union within a union” as divisive and contrary to its mission).

circumstances just detailed, private employers who would advise employees of such concerns are not only barred from using state funds, but are faced with litigation, fines, and attorney's fee awards if they cannot prove to the satisfaction of the state and private parties that no state funds were used. The foreseeable impact of such a state regulatory scheme is to chill the exercise of speech rights that, in the judgment of Congress and the Board, enhance the opportunity of employees to make a free and informed choice about unionization. That, in turn, would adversely affect Board elections in California, since employees would be less likely to have the benefit of the free flow of information that Congress envisaged in establishing a system of Board certification of elections.

In using its spending authority to induce private employer neutrality, California has also intruded in the area of collective bargaining between unions and employers that Congress left "to be controlled by the free play of economic forces." Machinists, 427 U.S. at 140 (*quoting* NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)). Under national labor policy, the freedom to speak out about representation choices is lodged in the parties to the election contest. See Trent Tube Co., 147 NLRB 538, 541 (1964) (Absent threats, the Board "will not restrict the right of any party to inform employees of 'the advantages and disadvantages of unions and joining them.')" (citations omitted). To the extent that such liberty may

be validly waived,¹⁷ the decision to do so is a matter for voluntary bargaining. See Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 619 (1986).

Under Congress' policy of free collective bargaining between unions and employers, the Board itself may not regulate "either directly or indirectly, [to] compel concessions" (NLRB v. American Nat. Ins. Co., 343 U.S. 395, 404 (1952)) or to "impose its own views of a desirable settlement" (H.K Porter Co. v. NLRB, 397 U.S. 99, 103-104, (1970)). It is no more permissible for California to use its spending authority to pressure employers to adopt neutrality policies. Under Congress' policy, these are matters for private parties to negotiate for themselves, in light of their individual circumstances, free of governmental influence and control.¹⁸ To allow California to use its spending power to impose a "one size fits all" neutrality policy on private employers would permit California, contrary to Machinists preemption principles, to upset "Congress' intentional balance between

¹⁷ See NLRB v. Magnavox Company of Tennessee, 415 U.S. 322, 325 (1974) (invalidating a union's contractual waiver of its right to campaign in the workplace as an interference with the employees' right to be informed).

¹⁸ Studies of private neutrality agreements show that, although private employers sometimes voluntarily agree to the kind of complete neutrality fostered by the California statute, when the matter is left to private bargaining (without government's thumb on the scale), the resulting neutrality agreement often is more nuanced, containing, for example, explicit exceptions for the employer to respond to employee questions or to respond to misrepresentations or other unfair attacks. See Hartley, *supra* note 7, at 377-382; Eaton and Kriesky, *supra* note 7, at 47-48.

the uncontrolled power of management and labor to further their respective interests.” Boston Harbor, 507 U.S. at 226.

5. The California Statute Is Also Preempted Because It Regulates Employer Speech That Congress Intended The Board To Regulate

As noted above, Garmon preemption principles aim to protect the Board's primary jurisdiction from interference by the states. The focus of Garmon preemption is on “the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes.” Garmon, 359 U.S. at 242. Accord Gould, 475 U.S. at 286. Thus, Garmon preemption prevents states from “providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.” Gould, 475 U.S. at 286. This is because “Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.” Garmon, 359 U.S. at 242.

In administering the unfair labor practice provisions bearing on the employees’ Section 7 right to join or refrain from joining a union, 29 U.S.C. § 157, the Board has the responsibility to decide in the first instance what employer conduct “interfere[s] with . . . the exercise of the rights guaranteed in section 7.” Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). See NLRB v. Gissel Packing

Co., 395 U.S. 575 at 620 (a "reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.") Likewise, in carrying out its responsibilities to conduct elections under Section 9 of the NLRA, 29 U.S.C. § 159, the Board has primary jurisdiction to determine whether employer communication, even if lawful under Section 8, is so prejudicial to a fair election to be grounds to set it aside. See General Shoe Corporation, 77 NLRB at 127. For example, in the interest of free and fair elections, the Board has long administered various "time, place, and manner" rules that bar certain kinds of employer and union campaign activities in the vicinity of the polls or during the final 24-hours before the election. See Peerless Plywood Co., 107 NLRB 427, 429-30 (1953); Milchem, Inc., 170 NLRB 362, 362-63 (1968).

The California Statute is preempted under Garmon because, in the guise of controlling state funding, it actually regulates the same partisan employer speech that Congress committed to the Board's jurisdiction and it does so using different standards and different sanctions than Congress thought appropriate. Under the uniform federal standard, partisan employer speech that reasonably tends to coerce employees is regulated either as an unfair labor practice or election objection. See, e.g., National By-Products, Inc. v. NLRB, 931 F.2d 445, 451-52 (7th Cir.1991). Under the California Statute, by contrast, all partisan employer speech is regulated

on the theory, discussed above, that such speech inherently interferes with employee free choice. Sanctions for violations of the NLRA are entirely remedial, including re-running the tainted election, directing the employer to cease and desist from the unfair labor practice found, and posting appropriate remedial notices to employees. E.g., National By-Products, Inc. v. NLRB, *supra*, 931 F.2d at 447-48, 450-51. Sanctions for violations of the California Statute, by contrast, are punitive, including civil penalties and awards of attorneys fees.¹⁹

In sum, because all partisan employer speech falls within California's funding restrictions, California's policing such speech necessarily results in state regulation of the same employer conduct that Congress determined should be regulated and remedied by the NLRB under Sections 8 and 9 of the NLRA. To the extent that the Board itself would find particular employer speech either an unlawful interference remediable under Section 8 or otherwise objectionable under Section 9 and grounds for setting aside an election, the California funding scheme

¹⁹ Because the California Statute regulates partisan employer speech that is arguably prohibited by the NLRA, the California Statute is distinguishable from the federal executive order recently upheld by a divided panel of the D.C. Circuit. UAW-Labor Employment and Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. April 22, 2003). The executive order at issue in Chao required government contractors to post a government notice accurately advising employees of their legal rights concerning compulsory union dues. The Circuit specifically found that, under extant Board precedent, the employer conduct required by the executive order was neither arguably protected by Section 7 nor prohibited by Section 8 of the NLRA. Chao, 315 F.3d at 363-65. In contrast here, California is regulating employer speech arguably prohibited by Section 8.

intrudes into the Board’s jurisdiction and accordingly violates Garmon preemption principles.²⁰

The California Statute interferes with the Board’s jurisdiction for the additional reason that it frustrates Congress’ purpose in enacting the NLRA “as an instrument of the national labor policy of minimizing industrial strife” Emporium Capwell Co. v. Community Org., 420 U.S. 50, 62 (1975). Congress’ objective was that the Board resolve election disputes efficiently and speedily in order that the majority’s choice could be fairly ascertained and the passions of the election campaign defused. See NLRB v. A.J. Tower, 329 U.S. 324, 330-332 (1946); Handy Andy, Inc., 228 NLRB at 454. The California Statute invites unions disappointed with Board-certified election results to initiate collateral state proceedings attacking the employer’s spending on partisan speech. California’s

²⁰ Concurrent state regulation may survive a Garmon preemption challenge if the conduct being regulated is only of “peripheral concern” to the NLRA or “touches on interests . . . deeply rooted in local feeling and responsibility.” Garmon, 359 U.S. at 243-44. In this case, it is evident from the statute’s preamble, and for the reasons explained above, that the conduct at issue cannot fit under this exception because it involves the core activities that Congress declared to be a federal concern: union organizing, free debate on labor-management issues and Board conducted elections of employee representatives. Compare Linn, 383 U.S. at 61 (state defamation suits conducted consistently with the standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) not preempted); Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 304 (1977) (state tort suit remedying intentional “outrageous conduct” causing mental distress not preempted where the potential for interference with the NLRA “is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens”); Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 754-56 (1985) (state minimum labor standards, equally applicable to union and nonunion employees, are not preempted).

funding scheme thus complicates and delays the resolution of representational disputes that Congress gave the Board primary jurisdiction to resolve in the interest of industrial peace.²¹

Finally, to the extent that the California Statute has its intended effect of deterring employer speech concerning representation election issues, the California funding scheme frustrates Congress' objective in entrusting "to the Board alone" (NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940)) the determination of the steps necessary to conduct a fair election. Relying on the NLRA's policy of encouraging vigorous campaigning by the parties, the Board has found it possible to craft uniform election rules that obviate the need to regulate certain subjects that, if regulated, would lead to additional litigation and delay in resolving representation disputes. For example, the Board has repeatedly declined suggestions that unions should be disqualified from participating in Board elections because of their record of violating civil and criminal laws. See Alto Plastics Mfg. Corp., 136 NLRB at 851. The Board determined that the better course was to rely on the sound judgment of the voters to decide whether to elect

²¹ Sensitive to the need to expeditiously resolve representation disputes, the Board has established a goal of concluding and certifying the results of elections within 60 days of the initial petition for the conduct of an election. FY 2004 Annual Program Performance Plan And FY 2002 Annual Performance Report, Government Performance and Results Act of 1993 (March 2003), pp. 18-19. Recent experience shows that the Board's actual median time from petition to certification was 54 days in Fiscal Year 2001, and 53 days for Fiscal Year 2002. Id. at 19.

such a union for themselves. Id. After debate and experiment, the Board also concluded that its attempts to regulate alleged campaign misrepresentations were a source of delay in resolving election cases and that, on balance, it would be better for the parties to rely on vigorous campaigning if they thought it important that their record on particular issues be made known to employees. Midland Nat'l Life Ins. Co., 263 NLRB 127, 131-33 (1982). See also NLRB v. Best Products Co., Inc., 765 F.2d 903, 910-13 (9th Cir. 1985) (approving Midland). If the California funding scheme discourages employers from actively campaigning, the effectiveness of these Board election rules would be impaired. For this additional reason, the California Statute frustrates Garmon's purpose of safeguarding the uniform federal law from conflicting state regulation.

6. Rust v. Sullivan And The Existence of Federal Statutes Do Not Save the California Statute From A Finding Of Preemption

California and Intervenors argue that California's refusal to use its funds to subsidize partisan labor speech cannot, as a matter of law, be deemed an interference with the right of private employers to speak out on labor issues with their own funds. In so contending, they primarily rely on Rust v. Sullivan, 500 U.S. 173 (1991). That case is inapposite.

In Rust, a First Amendment viewpoint discrimination case, the Supreme Court rejected a constitutional attack on federal regulations that subsidized family planning services but barred the use of appropriated funds to provide information

about abortion as a method of family planning. Rust relied on the Court’s earlier decision in Maier v. Roe, 432 U.S. 464 (1977), which reasoned that the liberty to have an abortion is not unqualified, id. at 473, and that the state has a ““strong and legitimate interest in encouraging normal childbirth,”” id. at 478, making it rational for Connecticut to choose to subsidize childbirth but not therapeutic abortions. Id. at 474, 478-80. The Court in Rust summarized its controlling principle as follows:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. “[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”

Rust, 500 U.S. at 193, *quoting* Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983). Rust stressed that the regulations at issue did not require the grantee to give up abortion-related speech but only required it to fund that speech through other sources and conduct its activities through programs that are separate and independent from the government funded project. Id. at 196.

California’s Rust-based defense assumes that California is likewise free to establish a program reflecting its value judgment that employer neutrality (as well as voluntary recognition and bargaining with unions) is worthy of subsidization, but partisan speech must be funded independently by the speaker. That argument overlooks that in Rust, the Court explicitly acknowledged that the States have a

substantial and legitimate interest in establishing programs promoting normal childbirth. California lacks any comparable legitimate interest in promoting a labor policy which is inconsistent with the express Congressional policy of free and robust debate. Congress enacted the NLRA to obtain uniform application of national labor policy and to avoid conflicts likely to result from a variety of local laws or procedures. Garner v. Teamsters, Local 776, 346 U.S. 485, 490-91 (1953). The NLRA precludes California and other states from imposing on private employers a local value judgment that partisan employer speech interferes with employee free choice, and therefore should not be subsidized the way collective bargaining and voluntary recognition are subsidized. Congress has already determined, as a matter of national labor policy, that employer free speech serves employee free choice.

Lastly, contrary to the Appellants' claim, the fact that Congress has chosen to impose restrictive spending language upon a small group of grantees who participate in discrete federal health and social welfare programs is not inconsistent with finding the California Statute preempted. Congress, which has the authority under the Commerce Clause to enact the NLRA, also has the authority to amend that statute either directly or by writing exemptions into other laws. It does not follow at all that a state may do likewise, as the District Court properly recognized. Lockyer, 225 F.Supp.2d at 1205-06.

CONCLUSION

For these reasons, the Board respectfully requests that this Court uphold the District Court's decision finding Sections 166445.2 and 16645.7 of the California Statute preempted.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBERS 03-55166; 0355169**

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: June 4, 2003
Washington, D.C.

Signature of Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CHAMBER OF COMMERCE OF THE)
UNITED STATES,)
)
)
Plaintiff – Appellees,)
)
v.)
)
BILL LOCKYER, ATTORNEY GENERAL OF)
THE STATE OF CALIFORNIA,)
)
)
Defendant – Appellants,)
)
)
and)
)
)
AMERICAN FEDERATION OF LABOR AND)
CONGRESS OF INDUSTRIAL)
ORGANIZATIONS and CALIFORNIA LABOR)
FEDERATON, AFL-CIO,)
)
)
Intervenors – Appellants.)
)

Court Nos. 03-55166 and
03-55169

CERTIFICATE OF SERVICE

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

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