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*Amici curiae* Chamber of Commerce of the United States of America, HR Policy Association (formerly LPA, Inc.), and the Business Council of New York State, Inc. [hereinafter referred to as “*Amici*”] respectfully submit this brief in support of Plaintiffs in this matter.

### **INTEREST OF AMICI CURIAE**

The Chamber of Commerce of the United States of America (“the Chamber”) is the world’s largest federation of business organizations, representing an underlying membership of more than three million businesses and organizations of every size, and in every industry sector and region of the country, including 4,711 direct members in the State of New York. Because of this wide representation, the Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members on issues of vital concern to the business community before the courts.

The HR Policy Association (formerly known as LPA, Inc.) (hereinafter “HR Policy Association”) is an organization representing the senior human resource officers of more than 200 of the nation’s largest private sector employers. Collectively, HR Policy Association members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. Since its founding in 1939, HR Policy Association’s principal mission has been to ensure that laws and policies affecting human resources, including labor relations, are sound, practical and responsive to the realities of the modern workplace.

The Business Council of New York State, Inc. (“Business Council”), is a not-for-profit corporation organized and existing under the laws of the State of New York, formed as a statewide trade association of businesses to improve and promote the welfare of its members, their employees, customers and the general public. The Business Council represents over three thousand five hundred (3,500) individual businesses. The Business Council’s members include more than one hundred (100) of the nation’s “Fortune 500” companies and hundreds of small businesses. The Business Council has an important institutional interest in the protection and enhancement of conditions that are fair to all and conducive to business and in seeing business flourish in New York State.

This case is of great legal and practical importance to all *Amici* represented in this brief because many of *Amici*’s members perform work funded in whole or in part by the State of New York. Thus, the right of some of *Amici*’s members to exercise their protected rights of free speech under the National Labor Relations Act (“the Act” or “the NLRA”), 29 U.S.C. §§ 151 *et seq.* (as amended), in communicating with their employees on labor-related issues, as well as their right to train management personnel and to consult with attorneys or other consultants about the legal implications of and possible responses to union organization, and to hire labor relations personnel in response to a union organization campaign are subject, or potentially subject, to New York CLS Labor Law § 211-a (“Labor Law § 211-a”). Moreover, should an *Amici* member engage in a counter-organizing campaign, it will be forced to expend significant sums of money and resources to comply with the reporting requirements of Labor Law § 211-a. Thus, the issue before the Court in this case—the extent to which the State of New York may, via Labor Law § 211-a, regulate employer conduct governed by the Act and thereby disrupt the delicate balance between management and labor crafted by Congress—is of great interest to all *Amici* and their members.

## ARGUMENT

### **LABOR LAW § 211-a, AS AMENDED, IS A REGULATORY SCHEME THAT IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT AND THUS AN INVALID EXERCISE OF NEW YORK STATE'S SPENDING POWER**

Labor Law § 211-a is part of a state-by-state attempt by unions to “alter the delicate balance of bargaining and economic power that the NLRA establishes.” Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996). It is far from being a neutral law. Its intended purpose and effect is to compel employer neutrality in the face of union organization by prohibiting the use of state funds in circumstances that would encourage or discourage union organization or encourage or discourage employees from participating in an organizing campaign. See Labor Law § 211-a(2).<sup>1</sup> Thus, the central issue here is whether New York State can use its spending power to compel employers to remain neutral during a union organizational campaign. *Amici* submit that it cannot.

#### A. NEW YORK CLS LABOR LAW § 211-a

The purpose of Labor Law § 211-a, which became effective on December 29, 2002, is set forth in paragraph 1:

. . . The legislature finds and declares that when public funds are appropriated for the purchase of specific goods and/or the provision of needed services, and those funds are instead used to encourage or discourage union organization, the proprietary interests of this state are adversely affected. As a result, the

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<sup>1</sup> On October 30, 2002, the National Labor Relations Board (“NLRB”) sent a letter to Commissioner of Labor Linda Angello expressing its concerns about the provisions of Labor Law § 211-a:

On its face, . . . it appears that the labor neutrality law will effectively regulate conduct that is intended by Congress to be free from governmental interference.

For example, the law imposes a requirement of employer neutrality during union organizing drives by restricting state funds from being used to encourage or discourage unionization (Section 2); imposes a burdensome record-keeping requirement for those employers who choose not to remain neutral (Section 3); and imposes substantial risk of punitive civil penalties and Attorney General prosecution of employers for any perceived violations of its provisions (Section 4). These provisions, taken together, appear to go well beyond New York’s choice not to fund certain conduct as they interfere with rights under the NLRA to freely discuss labor relations issues during union organizing.

See Attachment A, p. 1 (Letter dated October 30, 2003, from the NLRB to Commissioner of Labor Linda Angello).

legislature declares that the use of state funds and property to encourage or discourage employees from union organization constitutes a misuse of the public funds and a misapplication of scarce public resources, which should be utilized solely for the public purpose for which they were appropriated.

Labor Law § 211-a(1) (emphasis added). Referred to as the “union neutrality bill,” the revised statute broadly prohibits only employers from using state funds and property “to encourage or discourage union organization,” irrespective of the protected or permissible nature of the communication or activity under the NLRA.

The revised statute also specifically prohibits the use of state funds for certain activities:

Notwithstanding any other provision of the law, no monies appropriated by the state for any purpose shall be used or made available to employers to: (a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.

Labor Law § 211-a(2) (emphasis added). Ironically, the New York State Legislature (“Legislature”) plainly allows employees paid by state funds to participate in a union organizing campaign on behalf of unions.

The revised statute further provides that an employer that receives state funds, “for any purpose” (Labor Law § 211-a(2)) and regardless of amount, that engages in “such activities” must prove by a financial audit that no state funds were utilized in engaging in “such activities.” The employer must maintain its financial records for at least three years and make such records available within two business days of receipt of a request from the state agency and the State Attorney General. Labor Law § 211-a(3). The statute does not provide that an employer’s financial records, once submitted, will be kept confidential or exempt from public disclosure.

If the State Attorney General finds that there is a violation of Labor Law § 211-a(2), he may seek injunctive relief to enjoin the alleged violation and to retrieve the “unlawfully expended funds.” Labor Law § 211-a(4). In addition, punitive civil penalties up to \$1,000.00 or, for a “knowing” violation or repeat violation within the preceding 2 years, treble damages in the amount of “three times the amount of money unlawfully expended” may be imposed. *Id.*

Finally, the revised statute directs the Commissioner of Labor to promulgate regulations governing the recordkeeping requirements and “contractual and administrative measures to enforce the purposes of this section.” Labor Law § 211-a(5).

In summary, under revised statute Labor Law § 211-a, a private employer who receives state funds “for the purchase of specific goods and/or the provision of needed services,” regardless of amount and purpose of those state funds, is prohibited from using any portion of those state funds “to encourage or discourage employees from union organization,” regardless of whether the employer’s action is permitted and protected by the NLRA. For the reasons articulated below, *Amici* respectfully submit that Labor Law § 211-a is preempted by the NLRA and thus an invalid exercise of New York State’s spending power.

B. LABOR LAW § 211-a IS REGULATORY IN NATURE AND THUS SUBJECT TO PREEMPTION

In general, the Garmon and Machinists preemption doctrines govern NLRA preemption of federal and state statutes and courts which conflict, or arguably conflict, with the NLRA and the exclusive jurisdiction of the National Labor Relations Board (“NLRB” or “the Board”). In brief, Garmon preemption prohibits states from regulating an activity that is protected or prohibited, or arguably so, by the NLRA, San Diego Bldg. & Trades Council v. Garmon, 359 U.S. 236, 242-44 (1959); Machinists preemption prohibits states from regulating an activity arising from or related to the parties’ collective bargaining relationship that Congress intended to be left unregulated.

Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 141 (1976). See infra, Argument Section C.

There is no question that NLRA preemption applies to a state's regulatory acts. Bldg. & Constr. Trades Council v. Associated Builders & Contrs., 507 U.S. 218, 227 (1993) ("Boston Harbor"). However, where the state is acting in a proprietary manner as a "market participant," its actions are not subject to preemption. Id. at 232. Relying on this distinction, Defendants argue that the Legislature's "designation of the law's purpose as 'proprietary'" is conclusive and thus exempt from preemption. Defendants' Motion to Dismiss, p. 13. Defendants' assertions are without merit. Labor Law § 211-a is clearly a regulatory enactment and therefore subject to preemption.

In Boston Harbor, the Massachusetts Water Resources Authority ("MWRA") incorporated into its bid solicitation a requirement that all contractors sign a Project Labor Agreement ("PLA") which, inter alia, required them to join a previously negotiated collective bargaining agreement between the union and other construction industry employers. 507 U.S. at 220-22. Upon the filing of a charge, the NLRB refused to issue a complaint on the ground that the PLA was a valid agreement under §§ 8(e) and 8(f) of the Act ("construction proviso"). Id. The Boston Harbor Plaintiffs brought suit against the MWRA and others, seeking to enjoin the PLA bid specification on the ground, among others, that it was preempted by the NLRA. Id. at 223.

The Supreme Court found that the PLA bid specification was not a regulation; thus it was not subject to either Garmon or Machinists preemption. Id. at 232. In reaching its holding, the Court reflected on then Chief Judge Breyer's dissent: "[W]hen the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected

to find; it exemplifies them.” Id. at 233 (citation omitted). Thus, the Court held that when a state acts as a proprietor, its acts “are not ‘tantamount to regulation’ or policymaking.” Id. at 229. Consequently, it may act “without offending the preemption principles of the NLRA.” Id.<sup>2</sup>

The Supreme Court distinguished its holding in Boston Harbor from its earlier decision in Wis. Dep’t of Indus. of Labor & Human Rels.v. Gould, Inc., 475 U.S. 282 (1986), in which it rejected the argument that the state was acting as a proprietor rather than a regulator for purposes of Garmon preemption when it enacted a statute prohibiting the state from doing business with any individual or firm who had violated the NLRA three times within five years. 475 U.S. at 283, 287-88. The Court rejected the state’s argument that the statute was not subject to preemption because it was based on the state’s spending power rather than its regulatory power, holding that the state’s use of “its spending power rather than its police power [did] not significantly lessen the inherent potential for conflict . . . . It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.” Id. at 287-89 (quotation omitted).

The Court also rejected the state’s argument that it was acting as a market participant on the ground that, “by flatly prohibiting state purchases from repeat labor law violators Wisconsin ‘simply is not functioning as a private purchaser of services’ . . . ; for all practical purposes, Wisconsin’s debarment scheme is tantamount to regulation.” 475 U.S. at 289 (citation omitted).

The Court went on to state:

[T]here can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State to do business with repeat labor law

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<sup>2</sup> Similarly, based on the same construction proviso of the NLRA, in Bldg. & Constr. Trades Dep’t v. Allbaugh, 295 F.3d 28, 35 (D.C. Cir. 2002), the D. C. Circuit held that Executive Order No. 13, 202, which provided that the government would neither require nor prohibit the use of a project labor agreement (PLA) on any federal or federally funded construction project, was not preempted by the NLRA because it “embodie[d] just ‘the type of decision regarding the use of labor agreements that a private project owner would be free to make.’” In this regard, the court noted that while Section 8(f) of the Act explicitly permitted construction industry employers to enter into pre-hire agreements, it did not prevent employers from refusing to enter into such agreements. Thus, the court held, because the Executive Order did not require or prohibit PLAs on government construction contracts, the Executive Order left “contractors free to determine whether they will use PLAs on government contracts, just as they may determine whether to use PLAs on projects for private owner-developers that neither require nor prohibit their use.” Id. at 35.

violators. Like civil damages for picketing, which the Court refused to allow in *Garmon*, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" . . . .

Gould, 475 U.S. at 287 (citations omitted) (emphasis in original). Further, as noted in Boston Harbor, the Court's holding in Gould rested in part on the fact that the Wisconsin statute "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State." Boston Harbor, 507 U.S. at 228-29 (citing Gould, 475 U.S. at 289).

Consistent with Boston Harbor and Gould, the Court of Appeals for the District of Columbia held that President Clinton's Executive Order barring the federal government from contracting with employers who hired permanent replacements during a lawful strike, applicable to all government contracts over \$100,000, was regulatory in nature, even though the President acted to set procurement, rather than labor, policy. Chamber of Commerce v. Reich, 74 F.3d 1322, 1324, 1337 (D.C. Cir. 1996) (noting that NLRA preemption applies when the government acts as a purchaser of goods and services). The D.C. Circuit found that the Executive Order had "the effect of forcing corporations wishing to do business with the federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government." Id. at 1338. Because the Executive Order "disqualifie[s] companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government," the D.C. Circuit, following Gould, found that it was regulatory in nature and thus preempted by the NLRA. Id.

In this case, Defendants, relying on Boston Harbor, argue that "[w]hen buying goods or services, New York is not a regulator establishing a general legal framework for all citizens or economic actors, but a participant in an economic market." Defendants' Motion to Dismiss, p. 20. Defendants' arguments, however, miss the mark for several reasons.

While a state may be the “proprietor of its own funds,” Bldg. & Constr. Trades Dep’t v. Allbaugh, 295 F.3d 28, 35 (D.C. Cir. 2002), it is the conduct being regulated by the state, and not that the state may be regulating such conduct via its spending power, which is the proper focus for determining whether a state is acting as a regulator or a proprietor. Gould, 475 U.S. at 289; Amalgated Ass’n of St., Elec. Ry. & Motor Coach of Am. et al. v. Lockridge, 403 U.S. 274, 292 (1971). In this case, the conduct being regulated is an employer’s ability to express its views, arguments and opinions regarding union organization by prohibiting the use of state funds by employers to train its management and administrative staff on the “do’s and don’t’s” of organization campaigns, hiring attorneys, consultants or other contractors for legal and other advice, and hiring employees whose “principal job duties are to encourage or discourage union organization.” Labor Law § 211-a(2).<sup>3</sup> Thus, like the statute in Gould, Labor Law § 211-a was enacted as a statutory measure to “flatly prohibit[]” the use of state funds by employers during organizational campaigns. See Gould, 475 U.S. at 289; Van-Go Transp. Co. et al. v. New York City Bd. of Educ., 53 F. Supp. 2d 278, 288 (E.D.N.Y. 1999) (holding that the board of education’s policy not to grant conditional certification for drivers during a strike was regulatory, not proprietary, because it “severely curtailed, industry-wide, the ability of . . . contractors to hire striker replacement workers, a well-established, indeed, unquestioned, federal right”). Thus, Defendants in this case “‘simply [are] not functioning as a private purchaser of services’ . . . ; for all practical purposes, [Labor Law § 211-a] is tantamount to regulation.” Gould, 475 U.S. at 289.

In addition, like the statute and executive order found to be regulatory in nature and therefore preempted in Gould and Chamber of Commerce, respectively, Labor Law § 211-a does not address any employer conduct related to the performance of its duties. See Gould, 475 U.S. at

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<sup>3</sup> This last prohibition could conceivably include, but is not limited to, the hiring of labor relations specialists, striker replacements in the event of a strike, as well as the continued employment of union shop stewards who are elected by union members to attend to union matters while paid by the employer.

289; Chamber of Commerce, 74 F.3d at 1338. For example, an employer's ability to provide healthcare services in exchange for state funds is not dependent on its decision to train its management or administrative staff or to hire an attorney. See Labor Law § 211-a(2). In contrast, the bid specification requiring adherence to a PLA in Boston Harbor was specifically put in place to resolve or to prevent labor relations issues on a government funded project. See Boston Harbor, 507 U.S. at 221-22.

Moreover, Labor Law § 211-a is a regulatory scheme that is, in some respects, much broader in application and effect than the executive order that was found to be regulatory in nature in Chamber of Commerce. Labor Law § 211-a applies to all state contracts, regardless of amount, whereas the executive order in Chamber of Commerce applied only to government contracts over \$100,000. Thus, Labor Law § 211-a will undoubtedly impact employers who may be entirely dependent on state funds for their operations as well as employers who do very little business with the state. On the other hand, like the executive order in Chamber of Commerce, Labor Law § 211-a applies to all employer conduct during an organizing campaign even if the employees being organized do not perform services under a state government contract. See Chamber of Commerce, 74 F.3d at 1338. Thus, an employer who receives state funds for providing healthcare services would be prohibited by Labor Law § 211-a from expressing its views, argument or opinion regarding union organization during an organizational campaign of its janitorial workers despite the fact that the janitorial workers do not provide healthcare.

Finally, unlike the governmental entity in Boston Harbor that sought to exercise its right protected by Section 8(f) as a private actor in the marketplace, the Legislature in this case, in its governmental capacity, revised a statute which implemented its broad policy against employer opposition to organizing campaigns that “will have the effect of forcing corporations wishing to do business with [the state of New York]” to refrain from training its management and administrative

staff, hiring an attorney or other consultants, or hiring employees whose “principal job duties are to encourage or discourage union organization.” Labor Law § 211-a(2). Indeed, any employer wishing to do, or to continue to do, business with the state will “think twice” before opposing any organizational campaigns. See Chamber of Commerce, 74 F.3d at 1338.

In sum, while the prohibitions listed in Labor Law § 211-a are grounded in the state’s spending power, they are not exempt from preemption.<sup>4</sup> See Gould, 475 U.S. at 287-89. New York State, acting as a governmental entity, revised Labor Law § 211-a as a broad, far-reaching statute to prohibit employers from exercising their protected free speech right under Section 8(c) of the NLRA; it does not regulate any conduct related to the performance of a state government contract. Thus, Labor Law § 211-a is undeniably regulatory in nature and therefore subject to preemption. See Van-Go, 53 F. Supp. 2d at 289 (holding that the agency acted in a regulatory, not proprietary, capacity when it adopted a policy that had the “‘manifest purpose’ and ‘inevitable effect’ of throwing its weight behind one of the parties to a labor-management dispute”).

C. LABOR LAW § 211-a IS PREEMPTED BY BOTH *GARMON* AND *MACHINISTS*

As noted above, supra p. 5, the principles of NLRA preemption are well settled. Grounded in the Supremacy Clause of the Constitution, Machinists and Garmon preemption explicitly exclude state regulation where Congress “states an intent to occupy a field” and implicitly exclude state regulation “where the federal interest in the subject matter regulated is so pervasive that no

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<sup>4</sup> With respect to the disbursement of state funds under the State’s spending power, one of the questions raised during oral argument in the appeal of Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002), *on appeal*, Appeal Nos. 03-55166 and 03-55169 (consolidated) (9<sup>th</sup> Cir.), can also be asked of Labor Law § 211-a -- when do state funds stop being state funds for purposes of the statute? In other words, once the State of New York receives the services under the contract and disburses funds for payment of those services, are those funds which have been deposited into the employer’s account still considered state funds even though the State no longer has any control over those funds? Thus, if an employer uses those funds to pay for services rendered by a subcontractor who in turn uses those funds to encourage or discourage union organization, is the subcontractor in violation of the statute because the funds originated from the State? If the subcontractor uses those funds to pay for services rendered by one of its vendors (for example, office rental equipment), and the vendor then uses the money to encourage or discourage union organization, is the vendor in violation of the statute because funds which originated from the state treasury were used? The statute’s broad prohibitions are potentially far-reaching -- the office rental equipment vendor that never provided services to the State may find itself subject to prosecution under Labor Law § 211-a because, at one point, those funds originated from the State.

room remains for state action, indicating an implicit intent to occupy the field, or where the state regulation at issue conflicts with federal law or stands as an obstacle to the accomplishment of its objectives.” Rondout Elec., Inc. v. NYS Dep't of Labor, 335 F.3d 162, 166 (2d Cir. 2003), pet. for cert. filed, No. 03-560 (citations omitted). For the reasons stated below, Labor Law § 211-a is preempted by both Machinists and Garmon.

1. Labor Law § 211-a is Preempted by the *Machinists* Preemption Doctrine

Machinists preemption “precludes state and municipal regulation concerning conduct that Congress intended to be unregulated.” Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) (citations and quotations omitted) (“Golden State I”); Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Empl. Rels. Comm’n et al., 427 U.S. 132 (1971) (“Machinists”). In this regard, the Supreme Court recognized “that a particular activity might be protected by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be unrestricted by any governmental power to regulate because it was among the permissible economic weapons in reserve, . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.” Machinists, 427 U.S. at 141 (quotation omitted) (emphasis in original). As reiterated by the Supreme Court in Golden State I:

Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left to be controlled by the free play of economic forces. . . . The Court recognized in Machinists that Congress has been rather specific when it has come to outlaw particular economic weapons, . . . and that Congress’ decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests. . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help . . . unless such restrictions presumably were contemplated by Congress. Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act’s processes.

Golden State I, 475 U.S. at 614-15 (citations and quotations omitted) (emphasis added). Thus, Machinists preemption excludes state regulation to prevent intrusion into the NLRA’s “protect[ion of] certain rights of labor and management against governmental interference.” Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111, 112 (1989) (holding that the “interest in being free of governmental regulation of the ‘peaceful methods of putting economic pressure upon one another’ is a right specifically conferred on employers and employees by the NLRA”)(quoting Machinists, 427 U.S. at 154) (“Golden State II”). Further, it “preserves Congress’ intentional balance between the uncontrolled power of management and labor to further their respective interests,” and “create[s] a zone free from all regulations, whether state or federal.” Boston Harbor, 507 U.S. at 226 (quotations and citations omitted). As recognized by the Second Circuit Court of Appeals, Machinists preemption “protects employers’ and unions’ use of ‘economic weapons’ that Congress aimed for them to have freely available. . . . Even though no section of the NLRA expressly protects these economic weapons, they are integral parts of the legislative scheme and cannot be subject to regulation by the states or the courts or even the Board.” Bldg. Trades Employers’ Educ. Ass’n et al. v. McGowan et al., 311 F.3d 501, 508-09 (2d Cir. 2002). In short, “[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, 74 F.3d at 1337.

As shown below, Labor Law § 211-a affronts Machinists preemption principles by attempting to regulate an employer’s ability to engage in noncoercive speech to express its views, arguments and opinions in opposition to union organization -- “conduct that Congress aimed to be unregulated in furtherance of ‘policies implicated by the [Act] itself.’” McGowan, 311 F.3d at 509 (quoting Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 28 (2d Cir. 1988)). Because Labor Law § 211-a constitutes “government interference with [an] economic weapon[.]” that “upset[s] the

delicate balance of interests established in the NLRA,” McGowan, 311 F.3d at 509, it is preempted under Machinists.

- a. Labor Law § 211-a(1) has a Chilling Effect on the Use of All of an Employer’s Economic Weapons, Including Non-coercive Employer Speech Which is Intended to be Unregulated

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 of Am., 383 U.S. 53, 58 (1966). Further, 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 statement.” Id. at 60 (citation and quotation omitted).

Thus, in NLRB v. Virginia Elec. & Power Co., the Supreme Court recognized an employer’s constitutional right to “express[] its view on labor policies or problems” - an employer “is as free now as ever to take any side it may choose on this controversial issue.” 314 U.S. 469, 477 (1941). Consistent with the developing law, Congress amended Section 8 of the NLRA “to insure both to employers and labor organizations full freedom to express their views to employees on labor matters,” S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., pp. 23-24 (1947), by adding a “free speech” exemption which provides that an unfair labor practice is not committed by expressing or disseminating “any views, argument, or opinion . . . whether in written, printed, graphic, or visual form, . . . if such expression contains no threat or reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). “[T]he enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management.” Linn, 383 U.S. at 62. Thus, “an employer is free to communicate to his employees any of his general views about unionism or any of his

specific views about a particular union, so long as the communications do not contain ‘a threat of reprisal or force or promise of benefit.’” NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). See Trent Tube Co., 147 NLRB 538, 541 (1964) (holding that absent threats, the Board “will not restrict the right of any party to inform employees of ‘the advantages and disadvantages of unions and joining them’”).

Consistent with these principles, a statute which is substantively indistinguishable from Labor Law § 211-a was found to be preempted in Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002), *on appeal*, Appeal Nos. 03-55166 and 03-55169 (consolidated) (9<sup>th</sup> Cir.). Like Labor Law § 211-a, the statute challenged in Lockyer provided that private employers who received state grants and other state funds were prohibited from using state funds to “assist, promote or deter union organizing.” Cal. Gov. Code §§ 16645.2 and 16645.7. The California statute covered “any attempt by an employer to influence the decision of its employees” regarding whether to support or oppose a labor organization. Cal. Code Gov. § 16645(a)(1). Like Labor Law § 211-a, the California statute prohibited the use of state funds for payment of legal or consulting fees and salaries of supervisors or employees incurred in preparing, planning and carrying out an activity to assist, promote or deter union organization. Cal. Code Gov. § 16646(a). Also, the California statute required employers to maintain and provide financial records to show that state funds were not used, and imposed fine and penalties. Cal. Code Gov. §§ 16645.2(c) and (d), 16645.7(c) and (d). Granting the plaintiffs’ summary judgment motion in part,<sup>5</sup> the District Court for the Central District of California held that the California statute was preempted by the NLRA because it “regulate[d] employer speech about union organizing under specified circumstances, even though Congress intended free debate.” Lockyer, 225 F. Supp. 2d at 1204-06.

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<sup>5</sup> The district court denied summary judgment as to section 16645.1 and 16645.3-6 of the California statute for lack of standing. Lockyer, 225 F. Supp. 2d at 1202-03.

On appeal, as *amicus curiae* in the Ninth Circuit Court of Appeals in support of the plaintiffs challenging the California statute, the NLRB argued that the California statute was preempted by the NLRA under Machinists because it regulated employer speech that Congress intended to be left unregulated and interfered with Congress' policy of free collective bargaining. See Amicus Curiae Brief of the National Labor Relations Board in Chamber of Commerce v. Lockyer, Appeal Nos. 03-55166 and 03-55169 (consolidated) (9<sup>th</sup> Cir.), p. 16 (Attachment B) [hereinafter "NLRB Brief"]. The Board cited a number of cases preserving an employer's right to express its views, arguments and opinions during an organizational campaign, and argued that the California statute, by imposing restrictions on employer speech through spending controls, "chill[ed] the exercise of speech rights that, in the judgment of Congress and the Board, enhance the opportunity of employees to make a free and informed choice about unionization." NLRB Brief, pp. 16-21.<sup>6</sup> While employees have a Section 7 right "to receive aid, advice and information from others, concerning [their self-organization] right," Harlan Fuel Co., 8 NLRB 25, 32 (1938), as reinforced by Section 8(c) of the NLRA, the California statute "[w]ork[ed] at cross purposes with these policies" and "impeded the flow of information to employees that federal law has been designed to foster." NLRB Brief, p. 16-17.

Similarly, like the California statute found to be preempted, Labor Law § 211-a chills and prevents free debate on union organization as intended by Congress by broadly prohibiting employers from using state funds and property to provide information to employees about the advantages and disadvantages of unionization. See Labor Law § 211-a(1).

Moreover, like the California statute at issue in Lockyer, the training and hiring prohibitions contained in Labor Law § 211-a(2) hamper an employer's ability to resort to lawful self-help and, without a similar ban on the use of self-help weapons by unions, impermissibly tips

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<sup>6</sup> The Board made a similar point in its letter to Commissioner Angello. *See supra* n.1.

the balance of power in the unions' favor. See Labor Law § 211-a(2). Specifically, without proper training, employers run the risk of being charged with unfair labor practices because a supervisor may say or do something which may be unlawful under the NLRA. Thus, rather than risk the expense of litigating charges, employers may forego any communication with employees. In addition, there is nothing in the NLRA that prohibits employers from consulting with attorneys, consultants or other contractors about union organization. The NLRA, its regulations, and fifty years of case law present a legal minefield for employers who are unaware of the law governing employer as well as union conduct during union organizing campaigns. Seeking legal advice may be crucial to an employer's ability to withstand an organizational campaign.<sup>7</sup>

Finally, the NLRA does not prohibit an employer from hiring employees whose principal job duties are to encourage or discourage a union. In fact, the broad language used in this prohibition could arguably include the hiring of labor relations specialists as well as striker replacements. On the other hand, Labor Law § 211-a does not prohibit employees who may be paid by state funds from participating in an organizing campaign. Moreover, unions are permitted to hire employees whose principal job duties are to encourage union organization. Again, Labor Law § 211-a impermissibly tips the balance of economic power in favor of the unions.

Because of the prohibitions in Labor Law § 211-a, an employer that is entirely or primarily dependent on state funding would find itself unable to exercise its right to respond to union allegations during an organizational campaign; to inform employees about the advantages and disadvantages of union organization in furtherance of their Section 7 rights; to train its managers,

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<sup>7</sup> In addition, the statute's prohibition against consulting with attorneys raises a number of questions with respect to its application. For instance, what is the standard for determining when legal advice runs afoul of the statutory prohibition? During an organizing campaign, an employer may seek a variety of legal advice from counsel. Where does the statute draw the line with respect to permissible and impermissible consultation with legal counsel? More importantly, in order to prove that an employer did not run afoul of the statutory prohibition, is the employer required to waive its attorney client privilege with respect to its communications with an attorney? In this regard, since the burden is on the employer to prove that state funds were used appropriately, would the employer have to turn over attorney billing records and other correspondence which describe the content and context of such communications?

supervisors and other administrative personnel on the legal boundaries of communication with employees during an organizational campaign; to consult an attorney or other consultant for guidance in navigating the legal landmines; and to hire labor relations specialists to address labor relations matters. On the other hand, an employer that does engage in such activities will have to prove to the State Attorney General that state funds were not used for such purposes - an onerous accounting obligation that may discourage employers from doing anything. In either situation, Labor Law § 211-a severely restricts and chills an employer's ability to exercise its free speech right to voice opposition to union organization. Thus, the state intrudes upon the "zone" that is supposed to be free from state regulation "to be controlled by the free play of economic forces" and thereby frustrates the implementation of the NLRA. Machinists, 427 U.S. at 140 (quotation omitted). Moreover, by fundamentally interfering with an employer's ability to engage in such self-help activities, thereby compelling employer neutrality, Labor Law § 211-a impermissibly tips the "delicate balance of bargaining and economic power" in favor of the union. As a result, Labor Law § 211-a is preempted by the NLRA under Machinists. See McGowan, 311 F.3d at 509 (holding that New York State's refusal to register an apprentice program until the parties negotiated an agreement was prohibited by Machinists preemption because it threatened the bargaining process by putting economic pressure on the employer); New York News, Inc. v. State of New York et al., 745 F. Supp. 165, 171 (S.D.N.Y. 1990) (holding that the board of inquiry set up by the Labor Commissioner to investigate disputes between the parties during negotiations was preempted by the NLRA because it had a coercive and pervasive effect on the negotiations).

2. Labor Law § 211-a is Preempted by the *Garmon* Preemption Doctrine

Garmon preemption "prohibits States from regulating 'activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" Golden State I, 475 U.S. at 613 (quoting Gould, 475 U.S. at 286). Garmon preemption "is intended to preclude state interference with the [Board's]

interpretation and active enforcement of the ‘integrated scheme of regulation’ established by the NLRA.” Id. at 613. To this end, 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” protected, prohibited, or arguably protected or prohibited, by the NLRA. Gould, 475 U.S. at 286. Garmon preemption “is designed to prevent ‘conflict in its broadest sense’ with the ‘complex and interrelated federal scheme of law, remedy and administration[.]’” Id.

The NLRA was enacted as a “comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency . . . to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.” Lockridge, 403 U.S. at 286. The Act “creates rights in labor and management both against one another and against the State.” Golden State II, 493 U.S. at 109. To this end, Section 7 of the Act provides that employees have the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities . . . .” 29 U.S.C. § 157.

To prevent interference with an employee’s Section 7 rights, Section 8 contains a list of prohibitions on employer and union conduct. See 29 U.S.C. §§ 158(a) and (b). For instance, Section 8(a)(1) provides that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 157.” 29 U.S.C. § 158(a)(1). However, “[i]n selecting which forms of economic pressure should be prohibited . . . , Congress struck the balance . . . between the uncontrolled power of management and labor to further their respective interests.” Machinists, 427 U.S. at 146. Thus, within the context of what constitutes an

unfair labor practice, under Section 8(c) of the NLRA, only employer speech that is coercive, threatening, or promises a benefit is deemed to be an unfair labor practice.

In Lockyer, currently pending before the Ninth Circuit, the Board argued that the California statute, as described above, was preempted under Garmon “because, in the guise of controlling state funding, it actually regulates the same partisan employer speech that Congress committed to the Board’s jurisdiction and it does so using different standards and different sanctions than Congress thought appropriate.” NLRB Brief, pp. 21-26. The same rationale applies here.

Defendants concede that “a state could not prohibit or regulate non-coercive employer expression about unions.” Defendant’s Motion to Dismiss, p. 18. However, by prohibiting the use of state funds to train management and administrative personnel on what they can say during an organizational campaign, to consult with attorneys and other advisors about the parameters of communication during an organizational campaign, and to hire a labor relations specialist in response to organizing activities -- all of which factor into an employer’s ability to freely, lawfully, and effectively communicate with its employees, there can be no doubt that Labor Law § 211-a does precisely what Defendants admit the state cannot do. That is, Labor Law § 211-a dictates what an employer can say and cannot say (an employer cannot say anything that would encourage or discourage union organization or discourage employees from participating in a union organizing campaign), as well as how an employer may communicate with its employees (an employer cannot effectively and properly train its management and administrative staff on the lawfulness of employer speech during union campaigns, cannot hire attorneys and other consultants to provide advice on effective counter-union campaigns, and cannot hire labor relations specialists to manage issues arising out of relations with unions). These prohibitions are much broader in scope than Section 8(c) of the NLRA since they clearly restrict coercive and noncoercive employer communication with employees. As a result, these prohibitions are in direct conflict with the

NLRA, which only prohibits speech that is coercive, threatening or promises a benefit. See Linn, 383 U.S. at 62; Gissel, 395 U.S. at 618. Thus, Labor Law § 211-a is preempted under Garmon.

Defendants further argue that Garmon preemption does not apply to Labor Law § 211-a because “the NLRB has no power (much less ‘exclusive competence,’ . . . ) to ‘affirmatively protect’ employer speech.” Defendants’ Motion to Dismiss, p. 18 (citation omitted). In making this argument, Defendants completely ignore well settled Supreme Court precedent recognizing “the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” Gissel, 395 U.S. at 620 (citing Virginia Elec., 314 U.S. at 479) (emphasis added). Moreover, masked as a spending control, Labor Law § 211-a, regardless of the nature of the communication, would deem any employer communication that encourages or discourages union organization to be a violation unless the employer can prove that state funds were not used in communicating with the employees. This is tantamount to government supervision of the content of an employer’s speech camouflaged by the state’s spending power. Such state interference would be preempted under Machinists and Garmon as the NLRB has exclusive jurisdiction to determine the lawfulness of the content of employer speech within the parameters of the NLRA. See Gissel, 395 U.S. at 620.

In addition, Labor Law § 211-a cannot escape Garmon preemption because of the punitive nature of its civil penalties. See Labor Law § 211-a(4). As held by the Supreme Court in Gould, the “conflict between the challenged . . . statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of [the] supplemental remedy.” 475 U.S. at 288 n.5. The “regulatory scheme established for labor relations by Congress is ‘essentially remedial,’ and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution.” Id. (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-12 (1940)). “Indeed, to allow the State to grant a remedy . . . which has been withheld from the [Board] only accentuates

the danger of conflict because the range and nature of those remedies that are and are not available is a fundamental part of the comprehensive system established by Congress.” Gould, 475 U.S. at 287 (quotations and citations omitted).

Furthermore, contrary to the NLRB’s exclusive jurisdiction, Labor Law § 211-a creates another forum in which an employer’s communication with employees would be adjudicated. By authorizing the State Attorney General to seek injunctive relief in a state court, the state court will have to decide whether an employer’s communication encouraged or discouraged union organization, an issue which may depend upon whether the employer’s communication was coercive, threatening or promising of a benefit, which is an issue typically within the exclusive jurisdiction of the NLRB.

In short, Labor Law § 211-a creates a state “employer neutrality” scheme that is in direct conflict with an employer’s free speech rights protected by Section 8(c) of the NLRA. Indeed, Labor Law § 211-a uses a much broader standard for determining permissible speech (all communication which encourages or discourages union organization) than that used under Section 8(c) in determining whether an employer has committed an unfair labor practice (speech that is coercive, threatening or promises a benefit is an unfair labor practice). Finally, Labor Law § 211-a places adjudication of possible violations in the state courts, not the NLRB, and imposes punitive civil and treble damages, contrary to the NLRA’s remedial scheme. Thus, Labor Law § 211-a is preempted under Garmon.

### 3. Labor Law § 211-a Does Not Qualify for the Exceptions to *Garmon* Preemption

There are two exceptions to Garmon preemption. First, a state regulation will not be found to be preempted “where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Garmon, 359 U.S. at 243-44. In this case, Defendants argue that noncoercive employer speech is “not a core concern of the NLRA” because Section 8(c) of the

NLRA “‘merely implements’” the First Amendment. Defendants’ Motion to Dismiss, p. 18 (quoting Gissel, 395 U.S. at 617). An employer’s free speech right is not “peripheral”; it is firmly established in Section 8(c) of the Act, grounded in its legislative history, congressional intent, and case law precedent. See Linn, 383 U.S. at 62; Gissel, 395 U.S. at 618. Defendants’ argument completely ignores the Supreme Court’s recognition of the employer’s right to express its views, arguments and opinions during an organizational campaign, which will have a real effect on organization. Thus, “rather than being ‘peripheral’ to the concerns of the NLRA, [Labor Law § 211-a] goes to the heart of the collective bargaining process.” New York News, 745 F. Supp. at 172. On the other hand, a state’s spending power, although a “core state interest” (Defendants’ Motion to Dismiss, p. 18), is not paramount. See Gould, 475 U.S. at 287 (holding that an exercise of a state’s spending power rather than its regulatory power is “a distinction without a difference”).

Second, a state statute will not be preempted “where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility . . . .” Garmon, 359 U.S. at 243-44. This exception is typically reserved for cases involving tortuous actions, see, e.g., Brown v. NFL, 219 F. Supp. 2d 372, 381 (S.D.N.Y. 2002), and minimum labor standards, see Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (holding no NLRA preemption because state laws imposing minimum requirements for health care coverage did not limit the right of self-organization or collective bargaining); New York Tel. Co. et al. v. New York State Dep’t of Labor et al., 440 U.S. 519 (1979) (finding no compelling congressional direction for providing unemployment compensation for striking workers); Sears, Roebuck & Co. v. San Deigo County Dist. Council of Carpenters, 436 U.S. 180 (1978) (finding no preemption where the court was deciding lawful location of picketing, not the protected content of picketing). Labor Law § 211-a does not address tortuous actions or minimum labor standards. Its sole purpose is to prohibit the use of state funds so that employers can lawfully communicate with its employees during an organizational

campaign. It does not address a deeply rooted local concern and is therefore not saved from preemption.

### CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that this Court find that Labor Law § 211-a is preempted by the NLRA under the principles established by Garmon and Machinists.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Willis J. Goldsmith, hereby certify that the foregoing BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, AND THE BUSINESS COUNCIL OF NEW YORK STATE, INC. was served on the following individuals by Federal Express, overnight delivery, this 12<sup>th</sup> day of November, 2003:

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