Nos. 03-55166; 03-55169

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,
Plaintiffs/Appellees,

v.

BILL LOCKYER, et al.,
Defendants/Appellants,

and

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

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

PETITION FOR REHEARING AND REHEARING EN BANC

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FRAP 35 STATEMENT

California prohibits recipients of state grant and program funds from using those ***state*** funds to assist, promote or deter union organizing, but places no restrictions on recipients' use of ***their own*** money. The panel decision striking down this California law as preempted by the National Labor Relations Act (NLRA) should be reheard because it decides a question of great significance in a manner that is inconsistent with Supreme Court and Ninth Circuit precedents.

The Supreme Court has recognized a fundamental distinction between the government prohibiting or penalizing an activity and the government merely refusing to subsidize the activity. For example, the government can deny a tax deduction for the costs of lobbying and can grant funds on condition they not be spent to provide information about abortion, even though an outright prohibition on lobbying or discussing abortion would violate the First Amendment. *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983); *Rust v. Sullivan*, 500 U.S. 173, 193-94, 200 (1991); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959). The California law at issue falls on the refusal-to-subsidize side of the line because it governs only the use of state money.

Nothing in the NLRA – or the NLRA preemption precedents upon which the panel decision relies – suggests that Congress intended to compel California to

fund, out of its own coffers, private campaigns to promote or deter union organizing. All the NLRA itself says about employer speech during organizing campaigns is that non-coercive speech cannot be used as evidence of an unfair labor practice. *See* 29 U.S.C. §158(c). This provision "merely implements the First Amendment, " (*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), a context in which the penalizing/refusing-to-subsidize distinction is well established.

The Supreme Court's and this Court's NLRA precedents also recognize that employer speech rights in the workplace are more limited than in other contexts because of the potential for coercion of employees. *See Gissel,* 395 U.S. at 617-18; *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000); *NLRB v. Associated General Contractors, Inc.,* 633 F.2d 766, 772 n. 9 (9th Cir. 1980). The panel decision stands those precedents on their head by striking down, as "interfering" (slip op. at 5187, 5189) with employer speech rights, a law that governs only use of the State's money and would be perfectly valid as applied to core First Amendment speech such as lobbying.

There is no support for the panel's conclusion that the recordkeeping and enforcement provisions in the state law will chill employers from using their own funds to promote or deter union organizing. Much more burdensome requirements

were upheld against a claim they would chill free speech in *Rust v. Sullivan*, 500 U.S. at 179-81, 195-96, 199 n.5, and *Legal Aid Soc'y of Hawaii v. Legal Services Corp.,* 145 F.3d 1017, 1021-23, 1024-25, 1027-28 (9th Cir. 1998). We also are aware of no precedent for the conclusion that an otherwise legitimate restriction on spending government money cannot be enforced through private lawsuits and civil penalties. The California courts have ample authority to deal with frivolous lawsuits.

Even if the panel's preemption analysis were otherwise correct, the panel erred by striking down the California statute rather than severing the penalty and private enforcement provisions. The state law contains a severability provision. Cal. Gov. Code §16649. Insofar as the panel decision invalidates more of the statute than necessary to avoid a conflict with federal policy, the panel decision is inconsistent with *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996), *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050 (9th Cir. 2000), and *National Broiler Council v. Voss*, 44 F.3d 740, 748-49 (9th Cir. 1994). Rehearing is required to reconcile the panel decision with those severability precedents.

REASONS FOR GRANTING REHEARING

I. The Panel Erred By Striking Down a California Law that Controls Only the Use of California's Own Grant and Program Funds.

A. It is commonplace that grant money, whether from private foundations or the government, comes with strings that govern how the grant money may be spent. *See, e.g.,* ER 104-246 (rules applicable to federal grant recipients). As the panel decision acknowledges, federal statutes place exactly the same restriction on some federal grants – that the funds may not be used to "assist, promote, or deter union organizing" – that California has placed on the State's grant money. Slip. op. at 5194.

The Supreme Court has held that the government does not infringe on the exercise of private rights merely by refusing to subsidize them. *See Regan*, 461 U.S. at 549 ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right"); *Cammarano*, 358 U.S. at 513 (absence of government subsidy for activity means that private parties "are simply being required to pay for those activities entirely out of their own pockets").[1] The Supreme Court also has upheld as entirely legitimate the

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[1] The panel decision suggests that, after *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), this distinction may apply only when the party receiving funding is "the government's speaker." Slip op. at 5193 n.8. To be sure,

(continued...)

government's interest in avoiding the perception that the government is subsidizing one side in a labor dispute. *See Lyng v. UAW*, 485 U.S. 360, 371-72 (1988) (government can deny food stamps to striking workers).

B. Neither the text of the NLRA nor the *Machinists* preemption precedents on which the panel decision relies supports the panel's conclusion that the NLRA imposes "unique constraints" (slip. op. at 5193) on California's sovereign authority to control use of its own grant money.

The NLRA does not include a provision expressly preempting state laws, and all the NLRA itself says about employer speech during organizing campaigns is that the National Labor Relations Board (NLRB) may not use speech unaccompanied by a threat or the promise of a benefit as evidence of an unfair labor practice. 29 U.S.C. §158(c). This provision is not the source of employer speech rights that go beyond the First Amendment; it "merely implements the First

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[1](...continued)
Velazquez does point out that *Rust v. Sullivan* involved government speech and that, when government speech is involved, ***viewpoint-based*** speech classifications are permissible. But *Velazquez* cast no doubt on the permissibility of content-based governmental spending decisions such as those at issue here and in *Regan*. *See Regan*, 461 U.S. at 542 & n.1, 544-45 (government refusal to subsidize lobbying activities through tax exemption did not offend First Amendment). *Velazquez* invalidated spending restrictions because the purpose of the government program at issue was to facilitate private speech and the viewpoint-based spending restrictions did not allow the affected individuals an alternative means of expression. 531 U.S. at 538, 544-47.

Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. at 617. Since the distinction between penalizing and refusing to subsidize is an established part of First Amendment jurisprudence, the same distinction would apply under the NLRA. *Cf. Linn v. United Plant Guard Workers*, 383 U.S. 53, 61-65 (1966) (applying First Amendment standards for core political speech to state law defamation claim based on statements made during labor dispute; rejecting argument that First Amendment standards were inadequate to protect NLRA speech rights).

Moreover, what the Supreme Court actually has held in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) and its progeny is that the NLRA preempts regulation – whether by the NLRB or by the States – of ***the use of economic weapons*** (*i.e.* strikes, lockouts, picketing, etc.) by parties to labor disputes.[2] The doctrine recognizes that "Congress intended to give

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[2] *See, e.g., Machinists*, 427 U.S. at 135-36, 155 (state precluded from regulating union's concerted refusal to work overtime during collective bargaining negotiations); *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 479, 490, 497, 500 (1960) (NLRB precluded from finding that union committed unfair labor practice by engaging in on-the-job slow-down and sit-in activities to harass employer); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334, 1339 (D.C. Cir. 1996) (federal government's executive branch could not penalize employers for hiring permanent replacements during strikes); *Cannon v. Edgar*, 33 F.3d 880, 885-86 (7th Cir. 1994) (state could not require union and employer to negotiate to establish pool of replacement workers to be used during labor disputes); *cf. UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003), *cert. denied*, __ S.Ct. __, 2004 WL 827743 (2004) ("No

(continued...)

parties . . . the right to make use of 'economic weapons,' not explicitly set forth in the act, free of governmental interference." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989) (quoting *Machinists*, 427 U.S. at 154); *see also Associated Builders and Contractors of Southern Cal., Inc. v. Nunn*, 356 F.3d 979, 987 (9th Cir. 2004) ("*Machinists* preemption prohibits states from imposing restrictions on labor and management's 'weapons of self-help' that were left unregulated in the NLRA because Congress intended for tactical bargaining decisions and conduct 'to be controlled by the free play of economic forces.'") (quoting *Machinists*, 427 U.S. at 140). All the Supreme Court and reported circuit decisions that find laws preempted under *Machinists* deal with the use of economic weapons, not employer conduct during union organizing campaigns.

In cases that ***do*** arise from union organizing campaigns, both the Supreme Court and this Court have held that, because of the unequal power dynamics in the workplace, employers' free speech rights ***are more limited*** in the workplace than in other contexts. *See Gissel*, 395 U.S. at 617-18; *NLRB v. Associated General Contractors*, 633 F.2d 766, 772 (9th Cir. 1980); *White v. Lee*, 227 F3d 1214, 1236-37 (9th Cir. 2000). Thus, the NLRB ***has*** regulated employer conduct during

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[2](...continued)
claim is made that the posting of employees' *Beck* rights represents an economic weapon – certainly not one covered by *Machinists* preemption").

union organizing campaigns, by holding that certain employer conduct – like threats to close a plant if the workers unionize, mandatory employee "captive audience" meetings within 24 hours of an election, and visits to employee homes before an election – is inherently coercive.[3] The NLRB's authority to regulate in this area is well established.[4]

Because the *Machinists* preemption doctrine creates a zone free of ***all*** regulation, whether by states and localities ***or*** by the NLRB (*see Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986); *Machinists*, 427 U.S. at 149-50), it makes no sense to extend the *Machinists* doctrine to a context

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[3] *See, e.g., Rosewood Mfg. Co.*, 263 NLRB 420 (1982), *supplemented by* 278 NLRB 792 (1986) (threats of plant closure); *Peerless Plywood Co.*, 107 NLRB 427, 428-30 (1953) (captive audience meeting); *Peoria Plastic Co.*, 117 NLRB 545, 546-48 (1957) (visits to employee homes).

[4] *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (plurality op.) (upholding NLRB's requirement that employer provide unions with employee names and addresses prior to representation election); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.") (internal citation omitted); *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 450 (9th Cir. 1988) ("[T]he Board retains broad discretion to determine whether the circumstances of an election come sufficiently close to laboratory conditions so that employees can exercise free choice in deciding whether to select the Union as their representative") (internal quotation marks and citation omitted); *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1462 (9th Cir. 1986) ("The Board has broad discretion to establish safeguards and procedures necessarily to conduct representative elections.") (internal citations omitted).

that is highly regulated by the NLRB – that of employer conduct during organizing campaigns. There is a distinct NLRA preemption doctrine (the *Garmon* doctrine) that applies to state and local regulation of matters the NLRB ***does*** regulate; but for the reasons stated in the briefs filed before the panel, the California law would not be preempted under *Garmon.*

In sum, the panel's analysis is inconsistent with Supreme Court and Ninth Circuit precedent because the panel (1) extends the *Machinists* preemption doctrine to a context in which the doctrine does not apply, and (2) holds that the NLRA provides employers with a greater right to use the State's grant money to run pro- and anti-union campaigns than the First Amendment provides to grant recipients who wish to use the State's money for core political speech such as lobbying.

C. The panel deemed the record keeping and private enforcement provisions in the California law "crucial[]" to its conclusion that the California law is NLRA preempted. Slip op. at 5188. Those provisions, in the panel's view, expose employers that receive state funds to impermissible "compliance costs and litigation risk" if they wish to spend their own funds to influence employees about unionization. *Id.* But the provisions to which the panel refers are not unusual. There is no precedent for the conclusion that an otherwise legitimate restriction on

spending government money may be invalidated because it places minor burdens on parties that choose voluntarily to receive government money.

The recordkeeping burdens imposed by the California law are minimal. Employers that receive state money merely must maintain records sufficient to show that the state funds were not used for prohibited activities, and they may maintain those records in whatever form they choose. *See* Cal. Gov. Code §§16645.2(c), 16645.7(c), 16648. *Cf.* 29 U.S.C. §431(b) (requiring unions to report on an annual basis all receipts and specified disbursements). These bookkeeping requirements are far less burdensome than the detailed "program integrity" regulations that the Supreme Court upheld against a First Amendment challenge in *Rust v. Sullivan*, 500 U.S. at 179-81, 195-96, 199 n.5, and that this Court upheld against a First Amendment challenge in *Legal Aid Soc'y of Hawaii,* 145 F.3d at 1021-23, 1024-25, 1027-28. Under those regulations, government grant recipients were required to set up entirely separate entities if they wished to engage in activities that the government had declined to fund. Here, by contrast, the recipient of a state grant need only keep track of how the grant money is spent.

Likewise, the civil penalty and private enforcement provisions in the California law are not materially different from provisions in many other statutes that prohibit certain expenditures of funds or certain speech. *See, e.g.,* 2 U.S.C.

§437g(c)(4)(C)(II), (d) (authorizing penalties for violations of federal campaign finance law); 17 U.S.C. §504(c) (establishing statutory damages for copyright infringement); 31 U.S.C. §1352(c) (establishing penalties for violating prohibition on use of federal funds for lobbying activity); Cal. Gov. Code §91003 (authorizing "[a]ny person" to sue for injunctive relief to enjoy violations of state political reform law). In practice, these statutes do not chill speech: candidates still accept contributions and spend funds to campaign, companies still publish material, and recipients of federal funds still engage in advocacy using non-federal monies.

The penalty in the California statute is set at twice the amount of the misspent funds and is payable to the state treasury. Cal. Gov. Code §§16645.2(d), 16645.7(d). Thus, a *de minimis* violation of the statute would result in a *de minimis* penalty. The California courts also have ample authority to control frivolous lawsuits through sanctions and actions for malicious prosecution.

Unions that spend money on political and ideological activities unrelated to collective bargaining – that is, core political speech – must deal with far more burdensome restrictions. Those restrictions have not prevented unions from remaining politically active.

In particular, unions that engage in political and ideological activities unrelated to collective bargaining are precluded from funding those activities with

the agency fees collected from non-members who object to the expenditures. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communication Workers v. Beck*, 487 U.S. 735 (1988). This restriction on the use of agency fees means that unions must, among other things, keep track of all expenditures, have their books audited, issue annual notices setting forth "chargeable" and "nonchargeable" expenditures, provide a procedure for non-members to challenge the amount of the agency fee before an impartial decisionmaker, and hold disputed amounts in escrow while challenges are pending. *See Hudson*, 475 U.S. at 305-10 & n.18; *Cummings v. Connell*, 316 F.3d 886, 890 (9th Cir. 2003), *cert. denied,* 539 U.S. 927 (2003); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000).[5]

These restrictions on unions that collect money from non-members and engage in political activism are far more onerous than those imposed by the

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[5] *See also* 2 U.S.C. §441b(a)-(b) (2000) (prohibiting unions from spending dues money for certain political contributions or expenditures but allowing specified expenditures of some segregated funds); 68 Fed. Reg. 58374 (Oct. 9, 2003) (requiring unions to provide itemized accounting of receipts, disbursements, and accounts payable and receivables that fall into categories including political activities and lobbying).

California statute on employers that receive money from the State and conduct campaigns about unionization. *Cf.* Cal. Gov. Code §16648 (employers may maintain records of relevant expenditures in any form). And ideologically motivated lawsuits against unions for allegedly violating these agency fee restrictions are not uncommon. *See* http://www.nrtw.org/b/nr_prime.php3 (website of Right to Work Foundation recounting, among other things, lawsuits against unions for violation of *Hudson* requirements).

Nonetheless, the "compliance costs and litigation risk" (slip. op. at 5188) of engaging in political and ideological activities have not deterred unions from exercising First Amendment rights. There is no basis for the conclusion that the California law would actually dissuade employers from conducting campaigns about unionization with their own money.

II. Even if the Panel's Preemption Analysis Were Correct, the Panel Erred by Striking Down the Entire State Law Rather than Severing the Penalty and Private Enforcement Provisions.

The panel decision holds that "the California statute ***as written*** is preempted by the NLRA" (slip. op at 5172; emphasis supplied), "because an employer who decides against neutrality will incur both compliance costs and litigation risk" (*id.* at 5188). In reaching its conclusion, the panel found it "***crucial***[]" that "the statute contains not only a provision for compensatory damages and injunctive and

equitable relief" but also provisions for penalties and private enforcement. *Id.* at 5188 (emphasis supplied); *see also id.* at 5194 (distinguishing federal grant restrictions because they do not "contain comparable remedial provisions, such as section 16645.8's authorization of citizen suits or the civil penalty imposed by section 16645.2(d)").

The panel decision does not consider, however, whether the private enforcement and penalty provisions that were "crucial[]" to the panel's preemption conclusion are ***severable*** from the remainder of the statute. The answer, as a matter of California law, is "yes." That being so, even if the panel's preemption analysis were otherwise correct, the panel erred – and created a conflict with Supreme Court and Ninth Circuit decisions – by invalidating the statute *in toto* rather than severing the penalty and private enforcement provisions and upholding the remainder of the law. *See, e.g., Dalton*, 516 U.S. at 476 (holding that lower court erred in striking down state law as a whole, because "[i]n a pre-emption case such as this, the state law is displaced only to the extent that it actually conflicts with federal law") (internal quotation marks omitted); *Tocher*, 219 F.3d at 1050 (severing portion of city ordinance that was preempted by federal law); *National Broiler Council*, 44 F.3d at 748-49 (severing portion of California statute that was preempted by federal law).

A. Whether statutory provisions are severable is a question of state law. *See California Pro-Life Action Comm. v. Scully*, 164 F.3d 1189, 1191 (9th Cir. 1999). Here, the California statute itself answers the severability question:

> The provisions of this chapter are severable. If any section or portion of this chapter, or any application thereof, is held invalid, in whole or in part, that invalidity shall not effect any other section, portion, or application that can be given effect.

Cal. Gov. Code §16649. While not dispositive, the presence of an express severability provision creates a strong presumption in favor of severability. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821 (1989).

Under general California law, moreover, a provision is severable so long as it is "grammatically, functionally, and volitionally separable" from the remainder of the statute. *Calfarm,* 48 Cal.3d at 821-22. The penalty and private enforcement provisions easily meet those tests.

A provision is "grammatically . . . separable" if it "can be removed as a whole without affecting the wording of any other provision." *Calfarm*, 48 Cal. 3d at 822; *see also Barlow v. Davis*, 72 Cal.App.4th 1258, 1264 (1999) ("An enactment passes the grammatical test where . . . the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words.") (citations omitted). The penalty and private enforcement provisions are contained in

separate sections or subsections of the California law (Gov. Code §§16645.2(d), 16645.7(d), 16645.8), and can therefore be grammatically separated from the substantive restrictions on spending state funds to assist, promote or deter union organizing (Gov. Code §§16645.2(a), 16645.7(a)).

A provision is "functionally" separable if "the [remaining] sections are capable of independent application." *Barlow*, 72 Cal.App.4th at 1265-66. The core restrictions on spending state funds can operate independently of the penalty and private enforcement provisions, for the Attorney General would still have authority to enforce those restrictions like any other grant or contract terms.

A provision is "volitionally separable" if it would likely have been adopted even if the Legislature could have foreseen that that provision would be held invalid. *Calfarm*, 48 Cal. 3d at 822; *see also Gerken v. Fair Political Practices Commission*, 6 Cal.4th 707, 715, 719 (1993) (if a valid provision "reflects a substantial portion of the [legislature's] purpose, that part can and should be severed and be given operative effect"). Here, the Legislature has already stated — in Section 16649 – its intent that the remainder of the law be given effect even if some provisions must be invalidated. There is also no logical reason why the Legislature would not have adopted the spending restrictions even if the

Legislature had foreseen that the private enforcement and penalty provisions would be preempted.[6]

B. Severance of the penalty and private enforcement provisions, rather than invalidation of the entire statute, would be consistent with the remedy imposed by the Supreme Court in *Linn v. United Plant Guard Workers*, *supra*, one of the NLRA preemption decisions relied upon by the panel decision. In *Linn*, the Supreme Court addressed whether the NLRA barred a state law action for libel based on the allegedly defamatory comments of a union and its officials during an organizing campaign. The Court held that the libel action could proceed if the plaintiff met the malice and injury standards set out in *New York Times v. Sullivan*, 376 U.S. 254 (1964), but rejected the argument that state defamation law should be preempted in its entirety as applied to labor disputes. *Linn,* 383 U.S. at 61-65.

The Supreme Court in *Linn* was concerned with balancing a state interest in providing redress for personal injuries against the NLRA interest in free debate during labor disputes. The Court struck that balance by imposing First

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[6] As explained earlier, the recordkeeping burdens imposed by the California law are minimal because employers can keep records in whatever form they choose. If the Court concludes that even that minimal burden is too great, however, the recordkeeping provisions, like the penalty and enforcement provisions, are severable from the statute's core spending restriction.

Amendment standards on libel claims arising from union speech during labor disputes, not by invalidating state libel law in its entirely. Similarly, even on the preemption analysis in the panel opinion, the remedy of complete invalidation of the state statute is not necessary to effectuate federal labor policy.

CONCLUSION

For the foregoing reasons, this case should be reheard.

Dated: May 18, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,112 words.

Dated: May 18, 2004

Respectfully submitted,
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PROOF OF SERVICE

CASE: *The Chamber of Commerce of the United States, v. Bill Lockyer*

CASE NO. U.S. Court of Appeals, 9th Cir., Case Nos. 03-55166 and 03-55169 (U.S. Dist. Ct., C.D. Cal., Case No. 02-CV-377 GLT (ANx))

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On May 18, 2004, I served a copy of the following document(s):

PETITION FOR REHEARING AND REHEARING EN BANC

as indicated below:

By First Class Mail: I am readily familiar with the practice of Altshuler, Berzon for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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District Court Judge

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this May 18, 2004, at San Francisco, California.

Jean Perley

F:\002.00\Chamber of Commerce\Pleadings\Appeal\pos.pet.rhrg.wpd

COPY

Nos. 03-55166 and 03-55169

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 18 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as Attorney General of the State of California, et al.,

Defendants-Appellants.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.

Intervenors-Appellants.

On Appeal from the United States
District Court for the Central District of California, Southern Division
No. CV-02-00377-GLT
The Hon. Gary L. Taylor, Judge

PETITION FOR REHEARING EN BANC

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Defendants-Appellants Attorney General Bill Lockyer, Frank G. Vanacore, and Diana M. Bonta ("Defendants-Appellants") hereby respectfully petition this Court for rehearing *en banc* of the above-captioned case pursuant to Federal Rule of Appellate Procedure 35.

I.

INTRODUCTION AND STATEMENT OF COUNSEL

Defendants-Appellants respectfully seek rehearing *en banc* of the Panel Opinion (Beezer, J., Fisher, J., and England, J.) in *Chamber of Commerce of the United States, et al. v. Bill Lockyer, et al.*, filed on April 20, 2004, holding that the National Labor Relations Act ("NLRA") preempts California Government Code sections 16645.2 and 16645.7 ("California statute").

This petition is necessary because the Panel's Opinion presents questions of exceptional importance in that the Opinion: 1) departs from principles of preemption established under *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*"Machinists"*); 2) conflicts with Supreme Court precedent regarding government restrictions on subsidized protected speech; and 3) infringes upon the most basic sovereign interest of a state - the state's right to determine how to

spend its own funds, and in so doing, will have a broad impact on employers, unions and taxpayers statewide and nationwide.

II.

REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL'S OPINION DEPARTS FROM SETTLED PRINCIPLES GOVERNING PREEMPTION

This Court's decision departs from NLRA preemption principles well established in Supreme Court precedent. The Panel's Opinion extends the *Machinists* preemption doctrine beyond regulation that directly interferes with the bargaining process to include government activity that may affect the organizing *process* in general. The Panel Opinion found that the California statute is preempted under *Machinists* because it constitutes state regulation that directly targets a process that is central to the union organizing and collective bargaining system established by the NLRA. Slip op. at 5186.

Machinists established the principle that when Congress carefully crafted a comprehensive regulatory scheme that balanced power between labor and management, it intended to leave to the parties the freedom to use self-help weapons without regulation from local government. *Machinists* preemption has been found when government action constitutes direct interference in the bargaining process. *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986). In *Golden State*, the Supreme Court determined that the Los Angeles City

Council directly interfered in the bargaining process when it conditioned renewal of a franchise to operate taxi cabs on settlement of an ongoing labor dispute with the company's drivers by a certain date. The Court found that the City destroyed the balance of power by pressuring the employer to settle the labor dispute.

The Panel Opinion extends the "direct interference" concept beyond the scope of established precedent. It holds that state activity that affects the union organizing *process* in general, as opposed to state activity that directly interferes in an ongoing private labor dispute, is also preempted under *Machinists.* Defendants-Appellants submit that this extension goes well beyond the spirit and intent of *Machinists* and *Golden State.* State activity that directly interferes in an ongoing private labor dispute directly affects the balance of power between labor and management by interjecting the state on one side of the debate. In so doing, the state destroys the economic weapons of self-help Congress intended to remain available to the parties to a labor dispute.

Neither the balance of power nor the economic weapons of self-help are affected by state activity that impacts the organizing *process* in general, particularly when viewed in the context of the California statute. To the contrary, requiring state neutrality in private union organizing campaigns by prohibiting the use of state funds for that purpose *preserves* the free play of contending economic forces. (*Machinists,* 427 U.S. 132 at 150.)

The Panel's departure from established preemption principles presents an exceptionally important question warranting *en banc* review.

III.

REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL'S OPINION DEPARTS FROM SETTLED PRINCIPLES GOVERNING FREE SPEECH AND CONFLICTS WITH SUPREME COURT PRECEDENT

The Panel Opinion held that sections 16645.2 and 16645.7 impermissibly interfere with processes that the NLRA meant to leave free from regulation. Slip op. at 5193-5194. The Panel viewed California's restrictions on the use of its funds as a means of discouraging employer speech about union organizing. Slip op. at 5192.

The Panel's Opinion conflicts with Supreme Court precedent regarding government restrictions on subsidized speech. Government limitations on the use of its funds to subsidize speech have been consistently upheld by the Supreme Court. *See, for example, Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991) in which the Court held that Congress' refusal to fund certain activities, including speech, that restricted access to information regarding abortion did not violate the First Amendment; *Lyng v. UAW*, 485 U.S. 360, 369 (1988) in which the Court held that the government can deny striking workers food stamps without violating the workers' First Amendment rights; and *Regan v. Taxation with Representation*, 461 U.S. 540, 544-46 (1983) in which the Court upheld government restrictions on

lobbying activities by tax-exempt organizations. The Supreme Court has held that a legislature's decision not to subsidize the exercise of a right does not infringe on that right. *Id.*, at 549.

The Panel's Opinion, in effect, interprets the NLRA to provide employers greater free speech rights than those provided by the First Amendment. However, the provisions of the NLRA contain no affirmative free speech rights. To the contrary, the NLRA *restricts* employer speech. As stated by this Court in *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000), under the NLRA, "[t]he First Amendment rights of employers in the context of the labor relations setting are limited to an extent that would rarely, if ever be tolerated in other contexts." Though an employer has the right to free speech in the context of union organizing, that right is a First Amendment right, not an NLRA right. In fact, the only mention of employer speech in the NLRA is contained in section 8(c), which provides a *defense* to an unfair labor practice charge for employer non-coercive speech.

Even if the NLRA provided an employer a free speech protection, that NLRA right would be no broader than the free speech right protected by the First Amendment. The Supreme Court has held that section 8(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

///

If refusing to subsidize protected speech does not offend the First Amendment, then such a refusal could not violate the NLRA.

The Panel's view that California's restrictions on state subsidized employer speech discourage employer speech in violation of the NLRA contravenes established Supreme Court precedent upholding such restrictions on government funds. Consequently, the Panel's Opinion conflicts with the Supreme Court and this Court's precedent by providing broader free speech protections to employers under the NLRA than those afforded by the First Amendment.

IV.

REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL OPINION INVOLVES THE EXCEPTIONALLY IMPORTANT QUESTION OF STATE SOVEREIGNTY AND WILL HAVE A BROAD IMPACT

A. The Panel Opinion Involves the Exceptionally Important Question of State Sovereignty

In enacting sections 16645.2 and 16645.7, California exercised its sovereign power in determining that its money would not be used to fund one side of private labor debates. The purpose of sections 16645.2 and 16645.7 is not to regulate labor relations; rather the purpose is to ensure that the state's own funds are not used to "subsidize efforts by an employer to assist, promote, or deter union organizing." AB 1889, § 1. The crucial inquiry required by *Machinists* is whether Congress intended a particular area to be free from regulation. *Golden State*

Transit Corp. v. Los Angeles, 475 U.S. 608 at 614; *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1413 (9th Cir. 1996). There is no indication in the NLRA that Congress intended to preclude states from imposing restrictions upon the permissible uses of their own funds.

Government Code sections 16645.2 and 16645.7 are a means of ensuring that taxpayer funds are not misused to fund expensive campaigns encouraging or discouraging employees from voting for a union. By requiring employers to use non-state money for such purposes, the state is, as a matter of policy, refusing to reimburse those costs. Consequently, the overall cost of the grant or program is lower.

Control over a state's own fiscal affairs has been recognized as a state's sovereign right. For example, in *San Antonio Independent Sch. Dist. v. Rodriquez,* 411 U.S. 1 (1973), the Supreme Court refused to order the state of Texas to redistribute funds between school districts in a class action brought on behalf of school children residing in districts having a low tax base challenging a school-financing system that was based on local property taxation. In declining to invalidate the Texas school-financing system, the Court stated:

> We are asked to condemn the state's judgment in conferring on political subdivisions the power to tax local property to supply revenue for local interests. In so doing, appellees would have the

Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies . . . *Id.* at 40.

Government Code sections 16645.2 and 16645.7 are an exercise of California's sovereign right to manage and control its own financial affairs. "No right of a state is entitled to greater respect by the federal courts than the state's right to determine . . . for what purpose public funds should be expended." *Welsh v. Likins*, 550 F.2d 1122, 1131-32 (8th Cir. 1977).

Nothing contained in the NLRA evidences Congress' intent to prohibit a state from determining how to use its funds. Absent explicit direction from Congress, the Court should refrain from concluding "that our federal government has chosen to adopt a rule so antithetical to fundamental principles of federalism and democracy." (*Alameda Newspapers v. City of Oakland*, 95 F.3d 1406, 1415 (9th Cir. 1996.)

B. <u>The Panel Opinion Will Have a Broad Impact</u>

The question of whether, in enacting the NLRA, Congress intended to restrict state sovereignty in determining how to spend the state's own funds will have a broad impact in California and nationwide.

This is not a case involving a dispute between private parties. The invalidation of this statute will affect all California taxpayers, employers who do

business with state government, their employees, and the unions that represent or seek to represent those employees.

Furthermore, other states have enacted legislation similar to California's AB 1889, including New York and Massachusetts. See N.Y. Labor, § 211-a; MA ST 7, § 56. Undoubtedly, the courts in those jurisdictions will look to this Court's Opinion when similar challenges to the validity of those statutes are adjudicated and reviewed.

A matter of such broad impact warrants closer scrutiny *en banc*.

CONCLUSION

For the reasons stated, Defendants-Appellants respectfully urge the *en banc* Court to grant rehearing in this case.

Dated: May 17, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4, the attached petition for rehearing en banc is (check applicable option)

__X__ proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words).

or

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ Words or ____ Lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

_____ In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

Dated:

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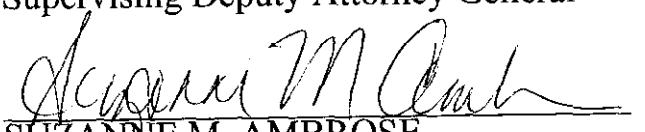
By: 
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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *Chamber of Commerce of the United States, et al. v. Bill Lockyer, et al.*
United States Court of Appeals, Ninth Circuit, Case Nos. 0355166 and 0355169

I declare:

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On May 17, 2004, I served the attached **PETITION FOR REHEARING EN BANC** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with **CALIFORNIA OVERNIGHT** addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 17, 2004, at Sacramento, California.

DONNA H. PARKER
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Signature

10055769.wpd

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeals Nos. 03-55166 and 03-55169 (Consolidated)

RECEIVED
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FILED
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DATE INITIAL

CHAMBER OF COMMERCE
OF THE UNITED STATES, et al.

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as
Attorney General of the State of California, et al.,

Defendants-Appellants.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and CALIFORNIA LABOR FEDERALTION, AFL-CIO,

Intervenors-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. CV-02-00377-GLT
The Honorable Gary L. Taylor, Judge

ANSWER TO APPELLANTS' PETITIONS FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Plaintiffs-Appellees submit this Answer pursuant to this Court's June 9, 2004 Order, requesting a response to the separate Petitions for Rehearing En Banc ("Petitions") filed by Defendants-Appellants ("the Attorney General") and Intervenors-Appellants ("the AFL-CIO") (collectively "Appellants").

In reviewing Appellants' Petitions, it appears they argue the following points: (1) Machinists preemption does not apply to state regulation of the union organizing process, as opposed to ongoing labor disputes or collective bargaining; (2) AB 1889 somehow is not preempted by Machinists because it would withstand a First Amendment constitutional challenge; (3) California has a sovereign interest in deciding how its funds are spent; and (4) the penalty and private enforcement provisions of AB 1889 should be severed, leaving the remainder of the statute in tact. Each argument lacks merit and does not warrant en banc review.

Appellants have waived arguments one, two and four by failing to raise them before the Panel or even the District Court. It is not appropriate to raise new arguments for the first time in a petition for rehearing.

Contrary to the Appellants', the Panel's decision is fully consistent with established principles governing Machinists preemption. Machinists preemption, which precludes state regulation of areas under federal labor law that Congress intended to be unregulated, includes a basic premise that employee free choice

about whether to join a union is best achieved through the open and robust exchange of ideas by employers and unions. Preventing state regulation of union organizing is critical to ensuring that employee free choice is not trampled. AB 1889 dramatically restricts and interferes with the ability of employers to present views on unionizing, thereby disrupting the delicate balance of power Congress intended to be left unregulated.

Nor does the Panel decision conflict with First Amendment case law. First Amendment constitutional analysis is irrelevant to determining whether AB 1889 is preempted under Machinists. The controlling question, recognized by the Supreme Court and this Circuit, is whether through AB 1889, California can intentionally and fundamentally alter the delicate balance of power between unions and employers assured under our national labor relations system.

The Attorney General contends en banc review is appropriate based on California's sovereign interest in controlling how its funds are spent. However, this is not a novel issue. The United States Supreme Court and this Circuit have consistently stated a state's exercise of its sovereign spending powers as a "market participant" must yield to our uniform system of labor relations where, as here, the spending decisions constitute impermissible regulation of federal labor law through broad policy objectives.

The AFL-CIO's severability argument ignores that AB 1889 is at its core improper regulation. The Panel properly recognized that "taken as a whole, the statute constitutes substantive regulation . . . ." Slip op. at 5189. Removing particularly egregious sections of the legislation does not alter the fundamental premise that AB 1889 regulates employers' ability to communicate with employees about unionizing. As such, AB 1889 cannot be saved by severing collateral elements.

En banc review is a disfavored and extraordinary process. Fed. R. App. Proc. 35(a); United States v. Wylie, 625 F.2d 1371, 1378 fn 10 (9th Cir. 1980) (noting "that en banc hearings are disfavored and generally are only ordered when there is (1) an intracircuit conflict, or (2) a question of exceptional importance"). Fed. R. App. Proc. 35(b)(1). Appellants have failed to satisfy any rationale for en banc review and Appellants' Petitions should thus be rejected.

LEGAL ARGUMENT

I. APPELLANTS WAIVED THOSE ARGUMENTS RAISED FOR THE FIRST TIME IN THEIR PETITIONS FOR RECONSIDERATION

To present arguments in a petition for rehearing en banc, Appellants must have "specifically and distinctly" raised those arguments in their Opening Briefs on appeal. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993) (city precluded from asserting new legal theories not presented in opening brief on appeal); In re Brazier Forest Prod.,

Inc., 921 F.2d 221, 224 n.3 (9th Cir. 1990). This Court typically refuses to consider issues raised for the first time in a petition for rehearing. Boardman v. Estelle, 957 F.2d 1523, 1535 (9th Cir. 1992), cert. denied, 113 S. Ct. 297 (1992). Moreover, issues not raised before the District Court will ordinarily not be considered on appeal. Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882-883 (9th Cir. 2003).

For apparent strategic reasons, the AFL-CIO chose not to assert severability at the District Court level or in their Opening or Reply briefs on appeal.[1] Having opted to structure their argument without raising an alternative request to sever preempted sections, Intervenors are now barred from raising the issue in a request for rehearing. Talk of the Town v. Dept. of Finance and Business Services, 353 F.3d 650, 650 (9th Cir. 2003) (court refused to consider arguments raised for first time in petition for rehearing); U.S. v. Patzer, 284 F.3d 1043, 1045 (9th Cir. 2001) (same); Boardman, supra, 957 F.2d at 1535 (same).

Appellants also assert for the first time in their Petitions a novel theory that Machinists preemption does not apply to state regulation of the union organizing process. Appellants have waived this argument by failing to raise it in their briefs before the District Court on summary judgment or in their briefs before the Panel. Talk of the Town, supra, 353 F.3d at 650.

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[1] The Attorney General has never raised severability as an issue.

Appellants further argue for the first time that AB 1889 must only satisfy minimum First Amendment thresholds to avoid Machinists preemption. In their Opening Briefs on appeal, Appellants only asserted First Amendment case law in defense to Garmon preemption. (AFL-CIO's Opening Brief on appeal, pages 24-28, Attorney General's Opening Brief on appeal, pages 19-23). By never raising the First Amendment in the context of Machinists preemption, Appellants have waived this argument. See Talk of the Town, supra, 353 F.3d at 650.

II. MACHINISTS PREEMPTION APPLIES DURING UNION ORGANIZING CAMPAIGNS

Appellants argue that Machinists preemption only applies to "labor disputes" and the "bargaining process," not the union organizing process. This argument is unsupported by any case law and is contrary to established precedent.

A. The AFL-CIO's Attempt to Avoid Machinists Preemption is Fundamentally Flawed

In their Petition, the AFL-CIO utilizes a flawed syllogism, essentially arguing that: (1) both California and the National Labor Relations Board ("NLRB") are precluded from regulating conduct subject to Machinists preemption; (2) the NLRB has regulated conduct during union organizing campaigns; therefore, (3) states also can regulate union organizing campaigns as

outside Machinists preemption.[2] The AFL-CIO attempts to obfuscate the distinction between Garmon and Machinists preemption.

Garmon preemption is founded on the principle that the NLRB has exclusive jurisdiction over claims either involving conduct actually or arguably protected under section 7 of the NLRA (employees' right to form, join or assist labor organizations) or actually or arguably prohibited under section 8 (prohibiting employers from interfering with section 7 rights). San Diego Building and Trades Council v. Garmon, 359 U.S. 236, 242-244, 79 S. Ct. 1278 (1973). Garmon preemption prohibits states from supplementing NLRB remedies for labor law violations. Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, 475 U.S. 282, 290, 106 S. Ct. 1057 (1986). On the other hand, the scope of the NLRB's charter and jurisdiction defines the line of demarcation on employer speech which Congress intended to be unregulated by the NLRB. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-500 80 S. Ct. 419 (1960) (NLRB's charter prevents it from interfering with conduct Congress intended to be left unregulated). Machinists preemption similarly prevents states from regulating employer speech and other conduct that Congress intended to be left unregulated.

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[2] The Attorney General simply argues that Machinists preemption does not apply to organizing campaigns without any attempt to justify the contention. Appellees' response to the underlying argument is presented in the following section.

Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140, 96 S. Ct. 2548 (1976).

The NLRB cases cited by the AFL-CIO pertain to conduct within the NLRB's exclusive jurisdiction under Garmon. Quite simply, the NLRB's regulation of union organizing under section 7 or 8 has no impact on whether Machinists preemption applies to organizing drives, where both states and the NLRB are precluded from regulating.

B. Machinists Preemption Ensures Employee Free Choice About Whether To Join A Union

Nor does the Panel's decision conflict with established principles governing Machinists preemption.

In Machinists, the Court confirmed that the balance of power between employers and unions "must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated." Machinists, supra, 427 U.S. at 155. 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 . . . ." Building & Constr. Trades Council v. Associated Builders and Contractors, 507 U.S. 218, 226, 113 S. Ct. 1190 (1993) (hereinafter Boston Harbor); see also Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1993) ("[n]o state or federal official or governmental entity can alter the delicate

balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be.").

Machinists preemption includes a basic premise that under our national labor policy, employee free choice about whether to join a union is best assured through protecting employers' and unions' freedom to engage in unregulated non-coercive speech during union organizing campaigns. The Supreme Court has recognized that union organizing "campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Linn v. United Plant Guard Workers, 383 U.S. 53, 58, 86 S. Ct. 657 (1966). Moreover, the NLRB "does not 'police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.'" Id. at 60 (emphasis added) (citing Stewart-Warner Corp., 102 NLRB 1153, 1158 (1953)).

As this Circuit has noted: "'The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the

choices available.'" N.L.R.B. v. TRW-Semiconductor, Inc., 385 F.2d 753, 760 (9th Cir. 1967) (quoting Southwire Co. v. N.L.R.B., 383 F.2d 235, 241 (5th Cir. 1967)); see also Steam Press Holdings v. Hawaii Teamsters, 302 F.3d 998, 1009 (9th Cir. 2002) ("Freedom of speech is an essential component of the labor-management relationship [which counterbalances] a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty . . . .").

The NLRB has noted that "a lack of information with respect to one of the choices available" impedes employees' free and reasoned choice about whether to join a union. Excelsior Underwear, Inc., 156 NLRB 1236, 1240 (1966). As the NLRB aptly noted in its Amicus brief filed with the Panel: "The same partisan speech that Congress sought to safeguard, California disapproves as 'interference' with employee free choice." (Brief for National Labor Relations Board as Amicus Curiae, page 12).

Through AB 1889, California has used its spending power to restrict employers' ability to engage in the type of open debate that Congress and the NLRB have determined fosters informed employee choice. Quite simply, "employer free speech serves employee free choice" and restricting employers' ability to present views on unionizing fundamentally alters the delicate balance protected by Machinists preemption. (See, NLRB Amicus Brief, page 28).

III. APPELLANTS' RELIANCE ON FIRST AMENDMENT CASE LAW IS MISPLACED AND IRRELEVANT

Appellants present an extensive, albeit irrelevant, recitation of the constitutional standard for spending restrictions outside the traditional labor context. (See, Attorney General's Opening Brief on appeal, pp. 20-21 and AFL-CIO's Opening Brief on appeal, pp. 24-28). These cases add nothing to the federal labor law preemption issue before this Court; that is, whether California can intentionally alter the delicate balance of power between employers and unions through onerous spending restrictions. Accordingly, there is no conflict with any decision of the Supreme Court or this Circuit involving First Amendment law.

While state spending restrictions may pass constitutional muster, it does not mean those restrictions survive NLRA preemption. Reich, supra, 74 F.3d at 1332 (if an enactment is preempted by the NLRA, it is unnecessary to decide whether it is constitutional). In Reich, the District of Columbia Court of Appeals specifically held that the NLRA's preemption doctrines can invalidate otherwise constitutional enactments. Id. ("But labor relations policy is different because of the NLRA and its broad field of preemption. No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes . . . .").

The Panel analyzed the cited First Amendment authority and properly concluded that "[t]he issue here is not whether California may as a constitutional matter exercise control over its own funds . . . . Rather, we must look to see whether Congress intended, when it enacted the NLRA, to allow California to exercise its spending power in this manner." Slip op. at 5192. The Panel noted that this Circuit has "long recognized that the balance between employer and employee expression established by the NLRA differs substantially from the standard First Amendment balancing of speech interests." Id. (quoting N.L.R.B. v. Associated Gen. Contractors, Inc., 633 F.2d 766, 772 n.9 (9th Cir. 1980) and White v. Lee, 227 F.3d 1214, 1236-37 (9th Cir. 2000)). The Panel appropriately concluded "[t]he constitutional analysis of cases like Rust[v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759 (1991)] is inapposite in this case." Id. at 5193.[3]

The only First Amendment cases cited by Appellants involving the labor context were Lyng v. Automobile Workers, 485 U.S. 360, 103 S. Ct. 1184 (1988) and Linn, supra. In Lyng, the Court held a federal statute denying food stamps to striking workers met the "rational basis" test under the First and Fifth Amendments. Id. at 371. The Court never discussed Machinists preemption and

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[3] Appellants petitioned for en banc review based on an alleged conflict between the Panel's Opinion and First Amendment jurisprudence. Because the Panel properly based its decision on Machinists preemption, and expressly disavowed the application of First Amendment authority, there is no conflict whatsoever and en banc review is inappropriate.

the Court's analysis thus has no bearing on the NLRA preemption issues presented on this appeal.[4] In Linn, the Court limited a state defamation statute to prevent conflict with the Board's jurisdiction, thereby avoiding Garmon preemption. Linn, 383 U.S. at 60-61. The decision did not involve Machinists preemption, but rather an exception to Garmon preemption for matters "deeply rooted in local feeling and responsibility." Id.

IV. AB 1889 IS NOT SAVED BY THE STATE'S ALLEGED "SOVEREIGN" INTEREST

The Attorney General argues en banc review should be granted because the Panel's decision touches on California's sovereign right to spend funds as it deems appropriate. However, this is not a novel legal issue justifying en banc review.

In the Machinists preemption context, this argument is known as the "market participant" doctrine. The Supreme Court has clearly stated that a state's interest in choosing how to spend its resources must yield when spending restrictions regulate federal labor relations. As the Court recognized in Gould: "[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' . . . as long as they did so

[4] Unlike conflicts between state and federal law, federal preemption principles do not apply to conflicts between two federal statutes. Chao v. Bremerton Metal Trades Council, AFL-CIO, 294 F.3d 1114, 1119 (9th Cir. 2002) ("When there is a potential conflict between two federal statutes, traditional preemption analysis is inapplicable . . . ."). As such, Lyng is inapposite.

through exercises of the spending power." Gould, supra, 475 U.S. at 290 (internal citations omitted).

This Circuit also has recognized that state or local spending decisions must yield to federal labor policy. See Dillingham Construction N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1038 (9th Cir. 1999) ("In contrast to [Boston Harbor] and [Associated Builders & Contractors, Inc. v.] City of Seward[, 966 F.2d 492 (9th Cir 1992)] . . . the State in this case did not establish the . . . law specifically for the detention facility project and the State was not motivated by management concerns . . . ."); Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1417 (9th Cir. 1996) (Although Oakland's decision to cancel several newspaper subscriptions was not preempted, a "City's conduct is potentially regulatory when the City purchases an unusually large quantity of a given product. . . . Under such circumstances, an argument could be made that federal law may legitimately impose constraints on the City's conduct that may not be imposed on the conduct of private parties.").

The Panel distilled prior Circuit precedent into a two-part analysis utilized by the Fifth Circuit in Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). Under the first prong of the analysis, the challenged action must reflect the entity's own interest in efficient procurement, rather than regulatory intent. The second prong operates to save otherwise preempted actions that are narrow in scope.

The Panel properly concluded that AB 1889 fails to satisfy the Cardinal Towing test. First, nothing about AB 1889 indicates that California was concerned about efficiency or other proprietary factors. Indeed, AB 1889's very preamble demonstrates the legislation was adopted for a regulatory purpose:

> It is the policy of the state not to interfere with an employee's choice about whether to join or to 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.

Cal. Govt. Code § 16645, Historical and Statutory Notes, Section 1 of Stats. 2000, c. 872 (emphasis added). Second, the Panel also properly recognized that AB 1889 was not saved as a narrow spending decision because "its design sweeps broadly to shape policy in the overall labor market." Slip op. at 5180. Based on the foregoing, California's interest in determining how its funds are used by recipients must yield to our uniform system of federal labor law.

V. SEVERING THE PENALTY AND PRIVATE ENFORCEMENT PROVISIONS DOES NOT ELIMINATE AB 1889'S REGULATORY EFFECT

The AFL-CIO argues that because the Panel took particular note of AB 1889's penalty and private enforcement provisions, the Panel should have severed those clauses, leaving the remainder of the statute in tact.[5]

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[5] The AFL-CIO also argues that Machinists preemption does not apply because AB 1889 only imposes "minor burdens." Because the onerous burdens imposed by AB 1889 are relevant to the AFL-CIO's severability claim, the analysis is presented here.

The AFL-CIO's severability argument is fundamentally flawed, as it is founded on the assumption that AB 1889 is valid without the penalty and private enforcement provisions. Although the Panel took note that union enforcement and punitive sanctions are "of particular concern in the NLRA context," the Panel's Opinion was based on the statute "as a whole." Slip op. at 5188-5189. Id. Following similar reasoning as the Supreme Court, the Panel expressly declined to "decide whether any one aspect of the statute, taken alone, would suffice to warrant preemption . . . [because] [t]aken as a whole, the statute constitutes substantive regulation of 'Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests.'" Slip op. at 5189 (quoting Boston Harbor, supra, 507 U.S. at 226).

By its very nature, AB 1889 impermissibly alters the balance of power between employers and unions. Removing the penalty and private enforcement sections will not alter the fact that AB 1889 fundamentally diminishes an employer's ability to oppose union organizing campaigns and thereby deprives employees of the opportunity to make an informed decision.[6] Among the elements

[6] The AFL-CIO argues that union enforcement actions should be severed, but somehow maintains that enforcement actions by the Attorney General's office should remain viable. This assertion actually disproves that severability is appropriate. The improper disruption to the balance of power between employers and unions occurs regardless of who initiates the enforcement proceeding, the Attorney General or unions.

that contributed to the Panel striking down AB 1889 "as a whole" are the following provisions:

1. AB 1889 covers every employer expense related to opposing a union organizing campaign, including attorney fees for advice, salaries for supervisor training, and wages for employees who attend meetings about a company's position on unionizing. Cal.Govt.Code §16646(a).
2. AB 1889 mandates that employers keep records demonstrating complete segregation of state funds, which must be provided to the Attorney General on request. Cal.Govt.Code §§16645.7(c); 16645.2(c).
3. AB 1889 imposes an irrebuttable presumption of prohibited expenditures as a result of commingling funds – even where there is no bona fide dispute that an employer had sufficient "private" funds so that no state funds were, in fact, expended. Cal.Govt.Code §16646(b). Given the scope of covered expenses, employers wishing to oppose a union organizing drive at some point in the future are faced with the virtually impossible task of setting up and administering two completely separate accounting systems, including duplicate payroll systems for supervisor and employee salaries.
4. AB 1889 expressly authorizes the Attorney General and private taxpayers to commence lawsuits demanding an audit, injunctive relief, damages and civil penalties. Cal.Govt.Code §16645.8. Moreover, unlike unions that are

entitled to recover their attorney fees, there is no similar provision awarding attorney fees to an employer who successfully defends against harassing enforcement actions. See Cal.Govt.Code §16645.8(d).

5. AB 1889 imposes daunting penalties for even innocent violations. Sections 16645.7 and 16645.2 create treble damages comprised of both the state funds expended, plus a civil penalty equal to twice that amount. Cal.Govt.Code §§16645.7(d), 16645.2(d).

6. While AB 1889 restricts employers' ability to oppose organizing drives, there is no similar bar to union activities. Indeed, AB 1889 permits state funds to be spent promoting unionizing. Cal.Govt.Code §16647(a)-(d).

(Slip op. 5173-5174, 5188).

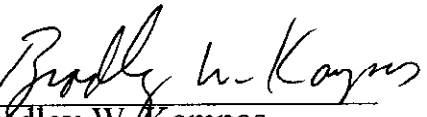
The AFL-CIO's argument that one or more of the preceding sections should be severed ignores the regulatory essence of AB 1889. "As a whole," AB 1889 restricts or chills employers from engaging in non-coercive speech which serves a fundamental purpose under our federal labor laws in enabling employees to make a free and informed choice about union representation – speech which Congress intended to be unregulated. That essential limitation on employers' ability to participate in the organizing process is the basis for Machinists preemption.

CONCLUSION

Based on the foregoing, Appellants have not demonstrated that the extraordinary and disfavored en banc review is appropriate. The Panel's Opinion was comprehensive, well-reasoned and should stand.

Dated: June 30, 2004

JACKSON LEWIS LLP

By: 

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached Answer to Appellants' Petitions for Rehearing and Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4,088 words.

Dated: June 30, 2004

Respectfully submitted,

JACKSON LEWIS LLP

By: _____
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CERTIFICATE OF SERVICE

US Court of Appeals Ninth Circuit, Docket Nos. 03-55166 and 03-55169
(Central District of California, Case No. CV-02-0077 GLT (ANX))

I, the undersigned, declare that I am citizen of the United States and am employed in the County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action; my business address is 199 Fremont Street, 10th Floor, San Francisco, California 94105.

On the date set forth below, I caused to be served a true andcorrect copy of the document(s) described as:

APPELLEES' ANSWER TO APPELLANTS' PETITIONS FOR REHEARING AND REHEARING EN BANC

on all interested parties in this action listed below,

Althsuler, Berzon, Nussbaum, et al., Law Offices Stephen Berzon, Esq. Scott A. Kronland, Esq. Stacey Layton, Esq. 177 Post St., Suite 300 San Francisco, CA 94108	Hooper, Lundy & Bookman, Inc. Mark E. Reagan, Esq 180 Montgomery St., Suite 1000 San Francisco, CA 94104
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in the indicated manner:

[X] **(By Mail Federal)** Pursuant to Federal Rules of Civil Procedure 4 (l), California Code of Civil Procedure § 1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth above, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Jackson Lewis LLP.

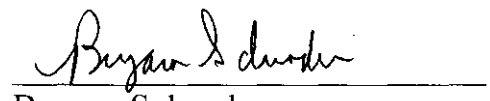
[ ] **(By Facsimile)** Pursuant to Federal Rule of Civil Procedure, I transmitted from a facsimile transmission machine whose telephone number is (415) 394-9401, the document(s) described above, to the facsimile number(s) set forth above.

[ ] **(By Overnight Courier)** Pursuant to Federal Rules of Civil Procedure 4, et seq, I placed a true and correct copy thereof enclosed in a sealed Overnight Mail Service envelope, addressed as set forth above, and deposited each envelope, fully prepaid, to be delivered via overnight courier.

I am familiar with the office's practice for collection and processing of correspondence for first class mailing with the United States Postal Service, that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, and that the document served was placed for deposit in the United States mail in accordance with the office practice, with postage thereon fully prepaid, at San Francisco, California.

[X] **(Federal)** I declare that I am employed in the offices of a member of the bar of this court at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2004, at San Francisco, California.



Bryana Schroder

Nos. 03-55166; 03-55169

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL.,
Plaintiffs/Appellees,

v.

BILL LOCKYER, ET AL.,
Defendants/Appellants,

and

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

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

REPLY IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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We submit this reply to address the contention that, even if the purely legal arguments in the Petition for Rehearing are correct, they cannot be considered because they were not raised earlier. That contention about waiver is wrong both legally and factually.

As a legal matter, the waiver argument is wrong because the Court always has the authority to consider purely legal arguments. The panel issued a published decision invalidating an important state statute. The statute applies to numerous state grants and programs and involves the permissible uses of millions of dollars in state funds. When purely legal issues are involved, and the decision will affect the public, the Court has an obligation to get the law right notwithstanding any purported failure by the parties to bring the relevant cases to the Court's attention. *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004); *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *see also Elder v. Holloway*, 984 F.2d 991, 999 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc); *id.* at 1001 (Reinhardt, J., dissenting from denial of reh'g en banc).

A duly enacted, lawful state statute should not be invalidated on erroneous legal grounds simply because an argument was not adequately articulated earlier in the proceedings. *Cf. Escobar Ruiz v. INS*, 838 F.2d 1020, 1022 (9th Cir. 1988) (*en banc*), *abrogated on other grounds*, *Ardestani v. INS*, 502 U.S. 129 (1991) (noting

that panel and *en banc* court addressed argument raised by government for first time in petition for rehearing, "because of the importance of the issue," among other circumstances). When a court declines to consider a particular basis for challenging a state law because the challenger failed to raise the claim, the court will have another opportunity to address the waived claim if and when it is raised in another case. In the instant circumstance, however, since the panel decision invalidates the state law, there would be no opportunity to correct the error.

The cases cited at pages 3-4 of the Answer to Appellants' Petitions for Rehearing and Rehearing En Banc establish the uncontroversial proposition that, ordinarily, the Court will not address arguments that were not raised before the District Court and/or in an Opening Brief. Ninth Circuit decisions also make it clear, however, that whether to consider such an argument is within the Court's discretion, and that "when the issue is one of law and either does not depend on the factual record, or the record has been fully developed," the argument *is* ordinarily addressed. *In re America West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000). All the arguments in the Petition for Rehearing are purely legal arguments about why the panel's NLRA preemption analysis is wrong. The Court has the authority to consider those arguments.

Equally to the point, as a factual matter, all the arguments in the Petition for Rehearing either *were* asserted earlier or could not have been asserted earlier because they respond to the analysis in the panel's opinion.

1. We *did* argue the relevance of First Amendment precedents before the District Court and in our Opening Brief to the panel, citing the very cases that are cited in the Petition for Rehearing. *See, e.g.*, Opening Br. at 13-15, 24-28. The Answer to Appellants' Petition for Rehearing contends that the First Amendment cases were cited only in the context of the *Garmon* preemption doctrine. That is simply not correct; the First Amendment cases are discussed at the beginning of the argument section of our Opening Brief to this Court as relevant to all preemption claims. The panel decision expressly addresses the same First Amendment case law in invalidating the statute on *Machinists* preemption grounds. *See* Slip. Op. at 5191-93.

2. We *did* argue, extensively, that the California law was not preempted under *Machinists* doctrine. *See* Opening Br. at 31-47. Pointing out specifically why the panel misread the *Machinists* cases on which the panel decision relies is not raising a new argument. Plaintiff-appellees concentrate on their waiver argument because, while they claim we are wrong on the merits, they do not cite a single case in which *Machinists* preemption doctrine has been applied in the

organizing context.[1]

3. It would have made no sense to argue, prior to the panel issuing its decision, that the logic of the panel's preemption analysis, even if it were correct, dictates severing the penalty and private enforcement provisions of the California law rather than invalidating the statute *in toto*. The District Court issued a short decision that contains little analysis and does not single out any particular parts of the California law for criticism. *See* ER 247-57. Accordingly, there was no reason to raise the issue of severance earlier. The statute contains an explicit,

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[1] Plaintiff-appellees' argument that the National Labor Relations Board has regulated in the organizing arena only in cases involving Section 7 or Section 8 of the National Labor Relations Act, *see* Answer to Appellants' Petitions for Rehearing and Rehearing En Banc at 7, misses the point. The salient point is that Congress granted the Board broad authority to regulate in the area of organizing and representation to ensure fair elections and that the *Machinists* preemption doctrine deals with areas of law that Congress intended to leave entirely *unregulated.*

That some (but not all) of the cases affirming the Board's authority involved Section 7 or 8 of the NLRA, *see* cases cited in Intervenors' Petition for Rehearing and Rehearing En Banc at 8 nn.3-4; *see also* 29 U.S.C. §159, is not responsive to the point that organizing and representational issues are not "no law" areas that fall within the *Machinists* preemption doctrine. Rather, all the *Machinists* cases are about Congress' intent to leave entirely unregulated the use of certain economic weapons during collective bargaining disputes.

extremely strong severance provision, and it would be error to strike down the entire law if only a specific section of the law is invalid.

Dated: July 9, 2004

Respectfully submitted,

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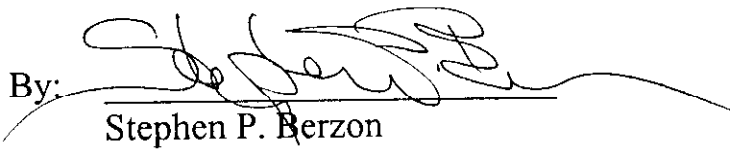
By: 
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeals Nos. 03-55166 and 03-55169 (Consolidated)

CHAMBER OF COMMERCE
OF THE UNITED STATES, et al.

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as
Attorney General of the State of California, et al.,

Defendants-Appellants.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and CALIFORNIA LABOR FEDERATION, AFL-CIO,

Intervenors-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. CV-02-00377-GLT
The Honorable Gary L. Taylor, Judge

PLAINTIFFS-APPELLEES' OPPOSITION TO REHEARING EN BANC

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I. INTRODUCTION

On September 6, 2005, Judges Robert Beezer and Morrison England, Judge Raymond Fisher dissenting, found that state spending restrictions imposed under California Government Code sections 16645-49 (commonly referred to as "AB 1889") on the use of funds received by Employers for services performed under State programs and grants are preempted by federal labor law. ("Panel decision"). In response to the Court's *sua sponte* request, Plaintiffs-Appellees submit the following brief explaining why *en banc* review of the Panel's decision is unwarranted.

En banc review is only appropriate to address intra-circuit conflicts or questions of exceptional importance, not "merely because of disagreement with a Panel's decision . . . ." *Hart v. Massanari*, 266 F.3d 1155, 1172 fn 29 (9th Cir. 2001). Here, the Panel's rejection of the State's "market participant" defense to federal labor law preemption is consistent with Ninth Circuit precedent. Moreover, because AB 1889 is unquestionably preempted by two National Labor Relations Act ("NLRA") preemption doctrines, this case presents no exceptionally important question.

The Panel appropriately rejected Appellants' argument that AB 1889 survives challenge under a narrow exception to preemption for "market participant" activity by distilling Ninth Circuit authority into a two-part test first applied by the Fifth Circuit. Slip Op. at 12201 (*citing Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)). Under this test, state spending decisions which interfere with federal labor policy avoid preemption only when based on proprietary goals *and* are

tailored to a specific project. AB 1889 fails under both parts of this test based on its improper express regulatory motive and extremely broad application.

Garmon preemption protects the National Labor Relations Board's ("NLRB's") ability to administer a uniform body of federal law. *San Diego Building and Trades Council v. Garmon*, 359 U.S. 236, 242-244, 79 S. Ct. 1278 (1973). *Garmon* is commonly applied to invalidate state or local enactments that regulate conduct actually or arguably protected or prohibited by the NLRA. *Id.* The Panel recognized that section 8(c) of the NLRA "explicitly protects the right of employers to express their views about unions . . . ." Slip Op. at 12185. By "imped[ing] the ability of the [NLRB] to uphold its election speech rules and administrate free and fair elections," and interfering with Employer rights protected under section 8(c), the Panel correctly struck down AB 1889 under *Garmon* preemption. Slip Op. at 12191-12193.

Machinists preemption applies to conduct not specifically protected or prohibited by the NLRA, but which effectively disrupts the "free play of economic forces" that Congress meant to be unregulated. *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140, 96 S. Ct. 2548 (1976). As the Panel recognized, "[a]n essential structural component of the union organizing process . . . is the ability of management to communicate its views on the merits of unionism . . . ." Slip Op. at 12197. By chilling employers' ability to oppose organizing, the Panel correctly held that AB 1889 regulates an area that Congress intended to be left unregulated, thereby triggering *Machinists* preemption. Slip Op. at 12195-12196.

II. *EN BANC* REVIEW IS UNWARRANTED

A. The Panel Correctly Applied Ninth Circuit Precedent In Rejecting Appellants' Market Participant Defense

Although an "irreconcilable split" within a circuit may justify *en banc* review (*see United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992)), the Panel's rejection of Appellants' market participant defense is consistent with Ninth Circuit precedent.

Ninth Circuit precedent establishes that the market participant doctrine is restricted to state spending decisions that are based on proprietary motive and effect *and* limited to specific projects. Here, AB 1889 has no proprietary purpose. Indeed, the preamble of AB 1889 expresses a regulatory purpose: "It is the intent of the Legislature . . . to prohibit an employer from using state funds and facilities for the purpose of influencing employees [about] unionization." Cal. Stats. 2000, Ch. 872, §1. Moreover, AB 1889 sweeps across all state contracts, programs and grants. As such, the Panel correctly rejected Appellants' attempt to shield state regulation of federal labor policy through the guise of a state spending restriction.

The Ninth Circuit has crafted its narrow view of the market participant exception to federal labor law preemption through several published decisions. In *City of Seward*, the court rejected the city's argument that spending restrictions are immune from preemption and limited the market participant doctrine to situations where the decision was advanced for: (1) proprietary interests; (2) on an isolated project it owned. *See Associated Builders & Contractors, Inc. v. City of Seward*, 966 F.2d 492, 496 (9th Cir.

1992) (but finding no preemption because the project labor agreement ("PLA")[1] at issue was proprietary and isolated); *see also Assoc. Gen. Contractors v. Metro. Water Dist. of So. Cal.*, 159 F.3d 1178, 1184 (9th Cir. 1998) (market participant exception must be founded on proprietary factors such as "on-time, effective, efficient construction."). In *Alameda Newspapers*, the court again recognized the market participant doctrine only applies to isolated decisions and added that government spending decisions may rise to regulation on sheer volume. *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1417 (9th Cir. 1996) (but finding no preemption because city's decision to cancel its own subscriptions and advertising was an isolated decision).

These principles were summarized in *Dillingham Construction*, in which the court held the market participant doctrine must be based on the "unique needs" of an isolated project. *Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037-1038 (9th Cir. 1999) (court held an apprentice wage law was regulatory, and thus subject to preemption analysis, but found no preemption under the minimum employment standards exception to *Garmon* preemption). Like its decision in *City of Seward*, the court in *Dillingham* flatly rejected the State's argument that its spending decisions are immune from NLRA preemption. *Id.*

B. The Panel's Decision Does Not Present An "Exceptionally Important" Question Justifying *En Banc* Review

[1] Under a PLA, employers are required to adhere to a previously negotiated collective bargaining agreement. PLA requirements are specifically permitted by section 8(f) of the NLRA. *See* 29 U.S.C. §158(f).

1. The Panel Correctly Applied Supreme Court Precedent Limiting The Market Participant Doctrine

Like the Ninth Circuit, the Supreme Court has taken a narrow view of the market participant doctrine. In *Gould*, the Supreme Court rejected a claim that state spending decisions should be immune from NLRA preemption, concluding: "[W]e cannot believe that Congress intended to allow States to interfere with the [NLRA] as long as they did so through exercises of the spending power." *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould*, 475 U.S. 282, 290, 106 S. Ct. 1057 (1986) (internal citations omitted). While private contractors can act for policy-related reasons, "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." *Id.*

In *Boston Harbor*, the court clarified its narrow construction. *Building & Constr. Trades Council v. Associated Builders and Contractors of Mass.*, 507 U.S. 218, 113 S. Ct. 1190 (1993) ("*Boston Harbor*"). In a case involving a PLA requirement on a municipal clean-up project, the court first recognized that state governments often "must interact with private participants in the marketplace," and NLRA preemption may not necessarily apply when spending decisions are made for *proprietary* reasons. *Id.* at 227.

The court cautioned, however, that government conduct is not immune from scrutiny merely because a private employer *could* have acted in the same manner. "A private actor . . . 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

private parties may act for non-proprietary reasons, state governments may not. A government entity only avoids NLRA preemption when it "acts as a market participant with no interest in setting policy." *Id.* Stated another way, preemption may be ruled out only where a government "pursues its purely proprietary interests." *Id.* at 231.

Unlike AB 1889, the PLA requirement in *Boston Harbor* was imposed on a single project and was issued in response to a court order requiring the project to be completed without interruption. *Id.* at 231. The local government entity was attempting to ensure that its own construction project was completed on time and without costly interruption. As such, the court held the PLA requirement was not "regulation." *Id.* at 231-232.

In essence, the Supreme Court through *Gould* and *Boston Harbor* established the same two-part test utilized by the Panel. The decision must be isolated and designed to further purely proprietary goals. AB 1889 fails to satisfy either element. The statute is designed to prevent employers from influencing employees about union organizing (a regulatory, non-proprietary interest). Moreover, the spending prohibition applies to all state contracts, programs and grants (not an isolated decision on a specific project).

2. Inter-Circuit Precedent Confirms *En Banc* Review Is Unwarranted

Like the Ninth Circuit and Supreme Court, circuit authority across the country have similarly taken a restrictive view of the market participant doctrine.

In *Reich*, the D.C. Circuit applied federal labor law preemption to strike down an Executive Order based on the breadth of the spending restriction, concluding that "[n]o state or federal official or governmental entity can alter the delicate balance of

bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337-1339 (D.C. Cir. 1993). Ten years later, the D.C. Circuit reiterated that broad procurement decisions constitute regulation when not imposed to advance proprietary goals. *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 362-363 (D.C. Cir. 2003) (Executive Order constituted regulation because it applied "across the board, rather than being tailored to any particular setting.").

The court in *Chao* evaluated whether *Garmon* preemption could be founded on section 8(c). Although the court noted that "fitting a *Garmon* claim under the language of §8(c) is awkward," the court confirmed that Supreme Court precedent supported the application. *Id.* at 364-365. As such, there is no conflict between *Chao* and the Panel's decision on the issue of whether section 8(c) supports *Garmon* preemption.[2]

In *Colfax Corp.*, the Seventh Circuit also restricted the market participant doctrine to "proprietary" goals on "specific project[s]." *Colfax Corp. v. Illinois Toll Highway Authority*, 79 F.3d 631 (7th Cir. 1996) (PLA requirement on toll road project upheld as proprietary and isolated). Because the narrow scope of the PLA requirement was sufficient to establish proprietary motive, the court declined to "go behind the contract to

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[2] In *Allbaugh*, the D.C. Circuit upheld an Executive Order prohibiting federal agencies from requiring *or* prohibiting a PLA. *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28, 29 (D.C. Cir. 2002). As the Panel noted in its original decision, *Allbaugh* supports the proposition that decisions based on "essentially proprietary" motives may survive preemption. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1162 (9th Cir. 2004) (depublished). While there is broad dicta in *Allbaugh*, its basic holding is consistent with Ninth Circuit precedent upholding PLA requirements. *See City of Seward, supra.*

determine whether the Authority's real, but secret, motive was to regulate labor."

In *Sage Hospitality*, the Third Circuit found the "pivotal difference" between *Boston Harbor* and *Gould* to be whether the spending condition was imposed to advance a proprietary interest. *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 214 (3rd Cir. 2004). The court concluded that "if the funding condition does not serve, or sweeps more broadly than, a government agency's proprietary economic interest, it must submit to review under labor law preemption standards." *Id.* at 216. The court noted the test was consistent with *Cardinal Towing* and the Panel's original decision. *Id.* The court concluded the city's interest was proprietary and isolated. Since the city had an ownership interest in the bonds that were secured by increased taxes, it had a proprietary interest in ensuring the specific project was completed efficiently and without disruption. *Id.* at 216-217.

The Second Circuit is currently reviewing a decision by Judge McCurn of the Northern District of New York holding that a New York statute substantially similar to AB 1889 is preempted by federal labor law. The District Court relied heavily on this Panel's original decision in finding preemption. *See, Healthcare Association of New York v. Pataki*, 2005 U.S. Dist. Lexis 9186, 177 L.R.R.M. 2359 (N.D. N.Y. 2005), appeal docketed, CCA No. 05-270-CV (2nd Cir. July 6, 2005).

The Panel's decision is thus consistent with inter-circuit precedent restricting application of the market participant doctrine. AB 1889 falls outside the doctrine based on both the statute's stated regulatory purpose and effect, and its broad scope.

3. The Panel Correctly Applied Garmon Preemption

a. *Garmon* Protects The Board's Jurisdiction And Our Integrated Federal Scheme Of Labor Relations

"The purpose of *Garmon* preemption is 'to preclude state interference with the [NLRB]'s interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Associated Builders and Contractors of Southern California v. Nunn*, 356 F.3d 979, 987 (9th Cir. 2004) (internal citations omitted). *Garmon* preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct" actually or arguably protected or prohibited by the NLRA.[3] *Gould, supra,* 475 U.S. at 286. In short, *Garmon* preemption "is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy and administration . . . .'" *Ibid.*

The Supreme Court has recognized that the *Garmon* preemption "guidelines" are not to be applied in a "literal, mechanical fashion." *Local 926, Int'l. Union of Operating Eng. v. Jones*, 460 U.S. 669, 676, 103 S. Ct. 1453 (1983). The Panel noted *Garmon* preemption also serves to protect the election process administered by the NLRB. Slip Op. at 12194 (*citing N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)). The court in

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[3] The Third Circuit recently stated that *Garmon* and *Machinists* preemption are facets of a broader "conflict preemption" doctrine. *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the U.S. Virgin Islands*, 357 F.3d 297, 302 fn 4 (3rd Cir. 2004). General conflict preemption principles would also invalidate a state law that "conflicts with the NLRA's express provisions or underlying goals and policies. A state or territorial law conflicts with the NLRA if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal citation omitted).

Garmon held that although courts are concerned with "inconsistent standards of substantive law," the "unifying consideration" behind NLRA preemption is "the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administration agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . ." *Garmon, supra,* 359 U.S. at 242.

b. Section 8(c) Creates A Zone Of Protected Conduct That AB 1889 Fundamentally Inhibits

The NLRA was enacted to "delicately structur[e] the balance of power among competing forces so as to further common ground." *Amalgated Ass'n of St., Elex Ry & Motor Coach of Am., et al., v. Lockridge*, 403 U.S. 274, 286, 91 S. Ct 1909 (1971). To protect that balance, Congress amended the NLRA to specifically add section 8(c) "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). 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, 86 S. Ct. 657 (1966).

As this circuit has stated: "The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union." *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 760 (9th Cir. 1967) (internal citation omitted). In short, "[t]he Supreme Court and this circuit are committed to the principle that debate in union campaigns should be vigorous and uninhibited . . . ." *N.L.R.B. v. Lenkurt*, 438 F.2d 1102, 1108 (9th Cir. 1971).

The Panel appropriately concluded that AB 1889 "stifles employers' speech rights which are protected by federal law, and in doing so, impedes the ability of the [NLRB] to uphold its election speech rules and administer free and fair elections." Slip Op at 12191. In conflict with national labor policy, California believes that partisan employer speech inherently interferes with employee free choice. The NLRB takes an opposite view, administering the NLRA under the assumption that employee free choice results from an open and robust debate. (Brief for NLRB as Amicus Curiae, pages 22-23.)

The Supreme Court has noted that "[e]ach additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress." *Gould, supra,* 475 U.S. at 288. AB 1889 is part of a national campaign by organized labor to *de facto* modify the NLRA at the state level to effectively require employer neutrality and uninformed employee decisions about unionization.[4] By chipping away at the NLRB's ability to administer labor policy, AB 1889 and its companion legislations threaten to disrupt the very foundation of federal labor relations policy in this country.

c. AB 1889 Is Not Saved By The "Local Interest" Exception To *Garmon* Preemption

The NLRA does not preempt statutes which "touch[] interests deeply routed in local feeling and responsibility." *Belknap, Inc. v. Hale, 463 U.S. 491, 498, 103 S. Ct. 3172* (1983). This exception is ordinarily applied "in cases where the conduct alleged

[4] To date, legislation similar to AB 1889 has been proposed or passed in Arizona, Connecticut, Missouri, Maryland, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New York, North Dakota, Oregon, and Pennsylvania. (SER77-281).

concerned activity traditionally recognized to be the subject of local regulation, most often involving threats to public order such as violence, threats of violence, intimidation and destruction of property." *Penn. Nurses Ass'n v. Penn. State Educ. Ass'n*, 90 F.3d 797, 803 (3rd Cir. 1996).

Appellant's attempt to equate violence to a state's "purse strings" is simply an attempt to re-label an argument rejected by both the Supreme Court and this Circuit that spending restrictions are immune from NLRA preemption. *See Gould*, *supra*, 475 U.S. at 290; *Dillingham Construction*, *supra*, 190 F.3d at 1037-38. As the Panel correctly noted, states have no "deeply routed" interest in silencing employer speech.

4. The Panel Correctly Found AB 1889 Chills Employer Speech Regarding Unionization, Thereby Triggering *Machinists* Preemption

The balance of power between employers and unions "must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated." *Machinists*, *supra,* 427 U.S. at 140. *Machinists* preemption is founded on the premise that employee free choice is assured by protecting employers' and unions' freedom to engage in unregulated non-coercive speech.

Organizing "campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors . . . and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, 86 S. Ct. 657 (1966). The NLRB "does not 'police or censor propaganda used in the

elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.'" *Id.* at 60 (*citing Stewart-Warner Corp.*, 102 NLRB 1153, 1158 (1953)).

As this Circuit has noted: "'The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.'" *N.L.R.B. v. TRW-Semiconductor, Inc.*, 385 F.2d 753, 760 (9th Cir. 1967) (*quoting Southwire Co. v. N.L.R.B.*, 383 F.2d 235, 241 (5th Cir. 1967)). The NLRB concludes that "a lack of information with respect to one of the choices available" impedes employees' free and reasoned choice about whether to join a union. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966).

Through AB 1889, California has restricted employers' ability to engage in the type of open debate that Congress and the NLRB have determined fosters informed employee choice. California has no authority to impose restrictions that advance its notion of "an ideal or balanced state of collective bargaining." *Machinists, supra,* 427 U.S. at 149-150 (*quoting N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 497-500 (1960)).

5. The Dissent's Effort To Distinguish "Use" From "Receipt" Of State Funds Is Misguided

In his dissenting opinion, Judge Fisher essentially argues that preemption is triggered when governments condition the receipt of state funds on achieving prohibited aims, not by merely placing restrictions that in effect have the same result. Slip Op. at

12226-12228 (J. Fisher dissenting).

Judge Fisher joined the majority in rejecting Appellants' attempt to draw an analogy to First Amendment jurisprudence. Slip Op. at 12227 (J. Fisher dissenting). Yet he inexplicably states that *Rust v. Sullivan*, 500 U.S. 173 (1991), "reveals the Supreme Court's understanding of what constitutes direct regulation through a state's spending power." Slip Op. at 12227 (J. Fisher dissenting).

However, *Rust* dealt strictly with the Court's analysis of First Amendment viewpoint discrimination. Indeed, the Court recognized that under First Amendment jurisprudence, the federal government can make spending decisions based on a regulatory agenda. *Rust, supra,* 500 U.S. at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest."). The Court's "funding" discussion was exclusively applicable to the very same First Amendment analysis that Judge Fisher rejected. *Rust* did not involve any preemption doctrine and there is no indication the Court meant for its discussion to extend outside First Amendment jurisprudence.

Drawing a distinction between conditioning "receipt" of state funds from restricting the "use" of those funds is simply another attempt to confer immunity to state spending decisions. The court in *Garmon* recognized that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted" and in *Gould,* the court rejected an argument that states can interfere with the NLRA "as long as they d[o] so

through exercises of the spending power." *Gould*, 475 U.S. at 290-291. AB 1889 is preempted because it chills employer speech during union organizing. The effect of that spending restriction is sufficient to trigger both *Garmon* and *Machinists* preemption.

C. The Panel Correctly Denied Severability

In his dissent, Judge Fisher argues AB 1889's core spending restriction survives preemption, but that its enforcement provisions may be preempted by "pressur[ing] employers . . . to remain neutral in labor disputes." Slip Op. at 12229 (J. Fisher dissenting).[5] As the majority aptly notes, however, AB 1889's core spending restrictions are preempted, not just its recordkeeping and enforcement structure. Slip Op. at 12197. Even if enforcement was limited to the Attorney General, employers would still be barred from spending State funds to oppose organizing drives. As the majority noted, "[n]o matter whether the Attorney General or the unions initiate the enforcement proceedings, the balance of power as between labor unions and employers would still be improperly disturbed." Slip Op. at 12198. "[T]he statute's total preemption in no way hinges on the statute's enforcement and penalty provisions." Slip Op. at 12199.

IV. CONCLUSION

Based on the foregoing, Appellants cannot demonstrate that extraordinary and disfavored *en banc* review is appropriate.

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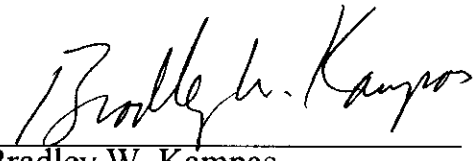
[5] Intervenor AFL-CIO did not raise severability until after the Panel's initial decision and the State has never raised severability. Intervenor should be barred from raising the issue at this late stage. *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 502 fn 1 (9th Cir. 1995) (rejecting severability argument raised in NLRA preemption case involving county ordinance as untimely).

Dated: October 25, 2005

JACKSON LEWIS LLP

By: 

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CERTIFICATE OF SERVICE

US Court of Appeals Ninth Circuit, Docket Nos. 03-55166 and 03-55169
(Central District of California, Case No. CV-02-00377 GLT (ANX))

I, the undersigned, declare that I am citizen of the United States and am employed in the County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action; my business address is 199 Fremont Street, 10th Floor, San Francisco, California 94105.

On the date set forth below, I caused to be served a true and correct copy of the document(s) described as:

PLAINTIFFS-APPELLEES' OPPOSITION TO REHEARING EN BANC

on all interested parties in this action listed below,

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in the indicated manner:

[X] **(By Mail Federal)** Pursuant to Federal Rules of Civil Procedure 4 (l), California Code of Civil Procedure § 1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth above, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Jackson Lewis LLP.

[ ] **(By Facsimile)** Pursuant to Federal Rule of Civil Procedure, I transmitted from a facsimile transmission machine whose telephone number is (415) 394-9401, the document(s) described above, to the facsimile number(s) set forth above.

[ ] **(By Overnight Courier)** Pursuant to Federal Rules of Civil Procedure 4, et seq, I placed a true and correct copy thereof enclosed in a sealed Overnight Mail Service envelope, addressed as set forth above, and deposited each envelope, fully prepaid, to be delivered via overnight courier.

I am familiar with the office's practice for collection and processing of correspondence for first class mailing with the United States Postal Service, that the correspondence would be deposited with the United States Postal Service that same

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U.S. COURT OF APPEALS

October 25, 2005

Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Chamber of Commerce v. Lockyer*, Nos. ~~03-55155~~ 03-55166, 03-55169

To the Honorable Court:

The American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation (collectively "Unions") submit this letter brief in response to the September 13, 2005 Order requesting the parties' views on whether this case should be reheard en banc.

The Unions urge the Court to grant rehearing en banc. The panel majority purports to apply "well-established preemption lines of analysis" (slip. op. 12206) to conclude that a California law restricting the use of *state* funds to promote or deter union organizing is preempted by the National Labor Relations Act ("NLRA"). But the majority actually expands dramatically the NLRA's preemptive scope, and its decision directly conflicts with decisions of the Supreme Court, the Ninth Circuit, other circuits, and the NLRB. Allowing the panel decision to stand would invite an avalanche of future litigation about the breadth of the new, NLRA employer-speech protection the panel erroneously creates. The majority's analysis of NLRA preemption doctrines is so misguided that rehearing would be appropriate even if the majority were correct (which it was not) in its ultimate holding that the California law is preempted.

The panel majority's conclusion that a law restricting only the use of government money would have the impermissible effect of chilling private speech also conflicts with precedents of the Supreme Court and Ninth Circuit that reject First Amendment challenges to structurally indistinguishable restrictions on the use of government money.

*ADMITTED IN MASSACHUSETTS ONLY

Allowing the panel decision to stand would invite free speech challenges to every government grant restriction that requires the recipient to keep records of how the grant money is spent and contains penalties for misusing government money. Rehearing en banc should be granted for that reason as well.

Finally, rehearing should be granted because the panel decision fails to respect California's sovereign interest in controlling the use of its own funds and, in doing so, creates an intercircuit conflict. The People of California, through the State's elected officials, enacted a law to prevent the diversion of state grant and program funds from vital services to campaigns about whether workers should unionize. The law carefully attaches a restriction only to the use of the state funds, and does not preclude program and grant fund recipients from using other revenue to speak for or against unionization. The result of the decision would be to force California to *subsidize*, from its own coffers, employer campaigns about unionization. Congress could not have intended that result.

I. Background.

This case involves a challenge to a California law that prohibits the use of state funds to promote or deter union organizing but places no restrictions on the use of other money for those purposes.

Two substantive provisions of the law are at issue. The first provides that "[t]he recipient of a grant of state funds . . . shall not use the funds to assist, promote or deter union organizing." Cal. Gov. Code §16645.2(a). The second provides that "[a] private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing." Cal. Gov. Code §16645.7(a).

The district court granted summary judgment to plaintiffs on the ground that these two provisions are preempted by the NLRA. The *only* undisputed facts before the district court were that the law existed and plaintiffs had standing to challenge the two provisions. Although the panel majority refers to a "substantial record generated over three years of litigation" (slip. op. 12199), most of that "three years of litigation" occurred in the Ninth Circuit and did not involve the presentation of evidence. Consequently, no factual findings support the majority's assertion that the California law "impel[s] employers to take a position of neutrality with respect to labor relations" (slip. op. 12178).

II. Reasons for Granting Rehearing En Banc.

A. The majority's recognition of an NLRA protection for employer speech that preempts state laws under the *Garmon* doctrine conflicts with Supreme Court, Ninth Circuit and NLRB precedent.

The majority departs from precedent by holding that the NLRA grants affirmative protections to employer speech about union organizing that go beyond the First Amendment and trump state laws. The majority finds such protections in NLRA §8(c), 29 U.S.C. §158(c), which, according to the majority, "explicitly protects the free speech rights of employers in the labor relations context." Slip. op. 12207. On that basis, the majority holds that the California law is preempted under the *Garmon* doctrine, which prohibits state regulation of activities the NLRA affirmatively protects.

All that Section 8(c) provides, however, is that non-coercive speech – whether by employees or employers – cannot be evidence of an unfair labor practice. "The activities described in §8(c) . . . are not 'protected *by*' the NLRA, except from the NLRA itself." *UAW-Labor & Employment & Training Corp. v. Chao,* 325 F.3d 360, 364-65 (D.C. Cir. 2003) (emphasis in original). The Supreme Court has already construed Section 8(c) not as a source of new speech protections but as "merely implement[ing] the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Likewise, this Court has recognized that "Section 8(c) merely states that an employer does not commit an unfair labor practice by expressing its views regarding unionization." *Hotel Employees v. Marriot Corp.*, 961 F.2d 1464, 1470 n. 9 (9th Cir. 2002).

Congress adopted the NLRA in 1935 to provide "*employees*" with federal statutory rights "to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives *of their own choosing.*" 29 U.S.C. §157 (emphases supplied). To secure those employee rights, Congress made it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. §157]." 29 U.S.C. §158(a)(1). Nothing in the NLRA created parallel employer rights.

The NLRB initially took the view that because the NLRA entitles employees to choose "their bargaining representative free from employer interference," the NLRA imposes a "correlative" duty on the employer to "maintain complete neutrality with respect to an election." *American Tube Bending Co.*, 44 NLRB 121, 129 (1942). The

Supreme Court initially appeared to agree with the Board that *any* employer participation in union organizing was inherently coercive. *See Machinists v. NLRB*, 311 U.S. 72, 72 (1940) (even "[s]light suggestions" of employer preference have "a telling effect among men who know the consequences of incurring that employer's strong displeasure"). But it then suggested in *NLRB v. Virginia Electric and Power Co.*, 314 U.S. 469 (1941), and stated (in dicta) in *Thomas v. Collins*, 323 U.S. 516 (1945), that employers have a *First Amendment* right to communicate their views to their employees.

When Congress adopted the Taft-Hartley Act in 1947, it conformed the NLRA with those recent First Amendment decisions by adding Section 8(c). Section 8(c) does not purport to create new rights. Instead, Section 8(c), added to the portion of the Act that deals with unfair labor practices, provides merely 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* . . . if such expression contains no threat of reprisal or force of promise of benefit." 29 U.S.C. §158(c) (emphasis supplied).[1]

That being so, it is not surprising that the Supreme Court construed Section 8(c) in *Gissel* as "merely implement[ing] the First Amendment." 395 U.S. at 617. Nor is it surprising that the NLRB has held that Section 8(c) does not provide any universally applicable employer rights, just a protection from unfair labor practice liability,[2] and has never issued a decision finding a violation of an employer's Section 8(c) "rights."

The majority's ahistorical reading of Section 8(c) is in conflict with all the

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[1] Congressional proponents of Section 8(c) cited *Thomas v. Collins* to show the provision would merely confirm a pre-existing First Amendment right. S. Rep. No. 80-105, at 23 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act 407, 429 (1948) (hereinafter "LMRA History"). Senator Taft told his fellow senators that Section 8(c) "in effect carries out approximately the present rule laid down by the Supreme Court of the United States." 93 Cong. Rec. S3953 (daily ed. April 23, 1947), reprinted in 2 LMRA History at 1011.

[2] *Fiber Indus., Inc.*, 267 NLRB 840, 841 n.4 (1983) ("[I]t is well settled that Sec. 8(c) applies only to unfair labor practice proceedings"); *Borden Mfg. Co.*, 193 NLRB 1028, 1034 (1971) (rejecting employers' argument that their speeches to employees "were protected by Section 8(c)" and holding Section 8(c) "not applicable to representation cases"); *see also Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 n.11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases.").

decisions cited above. The majority turns a statute adopted to allow employees to select representatives "of their own choosing," free from coercion by their employers, into a statute that affirmatively protects *employer* speech about union organizing.

Equally to the point, even if Section 8(c) *were* viewed as an NLRA protection for employer speech, the only plausible interpretation of Section 8(c) would be that it incorporated First Amendment free speech rights into the NLRA and protected them as a matter of statute as well. *See Gissel Packing Co.*, 395 U.S. at 617 (Section 8(c) "merely implements the First Amendment"); *Chao,* 325 F.3d at 365 (same). The Section 8(c) "right" (if it existed) would be no broader than the constitutional right it incorporated. Yet the majority rejects out of hand the relevance of Supreme Court precedents holding that the government does not interfere with the exercise of First Amendment rights merely by refusing to fund those rights.

For example, the government can deny a tax deduction for the costs of lobbying, and grant funds on the condition they not be spent to provide information about abortion, even though an outright prohibition on lobbying or discussing abortion would violate the First Amendment. *See Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right."); *Rust v. Sullivan*, 500 U.S. 173, 193-94, 200 (1991) (same); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959) (same). Similarly, the Government can deny food stamps to workers who become eligible because they are on strike without infringing striking workers' associational rights. *See Lyng v. UAW*, 485 U.S. 360, 368-69 (1988) ("[T]he strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right").

The majority dismisses those cases, stating that "even if [the California law] would pass muster under the First Amendment . . . . First Amendment cases (like *Rust v. Sullivan*) have no relevance to our inquiry." Slip. op. 12206. In doing so, the majority not only turns the NLRA upside down to protect *employer* speech about union organizing but creates protections for employer speech that are broader than – and completely unmoored from – the protections already provided by the First Amendment.

The majority's methodology for interpreting the NLRA creates additional direct conflicts with Supreme Court precedent. According to the majority, "[b]ecause the Act is a comprehensive regulatory scheme, to say that an activity is *not punishable* by the Act, which is what Section 8(c) dictates, is the equivalent of protecting that activity." Slip op.

12186 (emphasis in original). But the Supreme Court has held that there are activities neither punishable by nor protected by the NLRA. *See, e.g., NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 492-94 & n.23 (1960) (holding that while a work slowdown was not prohibited the NLRA, it was not protected by the NLRA either).[3] The entire *Machinists* preemption doctrine (discussed below) is based on the recognition that some activity in the field of labor relations is neither protected nor prohibited by the Act.

If the NLRA does not grant affirmative protection to employer speech, or if that protection is no broader than the First Amendment, then there is no way the California law could be *Garmon*-preempted. The majority's creation of affirmative, NLRA employer speech protections is so wrong, and creates so many conflicts with other decisions, that en banc review is necessary for this reason alone.

B. <u>The majority's extension of the *Machinists* preemption doctrine into the context of union organizing conflicts with Supreme Court and Ninth Circuit precedent.</u>

The majority's other fundamental error about NLRA preemption doctrines was in holding that *Machinists* preemption applies to a state law that allegedly interferes with speech during union organizing campaigns. Slip. op. 12195-97. The *Machinists* doctrine actually deals with the use during labor disputes of "*economic weapons*" (*e.g.* strikes, lockouts, picketing) that Congress intended to leave free from regulation. *Machinists*, 427 U.S. at 154; *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989) ("*Golden State II*") (emphasis added). Under the *Machinists* doctrine, the government is precluded from interfering with the collective bargaining process by regulating "conduct that was to remain a part of the self-help remedies left to the

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[3] *See also Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 410 n.8 (1988) (*Machinists* doctrine addresses "activity that was neither arguably protected against employer interference by §§7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by §8(b) of that Act") (internal quotation marks omitted); *Jacksonville Bulk Terminals v. International Longshoremen's Ass'n*, 457 U.S. 702, 712 n.11 (1982) ("Union activity that prompts a 'labor dispute' within the meaning of these sections may be protected by § 7, prohibited by § 8(b), 29 U.S.C. § 158(b), or neither protected nor prohibited."); *Bud Antle v. Barbosa*, 45 F.3d 1261, 1268 n.12 (9th Cir. 1994) ("If the Board explicitly decides that an activity is neither protected nor prohibited by the NLRA, then the activity can no longer be considered to be arguably protected or prohibited, and there is no *Garmon* preemption.").

combatants in labor disputes." *Belknap, Inc. v. Hale,* 463 U.S. 491, 499 (1983).[4]

This case has nothing to do with "economic weapons" or the "collective bargaining process" in the sense those terms are used in the *Machinists* cases. *Cf. Chao,* 325 F.3d at 363 ("No claim is made that the posting of employees' *Beck* rights represents an economic weapon – certainly not one covered by *Machinists* preemption"). Consequently, the majority's misreading of the *Machinists* cases is in conflict with *all* of the prior Supreme Court and Ninth Circuit precedents applying the doctrine, all of which have stated that the doctrine applies to the context of collective bargaining disputes.[5]

If left to stand, the majority opinion would have huge implications because the *Machinists* doctrine is a species of "field" preemption that forecloses regulation *by the NLRB* as well as the States, leaving conduct "'to be controlled by the free play of economic forces.'" *Machinists,* 427 U.S. at 147; *see also Golden State II,* 493 U.S. at 111 ("The *Machinists* rule creates a free zone from which all regulation, whether federal or State, is excluded."). Yet the NLRB *does* regulate employer conduct during union organizing campaigns, by holding that certain employer conduct – like threats to close a plant if the workers unionize, mandatory employee "captive audience" meetings within 24 hours of an election, and visits to employee homes – is inherently coercive.[6]

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[4] *See, e.g., Machinists,* 427 U.S. at 135-36, 155 (state precluded from regulating union's concerted refusal to work overtime during collective bargaining negotiations); *Insurance Agents' Int'l Union,* 361 U.S. at 479, 490, 497, 500 (NLRB precluded from finding that union committed unfair labor practice by engaging in on-the-job slow-down and sit-in activities); *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1334, 1339 (D.C. Cir. 1996) (federal government's executive branch could not penalize employers for hiring permanent replacements during strikes); *Cannon v. Edgar,* 33 F.3d 880, 885-86 (7th Cir. 1994) (state could not require union and employer to negotiate to establish pool of replacement workers to be used during labor disputes).

[5] *See, e.g., Golden State II,* 493 U.S. at 110-11 (*Machinists* doctrine addresses use of "economic weapons" during labor disputes); *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 617 (1986) ("*Golden State I*") (same); *Associated Builders and Contractors of Southern Cal., Inc. v. Nunn,* 356 F.3d 979, 987 (9th Cir. 2004) (same); *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1417-18 (9th Cir. 1996) (same); *Chamber of Commerce of U.S. v. Bragdon,* 64 F.3d 497, 500 (9th Cir. 1995) (same).

[6] *See, e.g., Rosewood Mfg. Co.,* 263 NLRB 420 (1982), *supplemented by* 278 NLRB 792

(continued...)

By transporting the *Machinists* field preemption doctrine into the union organizing context, the majority creates a conflict with decades of NLRB precedents that regulate employer activities during union organizing campaigns.

As Judge Fisher states in dissent, moreover, "[i]t is implausible that Congress intended the *use* of state funds to be an area 'unregulated because controlled by the free play of economic forces'; state funds are by definition not controlled by the free play of economic forces." Slip. op. 12224 (emphasis in original) (quoting *Machinists*, 427 U.S. at 140). It is particularly implausible that Congress intended the NLRA to preempt California from regulating the use of state money because Congress placed similar restrictions on the use of *federal* funds to promote or deter union organizing. *E.g.*, Workforce Investment Act, 29 U.S.C. §2931(b)(7) ("Each recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National Community Service Act, 42 U.S.C. §12634(b)(1) (similar restriction); Head Start Programs Act, 42 U.S.C. §9839(e) (similar restriction); Medicare Act, 42 U.S.C. §1395x(v)(1)(N) ("In determining reasonable costs, costs incurred for activities directly related to influencing employees about unionization may not be included.").

To be sure, restrictions on the use of federal money to promote or deter union organizing do not prove conclusively that Congress had no intent to preempt similar restrictions on the use of *state* money. But those federal restrictions would not exist if Congress believed that government financing of employer campaigns about unionization is essential to federal labor policy. "The fact that Congress itself has . . . imposed the same type of restriction . . . as a state seeks to impose . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality opinion).

Again, the panel majority is so wrong in its analysis of the *Machinists* preemption

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[6](...continued)
(1986) (threats of plant closure); *Peerless Plywood Co.*, 107 NLRB 427, 428-30 (1953) (captive audience meeting within 24 hours of election); *Peoria Plastic Co.*, 117 NLRB 545, 546-48 (1957) (visits to employee homes); *see also NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.").

doctrine, and its analysis would spawn so much litigation, that rehearing is warranted on that ground alone.

C. The majority's conclusion that a law restricting only the use of government money would impermissibly chill private activity is in conflict with Supreme Court and Ninth Circuit precedent.

What drives the majority to its holding that the California law is preempted is its conclusion that, although the law addresses only the use of *state* money, the practical effect of the law would be "to inhibit employers from opposing representation drives at all" and "impel employers . . . to take a position of neutrality." Slip op. 12178-80.

The core use-of-funds restriction in the California law, however, is structurally indistinguishable from other restrictions on the use of government money that the Supreme Court has held do *not* impermissibly chill private expression.

In *Regan* and *Rust*, for example, the Supreme Court held that a requirement that private actors who wish to use private funds for protected expression must set up *entirely separate* organizations in order to do so – or else lose their government funding – did *not* impose an undue burden on the right of free expression. *See Regan*, 461 U.S. at 544 n.6 (requiring separate incorporation of affiliate organization "is not unduly burdensome"); *Rust*, 500 U.S. at 180 (upholding detailed "program integrity" requirements). This Court upheld, against a First Amendment challenge, a similar ban on the use of government money for certain activities in *Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir. 1998). The Court rejected the argument that accounting requirements for government money pose an impermissible burden on the recipient's right to engage in protected activities with other funds. *See id.* at 1021-23, 1024-25, 1027-28.[7]

The majority criticizes the record-keeping requirements of the California law as

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[7] California's restriction on using state funds to pay for union-organizing-related expenses is also similar in form to Congress' general prohibition on the use of federal funds to pay for lobbying expenses. *See* 31 U.S.C. §1352(a)(1) ("None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress [or] an officer or employee of Congress" with respect to the award of a federal contract, grant or loan.).

"burdensome," "detailed," "strict," "expensive," "exacting" and "daunting." Slip. op. 12177-80, 12182. All the law actually requires, however, is that state money must be kept in a segregated account, and recipients must maintain records sufficient to show that state money was not used to promote or deter union organizing. Cal. Gov. Code §§16645.2(c), 16645.7(c), 16646. The law specifies that those records can be kept in any form. Cal. Gov. Code §16648. The uncontroverted evidence in district court showed that the California law's record-keeping requirements are significantly less burdensome than those generally applicable to recipients of federal and private grant money. *See* ER 101 [Declaration of Nicholas Ross, ¶¶6-8 (California law's record-keeping requirements are similar to, but less burdensome than, requirements imposed on federal grant recipients)]; *see also* ER 91-98 [Declaration of Fred Azcarate (examples of restrictions and record-keeping requirements that apply to private grants)].

It bears emphasis that the Supreme Court and Ninth Circuit have held that labor unions – which have a First Amendment right to engage in political expression – must adhere to far more burdensome record-keeping requirements if they wish to spend union dues for political or ideological purposes, so as to ensure that no dues money received from workers who object to such expenditures are used for those purposes. *See generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communication Workers v. Beck*, 487 U.S. 735 (1988).

Unions that spend money on political participation must, among other things, keep track of *all* expenditures and break them down into "chargeable," "non-chargeable," and "partially chargeable" categories; issue an annual notice giving non-members sufficient information to decide whether to challenge the union's allocation of expenses; have their books audited; provide a procedure for non-members to challenge the amount of the agency fee before an impartial decisionmaker; and hold disputed amounts in escrow while challenges are pending. *See Hudson*, 475 U.S. at 305-10 & n.18; *Wagner v. Professional Engineers*, 354 F.3d 1036, 1039, 1041, 1042 (9th Cir. 2004); *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1048-49 (9th Cir. 2003); *Cummings v. Connell*, 316 F.3d 886, 890 (9th Cir. 2003); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000); Labor Union Law and Regulation 452-481 (BNA 2003).[8]

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[8] *Cf. also* 2 U.S.C. §441b(a)-(b) (2000) (prohibiting unions from spending dues money

(continued...)

Notwithstanding all these record-keeping requirements, unions continue to spend money for political purposes. It is implausible that far less burdensome, run-of-the-mill requirements for keeping track of government grant money would chill employers from using their own money to take positions on whether their employees should unionize.

The majority also expresses concern that the private enforcement and penalty provisions in the California law would chill employer speech. Slip op. 12175, 12178, 12180. But the enforcement provisions are nothing out of the ordinary. *Compare, e.g.,* 16 U.S.C. §1540(g) (citizen-suit provision in Endangered Species Act); 42 U.S.C. §4911 (same in Noise Control Act); 42 U.S.C. §7604 (same in Clean Air Act); 2 U.S.C. §437g(c)(4)(C)(II), (d) (authorizing penalties for violations of federal campaign finance law); 17 U.S.C. §504(c) (establishing statutory damages for copyright infringement); 31 U.S.C. §1352(c) (establishing penalties for violating prohibition on use of federal funds for lobbying activity). In practice, these statutes do not chill speech: Candidates still accept contributions and spend funds to campaign, companies still publish, and recipients of federal funds still engage in advocacy using non-federal monies.[9]

In the end, moreover, the majority states that the private enforcement and penalty provisions that are subjected to such extensive criticism in the majority opinion are actually *irrelevant* to the majority's conclusion. According to the majority, "even the

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[8](...continued)
for certain political contributions or expenditures but allowing specified expenditures of some segregated funds); 29 U.S.C. §431(b) (requiring unions to report on an annual basis all receipts and specified disbursements); 68 Fed. Reg. 58374 (Oct. 9, 2003) (requiring unions to provide itemized accounting of receipts, disbursements, and accounts payable and receivables that fall into categories including political activities and lobbying).

[9] The majority criticizes labor unions for seeking to enforce the provisions of the California law. Slip op. 12182-85. But it cannot be that an otherwise valid restriction becomes preempted by the NLRA simply because unions seek to enforce that restriction. There are many laws with citizen-suit provisions, and affirmative litigation by unions is a common occurrence. Under the majority's reasoning any law with citizen-suit provisions that allow unions to sue employers and thereby gain leverage would be preempted. *But see BE&K Const. Co. v. NLRB*, 536 U.S. 516, 526-37 (2002) (NLRA does not prohibit lawsuits based on colorable claims); *United Transportation Workers v. Michigan Bar*, 401 U.S. 576, 585 (1971) ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment").

most generic requirement that state funds not be spent on discouraging union organization" would still be preempted because "*someone* would be empowered to enforce" the requirement and "[t]he need to keep records would dissuade some employers from engaging in union-related speech at all." Slip op. 12198 (emphasis in original). The majority's real quarrel, therefore, is with California's interest in tracking and preventing the diversion of its grant and program funds. On that basis, the majority rejects the argument that it should remand the case to allow the parties to present *evidence* of how the law operates in practice and for consideration of whether the private enforcement and penalty provisions are severable. *Id.* 12197-99.[10]

By holding that even "the most generic requirement" that government funds not be spent for a particular purpose would impermissibly chill speech by the recipients, the majority opinion creates a conflict with the Supreme Court's decision in *Rust*, this Court's decision in *Legal Aid Society*, and every other decision that rejects similar arguments by government grant recipients. The majority's opinion also calls into doubt the validity of many campaign finance requirements, which impose record-keeping burdens on candidates and political action committees and provide for enforcement actions.

The majority also states that the California law "might be most problematic with regard to employers and grantees who receive 100% of their revenues from the state" because "those employers would have no ability whatsoever to exercise their federal statutory rights to communicate their views about a union organizing effort." Slip. op. 12181. Yet Supreme Court precedents are clear that the government has no duty to subsidize the exercise of even the most important rights. The government can, for example, deny food stamps to the families of workers who go on strike and refuse to pay for medically necessary abortions. *See Lyng*, 485 U.S. at 369 ("[E]ven where the Constitution prohibits coercive governmental interference with specific individual rights,

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[10] The majority concludes that "a remand is not necessary" because "the substantial record before us has been generated over the course of three years of litigation" and "sufficiently informs our holding." Slip. op. 12199 n.9. As stated earlier, however, most of that "three years of litigation" occurred in the Ninth Circuit. The district court granted a motion for summary judgment filed less than two months after the filing of the complaint, and the district court did not conclude that *any* facts regarding the practical effects of the California law were undisputed. ER 247-57, 309, 311. The majority ignores that procedural posture (which requires that all disputed facts be resolved, and all inferences be drawn, *in favor* of the law) by plucking selected material out of the district court record and making its own factual findings about the significance of that material. *See, e.g.*, slip op. 12178-81, 12182-85.

it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (a "refusal to subsidize certain protected conduct. . . cannot be equated with the imposition of a 'penalty' on that activity"); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding government's refusal to pay for abortions for indigent women).[11]

As with its analysis of NLRA preemption, the majority's analysis of whether a government use-of-funds restriction will impermissibly chill private speech is in such conflict with precedent that rehearing en banc is appropriate just to correct that analysis.

D. The majority makes a fundamental error and creates an unnecessary conflict with the D.C. Circuit by failing to consider California's sovereign interest in controlling the use of its own funds.

Finally, the majority departs from precedent by brushing aside California's interest in controlling its own funds. Because the NLRA has no express preemption provision, whether Congress intended to preempt state action must be gleaned by considering both the purposes of the NLRA and the state interest at issue. The Supreme Court has held that when state regulation of conduct involves "interests . . . deeply rooted in local feeling and responsibility," the courts should not, "in the absence of compelling congressional direction, . . . infer that Congress ha[s] deprived the States of the power to act." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

Although most of the previously recognized examples of "interests . . . deeply rooted in local feeling and responsibility" involve common law tort claims, Judge Fisher is right that California has an even stronger interest here:

> A state's control of its own purse strings is of at least as great concern to it as the power to regulate defamatory speech or trespassing. Just as the state has a

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[11] The majority also expresses concern that the California law would restrict how employers spend the "profit" they earn from dealing with the State. One of the two provisions at issue, however, concerns the use of state *grant* money. Cal. Gov. Code §16645.2. The other applies to funds received "on account of . . . participation in a state program" (*id.*, §16645.7), and the record does not establish whether those program funds include a profit component. In any event, the majority expressly rejects any distinction based on whether the restricted funds constitute profits (slip. op. 12182 n.6) so its decision has no limiting principle.

> responsibility to protect its citizens from such torts, so it has a responsibility and a right to spend its treasury – largely generated from the pockets of its citizens – based on principles and guidelines that the democratically elected legislature of the state deems to be appropriate. . . .
>
> The majority ignores the broader state interest at issue – control over its own fisc – and inappropriately second guesses the California legislature's motivations in exercising this prerogative. In an era of tightening budgets, when many competing interests vie for every dollar of a state's treasury, it is all the more important that states retain the right to determine the best ways to allocate their scare resources. Today, the majority effectively forces California to fund employers' union-related expression with those scarce dollars.

Slip op. 12217-18 (Fisher, J., dissenting). *See also New York Tel. Co. v. N.Y. State Dept. Labor*, 440 U.S. 519, 539-41 (1979) (rejecting NLRA-preemption claim because state's interest in controlling unemployment benefits funds is "deeply rooted in local feeling and responsibility").

In addition to the obvious state interest in avoiding the diversion of grant money, the Supreme Court has recognized a "legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." *Lyng,* 485 U.S. at 371. The majority criticizes the California law as one-sided because, in the majority's view, employers never seek to *promote* labor unions. That is not true, particularly when employers are faced with two rival unions competing for support, or have workforces that are already partially unionized.[12] But regardless, only striking workers – not employers – suffered from the denial of food stamps at issue in *Lyng*. Even more to the point, Congress itself placed restrictions on the use of federal money to promote or deter union organizing that are indistinguishable from the restriction in the California law (*see* p. 8, *supra*), so *Congress* would not have regarded California's motives as illegitimate.

By ignoring California's interest in controlling its own funds, the majority creates

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[12] *See, e.g., Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1003 (1994); *Schlabach Coal Co. v. NLRB*, 611 F.2d 1161, 1161 (6th Cir. 1979); *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1159 (D.C. Cir. 1978); *Rochester Mfg. Co.*, 323 NLRB 260, 261-64 (1997), *aff'd sub nom., Cecil v. NLRB*, 194 F.3d 1311 (6th Cir.1999) (table).

an unnecessary circuit conflict with a decision it fails even to mention, which held that the NLRA did not preempt the government from forbidding entities that receive federal money for construction from requiring or prohibiting project labor agreements on those federally funded projects.[13] *Building and Construction Trades Department v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002). In that case, the D.C. Circuit reasoned that the regulation did not withhold government funds to penalize employers for their private employment practices, but simply vindicated the government's interest in controlling how its own funds are used. *Id.*[14] The same is true of the California law.

III. Conclusion.

For the foregoing reasons, the Court should rehear this case en banc.

Respectfully submitted,

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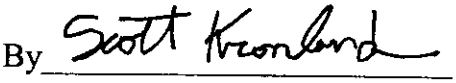
By 
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[13] The D.C. Circuit treated the federal executive order at issue identically to state laws for purposes of NLRA-preemption analysis. *Allbaugh*, 295 F.3d at 34 n.*.

[14] This distinction shows why the majority's reliance on *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 287-90 (1986), is a red herring. In *Gould*, the state law disqualified repeat NLRA violators from doing business with the State without regard to whether the violations were in the course of work on state contracts. The state conceded the only purpose of the law was to enforce the NLRA.

Nos. 03-55166 and 03-55169

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 26 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as Attorney General of the State of California, et al.,

Defendants-Appellants.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.

Intervenors-Appellants.

On Appeal from the United States District Court
for the Central District of California, Southern Division
No. CV-02-00377-GLT
The Hon. Gary L. Taylor, Judge

DEFENDANTS'/APPELLANTS' BRIEF IN SUPPORT OF REHEARING EN BANC

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

In response to this Court's September 13, 2005 Order requesting the parties to file briefs addressing whether this appeal should be reheard en banc, and for the reasons set forth below, Defendants-Appellants Attorney General Bill Lockyer, the California Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta, R.N., Dr. P.H. as the Director of the California Department of Health Services, by her successor in that capacity, Sandra Shewry, (collectively "Defendants-Appellants" and/or "State of California") respectfully urge this Court to rehear this appeal en banc.

INTRODUCTION AND STATEMENT OF COUNSEL

The State of California submits that the 2-1 panel opinion (Beezer, J., England, J., and Fisher, J., dissenting) filed in this case on September 6, 2005 warrants en banc review because this case presents questions of exceptional importance.[1/] Moreover, the analysis used by the majority in reaching its decision is inconsistent with National Labor Relations Act (NLRA) preemption analysis in prior Supreme Court and Ninth Circuit cases.

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1. Fed. R. App. P. 35(b)(1)(B).

This appeal involves the constitutionality of a California statute (Cal. Gov't. Code, §§ 16645-49), the core provisions of which prohibit recipients of state grant funds and participants in state programs who receive over $10,000 from the state in any calendar year from using those funds to "assist, promote, or deter union organizing." Cal. Gov't. Code, §§ 16645.2(a), 16645.7(a). The majority holds that the NLRA preempts California Government Code sections 16645.2 and 16645.7, and the corresponding enforcement provisions set forth in Government Code sections 16645-49 (collectively "California statute").[2] The majority opinion's holding is premised on two distinct preemption doctrines, the "*Garmon*" and "*Machinists*" preemption doctrines.[3] The majority concludes that under either doctrine the California statute is completely preempted by the NLRA.

However, Judge Fisher in his dissent concludes that the *Garmon* preemption doctrine is wholly inapplicable to this case. Judge Fisher also disagrees with the majority's analysis and holding with respect to the *Machinists* doctrine. In Judge

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2. This appeal addresses all provisions of California Government Code sections 16645-49, except 16645.1, 16645.3, 16645.4, 16645.5 and 16645.6. *Chamber v. Lockyer,* 422 F.3d 973 (9th Cir. 2005), *available at,* 2005 U.S. App. LEXIS 19208, at * 2 (9th Cir. Sept. 6, 2005).

3. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959) ("*Garmon*"); *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ("*Machinists*").

Fisher's view, the California statute's core restriction is not preempted under the *Machinists* doctrine, but several of the statute's enforcement provisions may be preempted under *Machinists*. Judge Fisher, thus, contrary to the majority, concludes that a remand to the district court is appropriate.

The majority's holding that the California statute is preempted by the NLRA presents issues of exceptional importance for several reasons. First, in invalidating the California statute, the majority departed from and expanded established *Garmon* preemption principles in order to reach its conclusion that the California statute is preempted. Significantly, this novel application of *Garmon* results in a conflict with precedent regarding government restrictions on subsidized protected speech. Second, in holding that the California statute was also preempted under *Machinists*, the majority significantly broadened the applicability of that doctrine. Third, the majority's novel interpretation of the *Garmon* and *Machinists* doctrines has resulted in the impairment of California's most basic sovereign right - - the right to determine how to spend its own funds. Fourth, the majority's ruling will have a broad impact on employers, unions and taxpayers statewide and nationwide.

The State of California thus respectfully urges this Court to rehear this appeal en banc.

ARGUMENT
I.

REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY DEPARTS FROM SETTLED PRINCIPLES GOVERNING *GARMON* PREEMPTION AND FREE SPEECH JURISPRUDENCE

The majority's opinion establishes an unprecedented and overly expansive interpretation of both the NLRA and the *Garmon* preemption doctrine. Prior to this opinion, it was well-settled that, as a threshold matter, *Garmon* preemption is only invoked "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, . . . " *Garmon,* 359 U.S. 236, 244; *see Bldg. & Const. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224-225 (1983).

The majority's opinion significantly expands the reach of *Garmon* preemption by holding that *Garmon* is applicable to state activities that relate to conduct that is *unregulated* by the NLRA. Specifically, the majority's holding that the California statute is preempted under *Garmon* is premised on its interpretation of Section 8(c) of the NRLA, which is codified at 29 U.S.C. section 158(c). Subdivisions (a) and (b) of Section 8 set forth the activities deemed "unfair labor practices" by employers and labor organizations, respectively. Subdivision (c), upon which the majority relies for its *Garmon* preemption

analysis, states:

> Expression of views without threat of reprisal or force or promise of benefit. The 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.

28 U.S.C. § 158(c).

In concluding that Section 8(c) is an appropriate basis to support *Garmon* preemption, the majority reasoned, "[b]ecause the [NLRA] is a comprehensive regulatory scheme, to say that an activity is not punishable by the [NLRA], which is what Section 8(c) dictates, is the equivalent of protecting that activity." *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 21.

This is the first case in any Circuit of the United States Court of Appeals in which a state law has been invalidated under *Garmon* because the statute allegedly conflicts with Section 8(c) of the NLRA.[4] Further, as explained by Judge Fisher in his dissent, the majority's novel interpretation of Section 8(c) conflicts with

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4. In *UAW-Labor Employment and Training Corporation v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), though the Court noted in dicta that, for the sake of argument, it would assume that Section 8(c) rights could be a basis for preemption, it recognized that fitting a *Garmon* claim under Section 8(c) is "awkward" and that the "activities described in § 8(c) do not 'constitute an unfair labor practice,' except by negation, and are not 'protected by' the NLRA, except from the NLRA itself." *Id.* at 364-365.

both the text of Section 8 and court decisions that hold that the NRLA does not actually protect employer, non-coercive union-related speech. Rather, he concludes that the correct interpretation of Section 8(c) is that the NLRA leaves that subject unregulated. *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 60-63.

As the Supreme Court explained in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), Section 8(c) "merely implements the First Amendment." This interpretation was reiterated by this Court when it explained that Section 8(c) "merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization." *Hotel Employees, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 n. 9 (9th Cir. 1992). The majority opinion departs from this well-established principle.

The significance of the majority's expansive interpretation of Section 8(c) and *Garmon* preemption is substantial. The majority's view that an activity that is not punishable by the NLRA is *per se* affirmatively protected under the NLRA is inconsistent with Supreme Court precedent. *See, e.g., NLRB v. Insurance Agents*, 361 U.S. 477, 483, 492-94, n. 23 (1960) (holding that while a work slowdown was not protected by the NLRA, it was not prohibited either). Indeed, the *Machinists* preemption doctrine, discussed in Part II below, is premised on the

fact that some conduct is neither protected nor prohibited by the NLRA. *Machinists,* 427 U.S. 132, 140.

Further, by interpreting Section 8(c) as providing affirmative free speech rights sufficient to invoke *Garmon* preemption, the majority, in effect, interprets the NLRA to provide employers greater free speech rights than those provided by the First Amendment.[5] Government limitations on the use of its funds to subsidize speech have been consistently upheld by the Supreme Court when challenged under the First Amendment. For example, in *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991), the Supreme Court held that Congress' refusal to fund certain activities, including speech, that restricted access to information regarding abortion did not violate the First Amendment. In *Lyng v. UAW*, 485 U.S. 360, 369 (1988), the Court held that the government can deny striking workers food stamps without violating the workers' First Amendment rights. Further, in *Regan v. Taxation with Representation*, 461 U.S. 540, 544-46 (1983), the Court upheld government restrictions on lobbying activities by tax-exempt organizations. In reaching that holding, the Supreme Court held that it "again rejected the 'notion

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5. Notably, though the majority's *Garmon* holding is premised on free speech rights purportedly protected by the NLRA, the majority declined to evaluate whether the California statute conflicted with the First Amendment, explaining that, in its view, that issue was irrelevant. *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 55.

that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). As the Court further explained, a legislature's decision not to subsidize the exercise of a right does not constitute infringement of that right. *Id.* at 549.

Yet, by reasoning that the NLRA contains affirmative free speech rights independent of the First Amendment, the majority grants employers broader immunity from state conduct than employers would otherwise enjoy under the First Amendment. This is in direct conflict with the Supreme Court's recognition that Section 8(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617. And, more importantly, this novel application of *Garmon* preemption undermines state sovereignty with respect to the use of its own funds as explained in Part III below.

For the reasons set forth above, the majority's departure from established *Garmon* preemption principles and the resulting conflict with free speech jurisprudence warrants en banc review of the exceptionally important question presented in this appeal.

II.

REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY DEPARTS FROM SETTLED PRINCIPLES GOVERNING *MACHINIST* PREEMPTION

The majority opinion extends the *Machinists* preemption doctrine beyond regulation that directly interferes with the bargaining process to include government activity that may affect the organizing process in general. The majority holds that the California statute is preempted under *Machinists* because, in the majority's view, the California statute "discourag[es] employers from exercising their protected speech rights" and, therefore, "operates to significantly empower labor unions as against employers." *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 37-38.

Machinists established the principle that when Congress carefully crafted a comprehensive regulatory scheme that balanced power between labor and management, it intended to leave the parties with the freedom to use self-help weapons without regulation from local government. *Machinists,* 427 U.S. 132, 147-148. Consistent with that fundamental principle, *Machinists* preemption has been found when government action constitutes direct interference in the bargaining process. *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986). In *Golden State*, the Supreme Court determined that the Los Angeles City

Council directly interfered in the bargaining process when it conditioned renewal of a franchise to operate taxi cabs on settlement of an ongoing labor dispute with the company's drivers by a certain date. The Court held that the City's action had destroyed the balance of power by pressuring the employer to settle the labor dispute and thus was preempted by the NLRA. *Id.* at 618-619.

The majority's opinion extends the "direct interference" concept beyond the contours of established precedent. It holds that state activity that affects the union organizing process in general, as opposed to state activity that directly interferes in an ongoing private labor dispute, is also preempted under *Machinists*. The State of California submits that this extension of the *Machinists* doctrine goes well beyond the spirit and intent of *Machinists* and *Golden State.*

State activity that directly interferes in an ongoing private labor dispute directly affects the balance of power between labor and management because it interjects the state on one side of the debate. In so doing, the state destroys the economic weapons of self-help Congress intended to remain available to the parties to a labor dispute. However, neither the balance of power nor the economic weapons of self-help are affected by state activity that may indirectly impact the organizing process in general, particularly when viewed in the context of the California statute. To the contrary, requiring state neutrality in private

union organizing campaigns by prohibiting the use of state funds for that purpose *preserves* the free play of contending economic forces. *Machinists,* 427 U.S. 132 at 150.[6]

The majority's departure from established *Machinists* preemption principles warrants en banc review of the exceptionally important question presented in this appeal.

III.

REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY'S HOLDING IMPAIRS CALIFORNIA'S SOVEREIGN RIGHT TO DETERMINE HOW TO SPEND STATE FUNDS

By enacting Government Code sections 16645.2 and 16645.7, California exercised its sovereign power and determined that its money would not be used to fund any side of private labor disputes. The purpose of sections 16645.2 and 16645.7 is not to regulate labor relations; rather the purpose is to ensure that the

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6. The majority opinion concludes that although the California statute does not prohibit employers from using their own funds to assist or deter union activity, its practical effect "impel[s] employers themselves to take a position of neutrality with respect to labor relations." *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 7. The State of California respectfully submits that the majority's conclusion is not supported by the record nor by any findings of undisputed facts reached by the district court. Moreover, as Judge Fisher in his dissent points out, the relevant issue is whether California in enacting the statute is remaining neutral. Because "[n]eutrality means not taking sides," the California statute meets that requirement. *Chamber v. Lockyer*, 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 77, n. 5.

state's own funds are not used to "subsidize efforts by an employer to assist, promote, or deter union organizing." 2000 Cal. Stat. 4926, 4927, Ch. 872, § 1(A.B. 1889).

Government Code sections 16645.2 and 16645.7 are a means of ensuring that taxpayer funds are not misused to fund expensive campaigns encouraging or discouraging employees from voting for a union. By requiring employers to use non-state money for such purposes, the state is, as a matter of policy, refusing to reimburse those costs.

The implication of the majority's decision is that California is forced to subsidize employers' union-related speech with California's own money. Indeed, as Judge Fisher observes in his dissent:

> Imagine that California had a certain amount of money that it wished to grant to hospitals to create more nurse positions. However, California wanted the money to go toward creating nurse positions -- not toward funding a campaign to convince the new nurses not to unionize. So long as the recipient hospitals are still free to lobby the nurses to whatever extent they please with their existing treasuries, why should California be forced to fund such lobbying with the money that the state wishes to go toward funding the positions themselves?

Chamber v. Lockyer, 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 80.

The majority's impairment of California's right to determine how to spend

its own funds presents a question of exceptional importance. Control over a state's own fiscal affairs has long been recognized as a state's sovereign right. For example, in *San Antonio Independent Sch. Dist. v. Rodriquez*, 411 U.S. 1 (1973), the Supreme Court refused to order the State of Texas to redistribute funds between school districts in a class action challenging a school-financing system that was based on local property taxation. In declining to invalidate the Texas school-financing system, the Court stated:

> We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenue for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies . . . .
>
> *Id.* at 40 (footnote omitted).

Government Code sections 16645.2 and 16645.7 are an exercise of California's sovereign right to manage and control its own financial affairs. "No right of a state is entitled to greater respect by the federal courts than the state's right to determine . . . for what purpose public funds should be expended." *Welsch v. Likins*, 550 F.2d 1122, 1131-32 (8th Cir. 1977).

Nothing contained in the NLRA evidences Congress' intent to prohibit a state from determining how to use its funds nor to preclude states from imposing restrictions upon the permissible uses of their own funds. Absent explicit

direction from Congress, the Court should refrain from concluding "that our federal government has chosen to adopt a rule so antithetical to fundamental principles of federalism and democracy." *Alameda Newspapers v. City of Oakland*, 95 F.3d 1406, 1415 (9th Cir. 1996).

For this reason also, the State of California urges this Court to rehear this appeal en banc.

IV.

REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY'S HOLDING WILL HAVE A BROAD IMPACT

Resolution of the question of whether, in enacting the NLRA, Congress intended to restrict state sovereignty by limiting a state's ability to determine how to spend the state's own funds will have a broad impact in California and nationwide.

This is not a case involving a dispute between private parties. The invalidation of this statute will affect all California taxpayers, employers who do business with state government, their employees, and the unions that represent or seek to represent those employees.

Furthermore, other states have enacted legislation similar to that of California, including New York and Massachusetts. *See* N.Y. Lab. Law, § 211-a; Mass. Gen. Laws ch. 7, § 56. It is evident that this decision could impact similar

challenges to the validity of those statutes. Indeed, New York's statute has also been challenged on preemption grounds and the New York District Court, in holding that the New York statute was preempted under *Machinists,* relied in part on the Ninth Circuit's first opinion in this case which was withdrawn on May 13, 2005. *See Health Care Association of New York State, Inc. v. Pataki,* 2005 U.S. Dist. LEXIS 9186, * 30 (N. D. N.Y. May 17, 2005) ("Given the similarity between the [New York] statute and the California statute at issue in [Chamber v.] Lockyer, the Ninth Circuit's decision therein is particularly instructive.").[7] *Health Care Association of New York State, Inc. v. Pataki* is now on appeal before the Second Circuit, where this Court's current opinion will undoubtedly be considered.

Such potential broad impact warrants en banc review to resolve the question whether the California statute is preempted by the NLRA.

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7. *Health Care Association of New York State, Inc. v. Pataki,* 2005 U.S. Dist. LEXIS 9186 is cited in *Chamber v. Lockyer,* 422 F.3d 973, 2005 U.S. App. LEXIS 19208, at * 8, n. 4.

CONCLUSION

For the reasons stated, Defendants-Appellants State of California respectfully urge the en banc Court to rehear this case

Dated: October 25, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-3

I certify that pursuant to Circuit Rule, the attached brief is (check applicable option)

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Nos. 03-55166; 03-55169
(Consolidated)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,
Plaintiffs/Appellees,

vs.

BILL LOCKYER, et al.,
Defendants/Appellants,

and

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

Appeal from the United States District Court
for the Central District of California, Southern Division
District Court Case No. CV-02-00377-GTL
Honorable Gary L. Taylor, United States District Judge

AMICUS CURIAE BRIEF OF SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF AMICUS CURIAE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Amicus curiae South Coast Air Quality Management District ("the District"), a political subdivision of the State of California, is the local agency responsible for controlling air pollution in the greater Los Angeles metropolitan area. Cal. Health & Safety Code §§ 40410, 40412; *see generally id.* §§ 40400-40540. Pursuant to its authority, the District adopted rules requiring state and local governments, as well as some private parties, to purchase alternative-fuel vehicles when adding vehicles to or replacing vehicles in certain vehicle fleets, such as fleets of garbage trucks, buses, and street sweepers. *See* Cal. Health & Safety Code § 40447.5; *see Engine Mfrs. Ass'n v. South Coast Air Quality Management District* ("*EMA v. SCAQMD*"), 158 F. Supp. 2d 1107 (C.D. Cal. 2001), *aff'd*, 309 F.3d 550 (9th Cir. 2002), *rev'd and remanded*, 541 U.S. 246 (2004).

In 2000, a lawsuit brought by the Engine Manufacturers Association ("EMA") and the Western States Petroleum Association ("WSPA") challenged these "Fleet Rules" as preempted by section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), which prohibits states and their political subdivisions from "adopting or attempting to enforce any standard relating to the control of

emissions from new motor vehicles." *Id.*; *EMA v. SCAQMD*, 158 F. Supp. 2d 1107. The district court concluded that purchase requirements were not "standards" under Clean Air Act section 209(a), and thus the Fleet Rules were not preempted. *EMA v. SCAQMD*, 158 F. Supp. 2d 1107. This Court affirmed. *EMA v. SCAQMD*, 309 F.3d 550.

The Supreme Court reversed, holding as a matter of law that the preemptive effect of Section 209(a) encompasses purchase requirements. *EMA v. SCAQMD*, 541 U.S. at 255. However, the Supreme Court did not determine whether the Fleet Rules, in whole or in part, were valid, but instead remanded the case to the district court to resolve a number of issues not presented in the petition for certiorari or addressed by the courts below. *Id.* at 258-59. One of these issues was whether some of the Fleet Rules, or some applications of them, constitute "internal state purchase decisions," and whether, as such, they are exempt from preemption under the market participant doctrine. *Id.* at 259.

On remand, the District addressed the remaining issues, as directed by the Supreme Court, arguing that the Fleet Rules, as they apply to state and local governments, are not preempted by the Clean Air Act because they constitute proprietary–not regulatory–activity. The district court agreed, *EMA v. SCAQMD*, 2005 WL 1163437 (C.D. Cal. 2005) (unpublished opinion), and entered a final

judgment in favor of the District. EMA and WSPA have appealed the district court's decision; that appeal is currently pending before this Court. *EMA v. SCAQMD*, No. 05-56654.

Thus, this Court's determination as to whether Assembly Bill 1889 ("AB 1889"), codified at California Government Code section 16645, *et seq.*, constitutes State regulation or State proprietary action, and the analysis this Court uses to reach its decision, is highly relevant to the disposition of *EMA v. SCAQMD.*

INTRODUCTION

For more than a decade, the Supreme Court has unambiguously declared that, to the extent the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-160, preempts State action, it only preempts State regulatory action. *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors* ("*Boston Harbor*"), 507 U.S. 218, 227 (1993). An equally unambiguous corollary to this principle is that the NLRA does not preempt actions taken by the State as a "market participant." *See Boston Harbor*, 507 U.S. at 229. This distinction between market regulation and market participation in the context of preemption analysis is known as the market participant doctrine.[1]

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[1] Since *Boston Harbor* was decided, the market participant doctrine has

At the heart of the market participant doctrine is the recognition that States must enter the market in a variety of ways–from buying and selling goods, to undertaking public works projects, to subsidizing private enterprises–to carry out their obligations. Absent a clear indication of congressional intent to the contrary, courts will not infer that federal law prevents States from negotiating the terms and conditions of these market interactions. *See Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045, 1049-50 (9th Cir. 2000) (reversed in part on other grounds). The question of whether any particular State action is regulatory or proprietary is not susceptible to resolution by the application of a bright-line test in which a single factor or attribute of the action is determinative. Rather, the ultimate outcome in any case requires that the court engage in a contextual

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been applied by this Court and other Circuit Courts to determine whether state actions are preempted by the Employee Retirement Income Security Act ("ERISA") (*Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.*, 159 F.3d 1178 (9th Cir. 1998)), the Federal Aviation Administration Authorization Act ("FAAAA") (*Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000) (overruled in part on other grounds)), the Federal Telecommunications Act ("FTCA") (*Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002)), and the Pipeline Safety Act ("PSA") (*Olympic Pipe Line v. City of Seattle*, 2006 WL 288125 (9th Cir. 2006)). The Supreme Court also uses the distinction between the State as market participant and the State as market regulator to determine whether certain State actions violate the dormant Commerce Clause. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

analysis that takes account of a variety of factors. Paramount among these factors is the scope of the challenged State action.

The district court in this case did not undertake a contextual analysis of AB 1889. Instead, it concluded that AB 1889 is regulatory simply because it takes the form of a generally applicable statute rather than an ad hoc contracting decision. *Chamber of Commerce v. Lockyer*, 225 F. Supp. 2d 1199, 1205 (2002). No other court has found this one factor to be dispositive of whether a State action is regulatory or proprietary. Indeed, there are specific cases in which this Court and others have found that states, by enacting generally applicable statutes, were acting as proprietors rather than regulators.

Had the district court considered the scope of AB 1889, in addition to the other factors that prior courts have identified as significant to determining whether State action is regulatory, it would have been clear that the statute's restrictions on the use of State funds by do not constitute State regulation. For these reasons, Amicus South Coast Air Quality Management District urges this Court to reverse the district court's order finding that AB 1889 is a regulatory statute that runs afoul of the NLRA.[2]

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[2] This amicus brief is limited solely to the issue of whether this Court should uphold the challenged statutory provisions as valid non-regulatory State action. If the Court concludes, as Appellants have argued, that the challenged

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT AB 1889 IS REGULATORY SIMPLY BECAUSE IT TAKES THE FORM OF A STATUTE.

The district court concluded that AB 1889 was a regulatory action preempted by the NLRA preemption analysis after examining only one attribute of the statute: whether AB 1889 was "specifically tailored to one particular job," or was, instead, a generally applicable legislative enactment. *Chamber of Commerce*, 225 F. Supp. 2d at 1205. However, under market participant case law, this single attribute is not determinative of whether a particular State action is regulatory.

Although some courts have considered whether a challenged action takes the form of a single contract or a generally applicable rule in determining whether the action is regulatory, *see, e.g.*, *Boston Harbor*, 507 U.S. at 232 and *Dillingham Constr. N.A, Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999), no court has found this one factor to be dispositive, trumping all other relevant factors.[3] *Boston Harbor*, to which the district court cites, notes that the

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provisions are not within the preemptive reach of the NLRA, the Court need not reach the question of whether the State's action is regulatory.

[3] The district court cites to *Alameda Newspapers* for the proposition that "traditional enactment of laws, ordinances, rules, and other legislative and administrative measures" are considered "regulation" for purposes of preemption law. *Chamber of Commerce*, 225 F. Supp. 2d at 1205. In fact, *Alameda*

challenged state action was "specifically tailored to one particular job," after *also* noting that the State was a proprietor of that job, and that the State was "attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Boston Harbor*, 507 U.S. at 232. Thus, the "project-specific" aspect of the action was simply one of a number of factors considered by the Supreme Court. *Id.*[4]

Newspapers simply stated that a State can "regulate" through these or other means, but then went on to analyze whether the particular City Council resolution challenged in that case was, in fact, regulatory. *Alameda Newspapers Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996). In determining that the City's action was not regulatory, the Court considered various factors, including both that the City's resolution was not a general regulatory provision, and the fact that the resolution would have a *de minimus* effect on the newspaper's business. *Id.* at 1419-20.

[4] Similarly, in *Associated Builders and Contractors, Inc. v. City of Seward* and *Dillingham Construction N.A., Inc. v. County of Sonoma*, this Court did not end its analysis after concluding that the challenged State action was "project-specific," but considered other factors as well. *Seward*, 966 F.2d 492, 495-96, 497 n.4 (9th Cir. 1992) (considering City's purpose and whether the action would effect conduct unrelated to the City's proprietary interest); *Dillingham*, 190 F.3d at 1038 (considering the State's purpose in addition to noting that the challenged action was not "project specific"). In *Associated General Contractors of America v. Metropolitan Water District of Southern California*, this Court emphasized that the challenged action was a negotiated contract provision rather than a generally applicable law or regulation in determining that the challenged state action was *not* regulatory. 159 F.3d 1178, 1182 (9th Cir. 1998). Because the Court concluded that the contract provision was not regulatory, its holding does not establish that, had the challenged action instead taken the form of a generally applicable statute, it would have been considered regulatory. Further, this Court also considered the objectives of the State agency and the purpose of the contract

Moreover, both the Supreme Court and this Court have found a number of generally applicable rules to be proprietary. In *White v. Massachusetts Council of Construction Employers, Inc.*, for example, the Supreme Court held that an executive order issued by the mayor of Boston that required fifty percent of the workforce on all of the City's public works projects to be residents of Boston was proprietary. 460 U.S. 204, 210 (1983). *See also Alexandria Scrap*, 426 U.S. 794, 809 (1976) (finding a Maryland statute subsidizing the processing of abandoned vehicle hulks to be proprietary and therefore not prohibited by the dormant Commerce Clause). In *Tocher v. City of Santa Ana*, this Court held that a city ordinance establishing rules and regulations to guide the formation of contracts for towing services provided to the city was proprietary. 219 F.3d at 1049. In a very recent decision, the Seventh Circuit found that an Illinois statute, which placed conditions on state subsidies for the construction and renovation of renewable-fuel plants, was proprietary. *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005). *See also Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 916 (9th Cir. 1993) (holding that an Oregon statute governing the minimum wages on all government construction projects is

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provision in analyzing whether the challenged action was regulatory. *Id.* at 1184.

proprietary); *Big Country Foods Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1178-79 (9th Cir. 1992) (holding that an Alaska state-wide procurement statute is proprietary).

Indeed, in *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, the D.C. Circuit expressly rejected the argument that State action is necessarily regulatory "when the Government acts through blanket, across-the-board rules that 'flatly prohibit' . . . certain actions on the part of its contractors and recipients of its financial assistance." 295 F.3d 28, 35 (D.C. Cir. 2002). The court held that there is no "good explanation why a 'blanket rule' – applicable to all government contracts, but not to the non-government contracts of those who do business with the Government – is somehow inconsistent with the action of a proprietor." *Id.* Instead of distinguishing the facts in *Allbaugh*, or identifying a flaw in the D.C. Circuit's reasoning, the district court below merely stated that *Allbaugh* is "not controlling." *Chamber of Commerce*, 225 F. Supp. 2d at 1205 n.5.

II. THE DISTRICT COURT SHOULD HAVE EXAMINED THE SCOPE OF AB 1889, AMONG OTHER FACTORS, TO DETERMINE WHETHER THE STATUTE IS REGULATORY.

Rather than focusing exclusively on the *form* of the State action at issue, as the district court did in its decision below, the Supreme Court and Circuit Courts instruct that courts are to assess the *scope* of the State action in determining

whether it is regulatory or proprietary. If the State action will affect conduct unrelated to the State's proprietary interest, the action is most likely regulatory. If, however, the effect of the State action is limited to conduct related to the State's proprietary interest, the action should be held to be proprietary.

Thus, in *Boston Harbor*, the Supreme Court explained that, in a previous decision, it had found a Wisconsin debarment statute to be "tantamount to regulation" in part because the statute at issue in that case "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State." 507 U.S. at 228-29. *Cf. Wisconsin Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 291 (1986) (finding Wisconsin debarment statute regulatory where statute punished past labor violations unrelated to contracts with the State). In *Lavin*, the Seventh Circuit found that conditions placed on the grant of state subsidies only constitute regulation "if they affect conduct other than the financed project." 431 F.3d at 1006; *see also Allbaugh*, 295 F.3d at 36 (holding that challenged Executive Order is not regulatory because its impact "extends only to work on projects funded by the government"). Similarly, in *Tocher*, this Court found that a provision of an ordinance governing the formation of contracts between the City and towing companies was proprietary because it "in no way affects the relationship between towing companies and the

general public" and "cover[s] only contracts between the City and towing companies." 219 F.3d at 1049. *See also Big Country Foods*, 952 F.2d at 1178 (examining whether the State "has imposed restrictions that 'reach beyond the immediate parties with which the government transacts business'" in its purchase of milk) (quoting *White*, 460 U.S. at 211 n.7, and citing *Wunnicke*, 467 U.S. at 95); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (considering whether "the challenged action essentially reflect[s] 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" and whether "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem").

Ignoring these precedents, the district court simply did not inquire into the scope of AB 1889, nor did it consider any of the other factors identified by this Court and others, as well as by the Supreme Court, as relevant to the market participant analysis. For example, in some contexts, courts have considered the objectives of the State or the purpose of the State action. *See, e.g.*, *Boston Harbor*, 507 U.S. at 232 (noting that the purpose of the bid specification at issue was to ensure efficient completion of the project). In cases in which the purpose of the

State action is concededly regulatory, courts have also looked to the State's overall role in the particular market affected by the State's action. *See, e.g.*, *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d at 1420 (holding that the City's cancellation of its thirteen newspaper subscriptions was not a regulatory action because the action had a *de minimus* effect on the market for newspapers). Had the district court evaluated the validity of AB 1889 by considering the range of relevant factors, it would have concluded that the statute is not regulatory.

III. APPLYING THE APPROPRIATE MARKET PARTICIPANT ANALYSIS, THE USE RESTRICTIONS SET FORTH IN AB 1889 PLAINLY ARE NOT REGULATORY AND THUS NOT PREEMPTED BY THE NLRA.

Analyzing the statute at issue in this case according to the market participant analysis described above, it is clear that AB 1889 is not regulatory. The State is directly interacting with private parties in the marketplace when it awards them grants or provides them with state funds through state programs. The challenged statute simply limits the ways in which the State's own money may be used by grant recipients or those who receive state funds on account of their participation in a state program. In this way, the scope of the statute reaches no further than the state's proprietary interest in the use of its own funds; the statute neither conditions the grant or other provision of state funds on the recipient or

program participant promising to use its own, private funds in a particular way, nor does it penalize recipients or program participants for past or current conduct that the State finds objectionable.

Further, the State's objectives in limiting the uses to which grant money can be put is consistent with the objectives of a private actor. Just as a private investor, lender, or donor would be concerned that his or her money not be wasted, the State unquestionably has a proprietary interest in the efficient use of its funds. In this case, the State has determined that paying for an employer to promote or deter union organizing is not an efficient use of its funds–certainly not an unreasonable determination.

The Seventh Circuit recently followed similar logic and concluded that an Illinois statute placing conditions on recipients' use of state subsidies was not regulatory, and therefore was not preempted by the NLRA. *Lavin*, 431 F.3d at 1007. The challenged state action in that case was an Illinois statute requiring that the recipients of state subsidies for the construction and maintenance of renewable-fuel plants enter into project labor agreements for the subsidized work. *Id.* at 1005. The court held that the Illinois statute was not a form of regulation because the condition it imposed was limited to the project financed by the subsidy, *i.e.*, that the State's restriction on the use of its funds did not affect any

conduct of the recipients unrelated to the financed project. *Id.* at 1007 (concluding that the generally applicable Illinois statute is "project-specific" because it establishes conditions only for "how subsidized renewable-fuels projects contract for labor"). Finally, the court declined to inquire into the State's motivation in enacting the statute, noting: "Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." 431 F.3d at 1006.

The statute challenged in the present action is even less amenable to being labeled "regulation" than the *Lavin* statute. Whereas the Illinois statute required subsidy recipients to take a labor position that they otherwise would not be inclined to take, AB 1889 demands no such action of recipients. Under AB 1889, the recipients of state funds are free to promote or deter union organizing as long as they do it with their own funds.

The D.C. Circuit's reasoning in *Allbaugh*, provides further support for the conclusion that AB 1889 is not regulatory. 295 F.3d 28. The action challenged in that case was an Executive Order[5] providing "that no federal agency,

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[5] The *Allbaugh* case differs somewhat from the other market participant cases in that it involves a challenge to an Executive Order, issued by the President of the United States, rather than a challenge to State action. The court noted this distinction, *Allbaugh*, 295 F.3d at 34 n.*, but concluded that it was bound to analyze whether the Executive Order was preempted by the NLRA because it had

and no entity that receives federal assistance for a construction project, may either require bidders or contractors to enter, or prohibit them from entering, into a project labor agreement." *Id.* at 29. Citing *Boston Harbor*, the court held that a condition imposed by the federal government in awarding a contract or in funding a project is regulatory *only* when it addresses conduct unrelated to the project in which the government has a proprietary interest. *Id.* at 36. The court dismissed the argument that the Executive Order was regulatory because it took the form of a blanket rule rather than an "ad hoc" contracting decision. *Id.* at 35. It held that the Executive Order could not be characterized as "regulatory" because it did not affect the use of project labor agreements on projects other than those funded by the federal government, *Id.*

Like the Executive Order challenged in *Allbaugh*, the California statute here at issue does not impose conditions on any projects other than those that are State-funded. Further, *Allbaugh* demonstrates that imposing a blanket rule applicable to all government contracts or grants of funds, as the State did in

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previously conducted a similar analysis. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). Regardless of whether the D.C. Circuit's use of preemption analysis to determine the validity of Executive Orders was well-advised, the court's reasoning with respect to whether the challenged action was regulatory or proprietary remains sound.

enacting AB 1889, is fully consistent with proprietary behavior. *Allbaugh*, 295 F.3d at 35.

CONCLUSION

For the foregoing reasons, Amicus South Coast Air Quality Management District supports Appellants and respectfully requests this Court to reverse the district court's decision that some of the provisions of AB 1889 are preempted by the NLRA.

Dated: February 28, 2006

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