No. 06- 939

IN THE

SUPREME COURT OF THE UNITED STATES

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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JOINT BRIEF OF *AMICI CURIAE*, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, THE AMERICAN HOSPITAL ASSOCIATION, THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COUNCIL ON LABOR LAW EQUALITY, IN SUPPORT OF THE PETITION

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INTERESTS OF THE *AMICI* [1]

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Ninth Circuit. The *Amici* represent small businesses, human resource managers, and providers of services from across a broad spectrum of industries. Many of the *Amici's* members receive funds from state and local governments, both in California and throughout the country, in the course of providing valuable services to state and local residents. At the same time, the private business recipients of such funds remain employers covered by the National Labor Relations Act, who interact with their employees under legal principles and protections specified in that preemptive federal law.

Associated Builders and Contractors, Inc. ("ABC National") is a national trade association of more than 24,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform work on government-funded projects. ABC filed a brief as *amicus curiae* in the Ninth Circuit on behalf of the Petitioners in this case, expressing the view that California's AB 1889 infringes on the right of employers to communicate with their employees in a manner protected by the National Labor Relations Act.

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[1] Pursuant to Supreme Court Rule 37.6, the *Amici* state that this brief was not prepared, written or produced by any person or entity other than the *Amici* or their counsel. Amici further state that all parties to the Petition have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court pursuant to Rule 37.2.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. As a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB Legal Foundation frequently files *amicus* briefs in the courts informing judges how the decision they make in a given case will impact small businesses nationwide.

The AHA is a national not-for-profit association that represents the interests of nearly 5,000 hospitals, health care systems, networks and other care providers, as well as 37,000 individual members, all of whom are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends and advocates on their behalf in state and federal legislative, regulatory and judicial fora to ensure that its members' perspectives and needs are understood and taken into account in the formulation of policy.

The American Health Care Association and the National Center for Assisted Living are the nation's leading long term care organizations. AHCA/NCAL and their membership are committed to performance excellence and Quality First, a covenant for healthy, affordable and ethical long term care. AHCA/NCAL represent more than 10,000 non-profit and proprietary facilities dedicated to continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 2.5 million of our nation's frail,

elderly and disabled citizens who live in nursing facilities, assisted living residences, sub-acute centers and homes for persons with mental retardation and developmental disabilities.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

The Council on Labor Law Equality (COLLE) is a national association of top labor relations executives and in-house counsel dedicated to maintaining a fair and balanced national labor policy. COLLE monitors the activities of the National Labor Relations Board (NLRB) and court decisions relating to the National Labor Relations Act (NLRA) and participates as an *amicus* in important cases affecting national labor law.

As further explained below, the *Amici* are jointly filing this brief in order to advise the Court of the significant adverse impact of the Ninth Circuit's decision on private sector labor relations throughout the United States, due to the pervasive nature of state and local government-funded programs all over the country. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici*, representing many industries and interests, have broad familiarity with state-funded programs

and the likely adverse impact of AB 1889 on employer communications with employees.

The ruling below improperly blurs the distinction between permissible state market participation and prohibited state regulation of labor policy. As a result, the Ninth Circuit has upheld a state law here that directly infringes on the protected speech of private employers, in contravention of the NLRA. The Petition should be granted so that this Court can review and resolve the conflict in the circuits regarding the legality of this type of state law, which is an issue of great public importance.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision upholding California's Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (collectively, "AB 1889"), threatens to significantly undermine the National Labor Relations Act (NLRA), by allowing state and local governments to use their spending powers to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining state "neutrality." The scope of state and local spending potentially affected by the appeals court's ruling is staggering, totaling trillions of dollars annually in California and in the numerous other states that are considering similar legislation.

The *Amici* submit that the Ninth Circuit significantly understated the impact of AB 1889's administrative, accounting and reporting requirements on the ability of small businesses to communicate with their employees on the subject of labor relations. Many of the private employers who receive such funds, including many of the *Amici's* members, are small businesses who are completely reliant on government grants. Such employers have not previously been held to lose their protected federal rights under the

NLRA merely by accepting state funds and providing services benefiting state residents. The Ninth Circuit, however, in direct conflict with decisions of the Second and Seventh Circuits,[2] has so held in the present case.

The Ninth Circuit also improperly interpreted the NLRA as somehow failing to protect the rights of employers to communicate with their employees on the important subject of labor relations, and the rights of employees to receive such information, under the plain language of Section 8(c) of the NLRA. The court's holding presents another direct conflict with the Second Circuit's decision and with the National Labor Relations Board and further conflicts with this Court's own longstanding interpretation of the Act.

Finally, the Ninth Circuit's holding that California's use of its spending power to regulate employer speech does not violate either of this Court's settled doctrines of labor law preemption, known as "*Garmon*" and "*Machinists*" preemption respectively, is plainly wrong. AB 1889 is preempted under both doctrines. The Ninth Circuit's failure to so hold creates additional conflicts with precedents of this Court and other courts of appeals, which must be resolved.

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[2] *Healthcare Association of New York State, Inc v. Pataki*, 471 F.3d 87 (2nd Cir. 2006); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).

REASONS FOR GRANTING THE PETITION

I. THE PETITION'S CHALLENGE TO CALIFORNIA'S IMPROPER REGULATION OF PROTECTED SPEECH IN VIOLATION OF FEDERAL LABOR LAW PRESENTS AN ISSUE OF GREAT IMPORTANCE TO BOTH EMPLOYERS AND EMPLOYEES

A. Absent Correction By This Court, The Ninth Circuit's Erroneous Decision Will Adversely Affect The Expenditure of Trillions Of Dollars Of State And Local Funds Throughout The Country.

In *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986), this Court held that "[state] spending power may not be used as a pretext for regulating labor relations." In the present case, the Ninth Circuit found that AB 1889 constituted state regulation of labor policy, "sweep[ing] broadly" beyond the state's proprietary interests and plainly impacting upon private employers covered by the NLRA. Pet. App. 11a-12a. The Ninth Circuit's failure to find AB 1889 to be preempted under such circumstances, in direct conflict with holdings of the Second and Seventh Circuits and the stated views of the National Labor Relations Board, creates an issue of extraordinary importance which this Court should resolve by granting review of the Petition. Absent review by this Court, the Ninth Circuit's decision will open the door to pervasive state regulation of private sector labor relations, undermining the NLRA through spending restrictions modeled on AB 1889.

At the outset, the Ninth Circuit failed to address the broad scope of state spending covered by this law. In Fiscal Year 2007-08, the state of California is expected to spend

more than $130 billion on grants and contracts. *See* Schedule 10 – Summary, http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html. Thousands of private employers in virtually every service, manufacturing and construction category are the recipients of such state funds, including many small business members of the *Amici*.

Throughout the country, state spending as a whole has dramatically increased in recent decades, and now exceeds a trillion dollars per year. *See* U.S. Census Bureau, Table 1: State and Local Government Finances Level of Govt. and By State,www.census.gov/govs/estimate/0200ussl_1.html Local government spending is nearly double that of the states themselves, adding trillions more to the total. *Id.*

State spending on Medicaid represented the single largest increase in state expenditures in the 1990s, growing nearly 150 percent. Snell, *State Spending in the 1990s, National Conference of State Legislatures* (2003), http://www.ncsl.org/programs/fiscal/stspend90s.htm. Another recent study found that total state spending on healthcare in fiscal year 2002 amounted to more than $290 billion, of which Medicaid expenditures accounted for $201 billion. *See* "State Health Care Expenditure Report," Milbank Memorial Fund, the National Association of State Budget Officers, http://www.milbank.org/reports/2000shcer/index.html.[3]

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[3] New York's 2006-07 state budget appropriated more than $45 billion for spending on Medicaid. *See* 2006-07 Budget Rep. 40-43, http://www.budget.state.ny.us/pubs/enacted/enacted.html. An analysis conducted by the Florida Senate found that the Medicaid program funded approximately two-thirds of the resident days in Florida nursing homes. *See* "Senate Staff Analysis and Economic Impact Statement, SB 1378" (2002),www.leg.state.fl.us/data/session/2002/Senate/bills/analysis/pdf/2002s1378.hc.pdf.

Even these levels of spending are exceeded by state and local expenditures on education and capital outlays, including construction. Other categories of state and local spending that frequently are distributed to private employers in order to obtain needed services include social services, hospitals, transportation, corrections, and the environment. *See* U.S. Census Bureau, *supra*, Table 1.

The nationwide expenditures by state and local governments take on added significance when it is recognized that California's AB 1889 has become the model for similar state and local legislation elsewhere. In December 2002, New York became the second state to enact labor neutrality legislation. *See* N.Y. Labor Law § 211-a. As noted by the Second Circuit in *Healthcare Assn of N.Y. State, Inc. v. Pataki*, 471 F. 3d 87 (2d Cir. Dec. 5, 2006), the New York Labor Law is very similar to the California provision and obviously modeled after AB 1889.[4]

In addition to California and New York, the following states have recently considered legislation similar to AB 1889: Arizona HB 2503 (2001) and HB 2548 (2002) (restricting the use of state funds by state contractors); Colorado SB 130 (2002) (same); Connecticut SB 763 (2001)(same); Georgia SB 271 (1999)(restricting the use of state funds by employers); Hawaii, "Bill to Provide for State Neutrality in Union Organizing" (2003); Illinois HB 726 (2001)(prohibiting the recipients of state funds from using those funds to promote, assist, or deter unionization), HB

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[4] A statute has also been recently enacted in Florida, applicable only to health care grant recipients, and providing, *inter alia*, that: "[a]ny expense, including, but not limited to, legal and consulting fees and salaries of supervisors and employees, incurred for activities directly relating to influencing employees with respect to unionization shall not be an allowable cost for Medicaid cost reporting purposes." Florida Public Health Code 440.443(1).

3395 (2003)(restricting the use of state funds, requiring that unions be given equal access to employees, and prohibiting captive meetings during working hours); Indiana Bill 1980 (2001)(prohibiting any employer with a reimbursement agreement with the state from using state funds to support or oppose unionization); Iowa HJ 215/256, HF 126 (2001) (prohibiting use of state funds by employer that was reimbursed by the state, received grants from the state, had contracts with state, or participated in state programs); Louisiana SB 1078 (2001)(prohibiting employers from using state funds to assist, promote or deter unionization); Missouri HB 1816 (2000) (same), HB 2209 (2002) (same), HB 308 (2003) (same); New Hampshire SB 162 (2002)(limiting use of state funds by private contractors; specifies prohibited activities, including using state funds to "defend against unfair labor practice charges"); New Jersey Executive Order 20 (2002)(requiring card check and neutrality from state contractors that provide uniforms for state employees), AB 2958 (2002)(prohibit the use of state funds to pay consultants train supervisors, or pay salaries of other employees whose primary responsibility is union avoidance); North Dakota SB 2434 (2001)(providing limits on use of state funds for union organizing); Oregon HB 3645; S 778/776 (2001) (prohibiting the use of state funds to encourage or discourage unionization), SB 494-A (2003)(prohibiting the use of state funds to oppose or support union organizing efforts), SB 975 (2005)(restricting the use of state funds by state contractors); Pennsylvania HB 1531/1659 (2001)(restricting the use of state funds by state contractors); Tennessee HB 20, SB 413 (2005) (prohibiting the use of state funds for the assistance, promotion or deterrence of labor organizations); Washington

HB 2016 (2003)(prohibiting the use of state funds to encourage or discourage unionization.[5]

As this Court has recognized in the past, little will be left of the NLRA's regulatory scheme if each state is free to use its spending power to impose its labor policy views on private sector employers. *Gould,* 475 U.S. at 288-89. The free speech rights of many private employers covered by the NLRA, who receive state and local funds not only in California but also in the other states listed above, depend on this Court's review of the Petition in this case. The proliferation of state legislation around the country modeled on AB 1889, combined with the trillions of dollars of state and local spending that could be adversely affected by the Ninth Circuit's erroneous opinion, clearly demonstrates the national importance of the issue presented here, and argues strongly for granting the Petition.

B. Contrary To The Ninth Circuit's Decision, AB 1889 Will Have A Significant Adverse Impact On The Federally Protected Right Of Small Businesses To Communicate With Their Employees.

The importance of this case and the need for review of the Petition are underscored by the magnitude of AB 1889's coercive impact on employers. The Ninth Circuit greatly understated the effects of AB 1889 on the ability of covered employers to communicate effectively with their employees in a manner protected by the NLRA. The Ninth Circuit found that AB 1889's effect on employer speech was

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[5] Enactment of AB 1889 has also encouraged local jurisdictions to impose new restrictions on recipients of government funds favoring unionization in the construction industry. *See Johnson v. Rancho Santiago Community College District*, Case No. SACV 04-280 JVS (S.D. Cal.) (stayed pending the outcome of this appeal).

"indirect and incidental," when the reality is more consistent with the dissent's view that the statute imposes "seemingly impossible compliance burdens." Pet. App. 4a-5a, n.2, 17a-18a, n.10.

The Ninth Circuit ignored substantial record evidence that many California employers receive all or virtually all of their operating revenues from the state for services provided under state programs. According to the record before the court, for example, over 500 employers in California rely exclusively upon Medi-Cal reimbursements, covered by AB 1889, for their operating revenue. Dkt. 118 (SER 499-525). One such employer, Zilaco, Inc., submitted an affidavit to the district court declaring without contradiction that 100% of one of its facility's revenues was dependent on Medi-Cal, while a second facility was 90% dependent on state funds. Dkt. 43 (SER 70-72). The employer was compelled to abandon all communications with its employees on the subject of unionization, after passage of AB 1889, as a matter of "survival." *Id.* Many of the *Amici's* members, in California and elsewhere, will be presented with the same draconian choice if the Ninth Circuit's decision is allowed to stand.

Many more employers, who have independent revenue streams but nevertheless accept state and local funds, will still face severe burdens if compelled to comply with the restrictions of AB 1889. Such employers will be required to segregate accounts and establish separate accounting systems to track each expenditure relating to union organizing. Absent such separation, as to which the law offers no guidance whatsoever, the challenged statute entitles the state to *presume* a violation on the part of the employer. Cal. Govt. Code 16646(b).

As construction industry representatives testified in California, AB 1889 poses "mammoth practical accounting

problems." Dkt. 119 (SER 612). "This is an accounting nightmare for all small business people, including subcontractors in as diverse fields as landscape contractors who would have as simple a job as reseeding a local football field, to large general contractors." *Id.* Similarly, a health care provider stated in an affidavit that "we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our financial accounting and record-keeping." Dkt. #37 (SER 57).

The adverse effects of AB 1889 are thus not limited to the particular state programs for which state funds are received. In order to avoid onerous administrative costs and potential litigation, many employers receiving state funds under AB 1889 believe it necessary to cease all communications with employees on both state-funded and non-state projects, due to the difficulty of proving that no state funds have been commingled with non-state operations. A skilled nursing provider testified to the district court that "the burden and cost associated with [the necessary accounting] change was so extreme that we decided that we could not afford it." Dkt. #41 (SER 66).

The coercive effects of AB 1889 are magnified by the creation of private causes of action against offending employers, causing them to face the prospect of litigation costs and potential treble damages if they risk any employee communications. *Id.* at 16645.8. *See also* Statement of California Landscape Contractors Assn, Mar. 27, 2000. Dkt. 119 (SER 610) ("[The law's] fuzzy language is an open invitation to endless litigation about how individual employees perceived an employer's feelings about unionization.").

Indeed, the record of enforcement of the California statute reflects exactly such a coercive impact on employers'

exercise of their free speech rights. Unions filed numerous court complaints against employers under the law in 2001-2, claiming improper uses of state funds on non-state programs. Dkt. 30 (SER 26-45). Rather than confront the administrative and judicial costs of defending such complaints, a number of employers either stopped all communications with their employees or avoided entering into state contracts.[6]

In the face of such record evidence, the Ninth Circuit's holding that AB 1889's impact was "indirect," "incidental," and insufficient to impinge on federally protected rights, was clearly erroneous. Moreover, the Ninth Circuit's opinion directly conflicts with the findings of the Second Circuit and Seventh Circuit when faced with similar state laws.

In *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, *supra,* 471 F. 3d at 105, the Second Circuit held that state funding restrictions may in fact "deter employers from the exercise of their rights," to the extent that the state imposes restrictions on private employers' use of proceeds earned in which the contractor's labor costs cannot affect the amount of expense to the state.[7]

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[6] In one example cited to the Ninth Circuit, a California hospital felt compelled to waive its right to a secret ballot NLRB election immediately after the union filed a complaint against the hospital's use of state funds. Dkt. #75 (SER 364-370).

[7] The *Amici's* citation to the Second Circuit's conflicting holding is not intended to express complete agreement with that court's analysis of all the possible circumstances in which state funding restrictions should be found preempted by federal law. As the Second Circuit itself noted, its analysis differs from both the majority and dissenting opinions of the Ninth Circuit, highlighting further the need for this Court to clarify the law.

The Seventh Circuit, in *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County, supra*, 431 F. 3d 277, held that it was necessary to analyze any possible impact of state funding restrictions that extended beyond the scope of the particular funded program. The court deemed this "spillover effect" to be fatal to any state funding restrictions on otherwise protected employer rights because of the "sheer impracticability of a separation between [government] and other work." AB 1889 unquestionably has the same "spillover effects" on state funding recipients that were present in *Metropolitan Milwaukee*, but the Ninth Circuit ignored them.

The Ninth Circuit's failure to properly analyze AB 1889's coercive impact on the exercise of employer rights in this case directly conflicts with each of the above-referenced circuit court holdings, and with this Court's seminal opinion in *Gould*. The Ninth Circuit's erroneous analysis of the magnitude of AB 1889's impact on private sector labor relations, and the circuit conflict created thereby, constitutes further grounds for granting the Petition.

C. The Ninth Circuit's Decision Creates Significant Conflicts In The Doctrine Of Federal Labor Law Preemption And Undermines Enforcement Of The NLRA.

The Ninth Circuit's failure to appreciate the severity of AB 1889's coercive impact on employers led to further error in the appeals court's application of this Court's labor law preemption doctrine to the California law. Having found the challenged statute to constitute "broadly sweeping," non-proprietary regulation of labor relations policy, the Ninth Circuit should have held that AB 1889 was preempted by the NLRA under this Court's holdings in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and/or *Lodge 76, Int'l Assn of Machinists & Aerospace Workers v.*

Wis. Employment Relations Comm'n, 427 U.S. 132 (1976). The Ninth Circuit's failure to find preemption under either *Garmon* or *Machinists* cannot be reconciled with the conflicting holdings of the Second and Seventh Circuits and again requires review by this Court.[8]

The appeals court's analysis improperly blurs the distinction previously established by this Court between permissible state market participation and prohibited state regulation of labor policy. *See Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993). Contrary to the Ninth Circuit's holding, AB 1889 plainly regulates speech that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*, and further regulates conduct that Congress intended to be left unregulated under the holding of *Machinists*. On either ground, or both, the Petition should be granted and the Ninth Circuit decision should be reversed.

1. *Garmon* Preemption.

Under *Garmon*, this Court has repeatedly preempted regulation of activity that "the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286. The theory behind *Garmon* preemption is the protection of the centralized administration of national labor policy. *See Garmon*, 359 U.S. at 242.

As the Second Circuit squarely held in *Healthcare Assn, supra*, 471 F. 3d at 106, "Section 8(c) of the NLRA

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[8] While ultimately acknowledging that AB 1889 is regulatory in nature, as it clearly is, the Ninth Circuit committed further error by improperly narrowing the categories of state actions that can be found to be regulatory, in conflict with (though purporting to apply) the holding of the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999).

protects an employer's right to direct non-coercive speech to their employees during the course of a union campaign." Yet the Ninth Circuit declared that non-coercive speech is not "protected" by the NLRA but is instead guaranteed only by the First Amendment. Pet. App. 23a. The Second Circuit properly rejected the Ninth Circuit's interpretation of the Act, as follows:

> Many courts, including this one, have affirmed that section 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present.

Id. at 98-99. As the Second Circuit further articulated, the language of Section 8(c) not only was intended to protect employers but also to insure that *employees* had access to information from both sides of the labor debate during any organizing campaign. *Id.* at 99. *See also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F. 2d 121, 134 (2d Cir. 1986) ("Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance."); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F. 3d 867, 875 (4th Cir. 1999) ("[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process."); *Southwire Co. v. NLRB*, 383 F. 2d 235, 241 (5th Cir. 1967) ("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.").[9]

The Second Circuit's contradiction of the Ninth Circuit's holding as to the purpose of Section 8(c), and the above-cited statements from several other circuits that are likewise inconsistent with the Ninth Circuit's opinion, are amply supported by this Court's own precedents. *See Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) ("The enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management."); *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (referring to non-coercive anti-union solicitation as a "right protected by the so-called 'employer free speech' provision of Section 8(c) of the [Act]"). The Ninth Circuit failed to address these precedents, and the appeals court's constrained reading of Section 8(c) plainly requires review and correction by this Court.

The Ninth Circuit's holding also directly conflicts in this regard with the Seventh Circuit decision in *Metropolitan Milwaukee*. The Seventh Circuit there found preempted under *Garmon* and *Gould* a County ordinance that forbade contracting employers from holding meetings "intended to influence an [employee's] decision in selecting or not selecting a bargaining representative." 431 F.3d at 280. The Court specifically determined that the NLRA granted the right to employers to hold meetings in order to educate employees on the issue of labor representation. *Id.*

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[9] Even the Ninth Circuit has declared that "collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate." *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F. 3d 998, 1009 (9th Cir. 2002).

2. *Machinists* Preemption.

Equally misguided is the Ninth Circuit's holding that *Machinists* preemption does not apply to AB 1889. Under *Machinists,* this Court requires preemption of any state regulation of activity that Congress intended to be governed "by the free play of economic forces." 427 U.S. 132, 140. *See also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989). The Ninth Circuit nevertheless found that non-coercive employer speech was not intended to be "free from all regulation" under *Machinists* because the NLRB does regulate *coercive* campaign speech. Pet. App. 19a.

Again, the Second Circuit has contradicted the Ninth Circuit's analysis and has cogently explained why the latter court is wrong:

> Because the protection afforded by Section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and *Machinists* doctrine actually tend towards the same point: requiring [the state] to respect Congress intent to "leave some activities unregulated," *Machinists*, 427 U.S. 144, so that the parties may resolve their disputes by use of the economic weapons left to them.

Healthcare Association of New York State, Inc. v. Pataki, supra, 471 F. 3d at 107. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 751 (1985) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if a state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

As explained above, the Ninth Circuit primarily justifies the state's admitted regulation of employer conduct by returning to the contention that employers are free to forgo the state funds and engage in any speech permitted by the NLRA. Pet. App. 17a. As both the Second Circuit, the Seventh Circuit, and this Court have held, however, the exercise of state spending power to regulate private sector labor policy can result in impermissible conflict with federal labor law by deterring employers in the exercise of their rights under the NLRA. *Healthcare Association, supra,* 471 F. 3d at 107; *Metropolitan Milwaukee, supra*, 431 F. 3d at 277; *Gould*, 475 U.S. at 286. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (restrictions on lawsuits by private grantees deemed unconstitutional even when grantees were free to engage in such lawsuits with their own funds). Plainly, such deterrence is caused by the broadly sweeping provisions of AB 1889, such that review of the Petition should be granted and the conflicting opinions resolved.

Finally, the Second Circuit also properly rejected the Ninth Circuit's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), a decision of this Court that upheld certain abortion-related restrictions on the uses of *federal* grants based upon constitutional grounds having no relevance to issues of labor law preemption of state funding restrictions. *Healthcare Association, supra,* 471 F.3d at 102. The Second Circuit noted that while in cases such as *Rust*, it may be constitutional for the federal government to make a "value judgment favoring conduct other than the exercise of a protected right" and to restrict the use of public funds to exclude that protected conduct, *Gould* prohibits a state from "leveraging its money to affect the contractor's protected activity beyond the contractor's dealings with the State." As this Court further held in *Gould,* the question of constitutional limits on federal spending "is an entirely different question from what States may do with the

[National Labor Relations] Act in place." 475 U.S. at 290. The Ninth Circuit thus committed further error in this case, necessitating review and correction by this Court, by importing the inapposite Constitutional holding of *Rust* into the unrelated doctrine of federal labor law preemption.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

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