

No. 06-_____

IN THE
Supreme Court of the United States

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

Petitioners,

v.

BILL LOCKYER, *ET AL.*,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

[Additional counsel listed on signature page]

QUESTION PRESENTED

Is the State of California's regulation of noncoercive employer speech about union organizing, California Assembly Bill 1889, Cal. Gov't Code §§ 16645.2, 16645.7, preempted by federal labor law?

**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

The parties before this Court are petitioners the Chamber of Commerce of the United States of America; California Chamber of Commerce; Employers Group; California Hospital Association (*fka* California Healthcare Association); California Manufacturers and Technology Association; California Association of Health Facilities; Aging Services of California (*fka* California Association of Homes & Services for the Aging); Marksherm Corporation; Zilaco, Inc.; and Front Porch (*fka* Internext Group) (“petitioners”); and respondents Bill Lockyer, Attorney General, in his capacity as Attorney General of the State of California; 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; Diana M. Bonta, R.N., Dr., Ph.D, as the Director of the California Department of Health Services; California Labor Federation, AFL-CIO; and American Federation of Labor and Congress of Industrial Organizations (“respondents”). The other parties in the Ninth Circuit were Bettec Corporation; Zilaco; Beverly Health & Rehabilitation Services, Inc. (*dba* Beverly Manor Costa Mesa); and Del Rio Sanitarium, Inc. (*fka* Del Rio Healthcare, Inc.).

None of the petitioners has a parent company or publicly held company owning 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW.....	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT.....	2
A. The National Labor Relations Act.....	2
B. California Assembly Bill 1889.....	4
C. Proceedings in the District Court.....	6
D. Decisions of the Court of Appeals.....	7
REASONS FOR GRANTING THE WRIT.....	10
I. THE NINTH CIRCUIT’S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SECOND AND SEVENTH CIRCUITS AND DISREGARDS THE CONSIDERED VIEWS OF THE NLRB	12
A. There Is A Circuit Split On Whether The NLRA Protects Noncoercive Employer Speech About Union Organizing From State Interference.....	12
B. There Is A Circuit Split On Whether State Spending Decisions That Interfere With Noncoercive Employer Speech Are Preempted	14

TABLE OF CONTENTS
(Continued)

	Page
II. THE NINTH CIRCUIT’S DECISION IS IN CONFLICT WITH THIS COURT’S PREEMPTION PRECEDENTS	18
III. THIS CASE RAISES AN IMPORTANT QUESTION THAT WILL HAVE A SIGNIFICANT EFFECT ON FEDERAL LABOR POLICY	28
CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page
Cases	
<i>Amalgamated Ass’n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge</i> , 403 U.S. 274 (1971).....	2, 22, 28
<i>Austin v. Mich. Chamber of Commerce</i> , 494 U.S. 652 (1990).....	26
<i>Beth Israel Hosp. v NLRB</i> , 437 U.S. 483 (1978)	18
<i>Bd. of County Comm’rs v. Umbehr</i> , 518 U.S. 668 (1996).....	24
<i>Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.</i> , 507 U.S. 218 (1993)	10, 19
<i>FEC v. Mass. Citizens for Life, Inc.</i> 479 U.S. 238 (1986).....	26
<i>Garner v. Teamsters, Chauffeurs & Helpers Local Union</i> , 346 U.S. 485 (1953)	30
<i>Golden St. Transit Corp. v. City of Los Angeles</i> , 493 U.S. 103 (1989)	21
<i>Healthcare Ass’n of N.Y. State, Inc. v. Pataki</i> , ___ F.3d ___, 2006 WL 3499469 (2d Cir. Dec. 5, 2006).....	<i>passim</i>
<i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533 (2001).....	24-25, 28
<i>Linn v. United Plant Guard Workers of Am.</i> , 383 U.S. 53 (1966).....	3, 20
<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994)	19, 26, 28
<i>Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm’n</i> , 427 U.S. 132 (1976)	<i>passim</i>
<i>Metro. Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985).....	21
<i>Metro. Milwaukee Ass’n of Commerce v. Milwaukee County</i> , 431 F.3d 277 (7th Cir. 2005).....	<i>passim</i>

TABLE OF AUTHORITIES
(Continued)

	Page
<i>NLRB v. City Disposable Sys. Inc.</i> , 465 U.S. 822 (1984).....	18
<i>NLRB v. Nash-Finch Co.</i> , 404 U.S. 138 (1971).....	2, 19
<i>NLRB v. United Steelworkers of Am.</i> , 357 U.S. 357 (1958).....	20
<i>Nash v. Fla. Indus. Comm’n</i> , 389 U.S. 235 (1967).....	28
<i>Nat’l Endowment for Arts v. Finley</i> , 524 U.S. 569 (1998).....	27
<i>N.Y. Tel. Co. v. N.Y. State Dep’t of Labor</i> , 440 U.S. 519 (1979).....	19, 28
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	24, 28
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959).....	<i>passim</i>
<i>Wis. Dep’t of Indus., Labor & Human Relations v.</i> <i>Gould Inc.</i> , 475 U.S. 282 (1986)	<i>passim</i>

Federal and State Laws

U.S. CONST., art. VI, cl. 2.....	2, 29
28 U.S.C. § 1254(1)	2
National Labor Relations Act (“NLRA”), 29 U.S.C.	
§§ 151-169	2
29 U.S.C. § 157	3
29 U.S.C. § 158(c)	<i>passim</i>
29 U.S.C. § 159	3
Cal. Gov’t Code §§ 16645-16649.....	2
Cal. Gov’t Code § 16645(a)	4
Cal. Gov’t Code § 16645.1(a)	4
Cal. Gov’t Code § 16645.2.....	4, 5, 6
Cal. Gov’t Code § 16645.3(a)	4
Cal. Gov’t Code § 16645.4(a)	4
Cal. Gov’t Code § 16645.5(a)	4
Cal. Gov’t Code § 16645.7	4, 5, 6
Cal. Gov’t Code § 16645.8.....	6

TABLE OF AUTHORITIES
(Continued)

	Page
Cal. Gov't Code § 16646.....	4, 5
Cal. Gov't Code § 16647.....	5
California Assembly Bill No. 1889 (“AB 1889”).....	<i>passim</i>
Cal. Stats. 2000, Ch. 872, § 1.....	4
N.Y. Labor Law § 211-a.....	12, 15, 29

Miscellaneous

California Fiscal Budget, <i>available at</i> http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html	29
185 Daily Lab. Rep. (BNA) A-8 (Sept. 25, 2006).....	29
NLRB <i>Amicus</i> Brief, <i>Chamber of Commerce v. Lockyer</i> (9th Cir. Nos. 03-55166, 03-55169), <i>available at</i> 2003 WL 22330725.....	9, 17, 18

PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States of America, *et al.*, respectfully petition for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was issued on September 16, 2002, and is reported at 225 F. Supp. 2d 1199 (Pet. App. 140a-149a).

The first panel opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 20, 2004, and is reported at 364 F.3d 1154 (Pet. App. 114a-139a). The Ninth Circuit's order granting rehearing and withdrawing the first opinion was issued on May 13, 2005, and is reported at 408 F.3d 590 (Pet. App. 157a-158a). The second panel opinion of the Ninth Circuit was issued on September 6, 2005, and is reported at 422 F.3d 973 (Pet. App. 58a-113a). The Ninth Circuit's order granting rehearing *en banc* was issued on January 17, 2006, and is reported at 435 F.3d 999 (Pet. App. 155a-156a); its order withdrawing the second panel opinion was issued on February 9, 2006, and is reported at 437 F.3d 890 (Pet. App. 153a-154a). The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006, and is reported at 463 F.3d 1076 (Pet. App. 1a-57a). On November 20, 2006, the Ninth Circuit entered an order staying its mandate pending this Court's disposition of this case. Pet. App. 151a-152a.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 21, 2006. Pet. App. 1a-57a. On December 7, 2006, petitioners timely filed an application to extend the time to file a petition for certiorari from December 20, 2006, to January 5, 2007. On December 12, 2006, Justice Kennedy granted the

application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2, section 8(c) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(c), and California Assembly Bill No. 1889 (“AB 1889”), Cal. Gov’t Code §§ 16645-16649, each of which is set out in full in the Appendix to this Petition. Pet. App. 159a-167a.

STATEMENT

This is a preemption case arising under the NLRA. In response to union lobbying efforts, California enacted AB 1889 in 2000 to forbid employers receiving state funds of virtually every type, including state grant and program funds, from using those funds to “assist, promote, or deter union organizing.” Petitioners—joined in the Ninth Circuit by *amicus* the National Labor Relations Board (“NLRB”)—have argued that this California statute is preempted under the NLRA in part because it deters an activity, noncoercive employer speech about union organizing, that federal labor policy protects and encourages. In a divided *en banc* decision, the United States Court of Appeals for the Ninth Circuit sustained AB 1889.

A. The National Labor Relations Act

The NLRA, 29 U.S.C. §§ 151-169, was enacted in 1935 to federalize and bring uniformity to labor-management relations. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (the NLRA is designed “to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies”) (internal quotation marks and citation omitted); *Amalgamated Ass’n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971) (the NLRA is “a comprehensive

national labor law . . . for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces”). Although the NLRA contains no express preemption provision, “[i]t is by now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations.” *Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). In particular, this Court has held that the NLRA preempts state regulation of activity (i) that Congress intended to remain unregulated, *see Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976) (“*Machinists*”), and (ii) protected, prohibited, or arguably protected or prohibited by the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (“*Garmon*”).

Employees have the right under the NLRA to “join” or “to refrain” from joining a union. 29 U.S.C. § 157. To become an exclusive collective bargaining representative, a union must be supported by a majority of employees in an appropriate bargaining unit. This is typically done through a secret-ballot election overseen by the NLRB. *Id.* § 159. Campaigns preceding these representation elections often are vigorously contested, with employees being inundated with union arguments for, and employer arguments against, unionization. *See generally Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966).

When Congress amended the NLRA in 1947, it added section 8(c), which provides 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 or promise of benefit.” 29 U.S.C. § 158(c). This Court has stated that “the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management.” *Linn*, 383 U.S. at 62.

B. California Assembly Bill 1889

AB 1889, signed into law by Governor Gray Davis in 2000, forbids employers that receive either a state “grant” or over \$10,000 from a “state program” from using those funds “to assist, promote, or deter union organizing,” Cal. Gov’t Code §§ 16645.2, 16645.7, which is defined as “any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] [w]hether to become a member of any labor organization,” *id.* § 16645(a).¹ This proscription applies to “any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing.” *Id.* § 16646(a).

There are several exceptions to AB 1889’s spending ban. Covered employers are free under AB 1889 to use “state funds” to enter into a “voluntary recognition agreement”

¹ The preamble to AB 1889 states that “[i]t 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” and that “[i]t is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization.” Cal. Stats. 2000, Ch. 872, § 1. Although only the spending bans related to state grants and programs are currently before this Court, *see* Dist. Ct. Docket No. (“Dkt.”) 168 (Ninth Circuit Supplemental Excerpts of Record (“SER”) 758-770), AB 1889 also precludes reimbursements to employers for any union-related activity, Cal. Gov’t Code § 16645.1(a); prohibits employers from speaking to employees working on state contracts about union organizing, *id.* § 16645.3(a); imposes a spending ban on employers with state contracts of over \$50,000, *id.* § 16645.4(a); and bars employers from using certain state property to meet with employees about union organization, *id.* § 16645.5(a).

with a union, thereby allowing that union to bargain collectively on behalf of the employer's workforce without having to win a secret-ballot election. Cal. Gov't Code § 16647(d). In addition, AB 1889 does not apply to employer expenditures related to grievance handling; negotiating or administering a collective bargaining agreement; allowing a labor organization access to employer property; or performing an activity required by law or a collective bargaining agreement. *Id.* § 16647(a)-(c).

All employers must provide a certification that they will abide by AB 1889's spending prohibitions. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Employers that have sufficient private funds to speak about union-organizing attempts are subject to several additional regulatory requirements:

Segregated Accounting Systems. Employers must create separate accounts for funds traceable to a state grant or program and implement special accounting procedures to trace all expenditures related to union organizing. That is so because if employers make an expenditure relating to union organizing from an account with commingled funds, AB 1889 creates an irrebuttable presumption that "state funds" have been (illegally) used on a *pro rata* basis. Cal. Gov't Code § 16646(b).

Employee Salaries. Employers must ensure that employees who spend any portion of their work time on unionization matters are paid for such time with funds that cannot be traced to "state funds" in order to comply with AB 1889's prohibition with respect to employee salaries. Cal. Gov't Code § 16646(a).

Recordkeeping and Disclosure. Employers must maintain records "sufficient" to show that no "state funds" were used to assist, promote, or deter union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(c), and employers must provide these records to the California Attorney General upon request, *id.* §§ 16645.2(c), 16645.7(c).

Employers may be sued under AB 1889 by the California Attorney General or “any state taxpayer,” which could include a union involved in an ongoing effort to organize an employer’s workforce. Cal. Gov’t Code § 16645.8(a). In addition to injunctive and other equitable relief, a court may award treble damages—*i.e.*, disgorgement plus a civil penalty of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d), 16645.8(a). Although any damages award goes to the state, a prevailing private plaintiff can recover attorney’s fees and costs. *Id.* § 16645.8(d).

An example of a “state program” to which AB 1889 applies is Medi-Cal, California’s Medicaid program. Dkt. 30 (SER 11-12). Medi-Cal provides health insurance for certain low-income and elderly persons, and reimbursements to employers that provide healthcare services for Medi-Cal insureds are therefore governed by AB 1889. Petitioner Zilaco, Inc., for example, receives over 90 percent of its revenue from Medi-Cal. Dkt. 43 (SER 69-72). Other employers in California, such as United Cerebral Palsy, are entirely dependent upon Medi-Cal for their earnings. Dkt. 32 (SER 46-49); *see also* Dkt. 118 (SER 499-525) (identifying over 500 employers that rely exclusively on Medi-Cal reimbursements).

C. Proceedings in the District Court

Petitioners filed this action in 2002 in the United States District Court for the Central District of California arguing that AB 1889 is preempted by the NLRA and seeking declaratory and injunctive relief. Respondents California Department of Health Services and individual California officials were named in the complaint; respondents the California Labor Federation, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations intervened.

On cross-motions for summary judgment, the district court entered partial final judgment in favor of petitioners declaring sections 16645.2 and 16645.7 of the California

Government Code preempted under the *Machinists* doctrine because they “regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate.” Pet. App. 147a.

D. Decisions of the Court of Appeals

The United States Court of Appeals for the Ninth Circuit issued three opinions in this case: two panel opinions holding that the contested provisions of AB 1889 were preempted by the NLRA, and an *en banc* opinion holding that they were not.

First panel opinion. The first Ninth Circuit opinion, authored by Judge Fisher, held that AB 1889 was preempted under *Machinists*. The court, explaining that “open and robust advocacy by both employers and employees must exist in order for the NLRA collective bargaining process to succeed,” held AB 1889 preempted because it “directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process.” Pet. App. 127a.

Second panel opinion. The Ninth Circuit panel granted rehearing and withdrew the first opinion. The second opinion, written by Judge Beezer, held that AB 1889 was preempted under *Machinists* and *Garmon*. It held that “by discouraging employers from exercising their protected speech rights,” AB 1889 “operates to significantly empower labor unions as against employers” and “runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the [NLRA].” Pet. App. 81a. Judge Fisher, author of the first opinion, dissented from the second opinion and would have remanded to consider preemption of several of AB 1889’s enforcement provisions, which he stated “appear to have an impermissibly intrusive effect on the NLRA’s balance . . . between employer and employee.” Pet. App. 110a.

En banc opinion. The Ninth Circuit granted rehearing *en banc* and withdrew its second opinion. Over the dissent of

three judges, the *en banc* court, in an opinion by Judge Fisher, held that AB 1889 was not preempted by the NLRA in any respect. The *en banc* court rejected respondents' argument that there could be no preemption because the State of California in AB 1889 was not acting as a regulator, but rather as a proprietor (or "market participant"). The court held that "California's condition on the use of its funds constitutes 'regulation[],'" Pet. App. 7a, because "[t]he statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal," Pet. App. 12a. It nonetheless determined that AB 1889 was not preempted under either *Machinists* or *Garmon*.

The *en banc* majority held that *Machinists* was inapplicable because AB 1889 involves the use of state funds, an activity which "by definition [is] not controlled by the free play of economic forces." Pet. App. 17a. It determined, in any event, that "an employer has and retains the freedom to spend its own funds however it wishes," and that AB 1889's effect on noncoercive employer speech is therefore "indirect and incidental." Pet. App. 17a & 18a n.10. It also noted that *Machinists* applies only to "activity left free from *all* regulation," and determined that the NLRB's "extensive regulation of organizing activities demonstrates that *organizing*—and employer speech in the context of organizing—is not such a zone." Pet. App. 19a (emphases in original).

Garmon did not apply, the Ninth Circuit *en banc* held, because noncoercive employer speech is neither actually nor arguably protected by the NLRA. It held that section 8(c) of the NLRA "does not *grant* employers speech rights" but "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in original). It held that even were noncoercive employer speech protected under the NLRA, AB 1889, as an exercise of the state's spending power, falls within an exception to *Garmon* preemption for state regulation of

conduct that involves “‘interests so deeply rooted in local feeling and responsibility that . . . we [cannot] infer that Congress ha[s] deprived the States of the power to act.’” Pet. App. 30a (quoting *Garmon*, 359 U.S. at 243; brackets in original). The *en banc* majority recognized that *Garmon*’s “‘deeply rooted” exception had never been applied to a state spending decision, but determined that a state “has a responsibility and a right to spend its treasure . . . based on principles and guidelines that its democratically elected legislature deems to be appropriate.” Pet. App. 31a.

In so holding, the Ninth Circuit expressly rejected the views of the NLRB, which, as *amicus*, argued that AB 1889 is preempted under both *Machinists* and *Garmon*. The NLRB explained that “the federal policy, expressed in NLRA Section 8(c), [is] to insure both to employers and labor organizations full freedom to express their views to employees on labor matters.” NLRB *Amicus* Brief at 6, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169) (internal quotation marks and citation omitted), *available at* 2003 WL 22330725. The NLRB argued that AB 1889 should be preempted because it “reflects California’s labor-driven policy decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model.” *Id.* at 15.

Judge Beezer, joined by Judges Kleinfeld and Callahan, dissented. In addition to reiterating several of the arguments made in the second panel decision, the dissent cited an intervening decision from Seventh Circuit Court of Appeals, *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277, 278-79 (7th Cir. 2005), for the proposition that “regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds.” Pet. App. 51a (Beezer, J., dissenting).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit’s decision—upholding California’s spending restriction that was concededly designed for the regulatory purpose of deterring noncoercive employer speech concerning unionization—is based on two fundamentally erroneous preemption analyses. *First*, the Ninth Circuit incorrectly ruled that the NLRA’s express authorization and protection of this noncoercive speech in section 8(c) does not foreclose direct state regulation and punishment of such speech. *Second*, the Ninth Circuit erred in ruling that, because the regulation here comes in the form of a spending restriction, it does not impose a cognizable burden on employers’ noncoercive speech.

Both of these preemption rulings are in direct conflict with decisions of the Second and Seventh Circuits, as well as this Court’s precedents and the considered views of the NLRB, which Congress entrusted to bring uniformity to the regulation of labor-management relations. As discussed in Part I *infra*, both Circuits recognize that, under *Machinists* and *Garmon*, state regulation of noncoercive employer speech is preempted because states “are not permitted to regulate activities that are either expressly permitted . . . by the Act or that are reserved [by the Act] for market freedom.” *Metro. Milwaukee*, 431 F.3d at 278 (internal quotation marks and citation omitted). Moreover, both Circuits and the NLRB also recognize that, under *Gould*, 475 U.S. at 288-89, NLRA preemption applies not only to direct regulation, but to state spending restrictions where, as the *en banc* court held here, the purpose of the restriction is “regulatory” and unrelated to any “interest in the efficient procurement of goods and services,” Pet. App. 11a. In such circumstances, the proprietary exception identified in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) (“*Boston Harbor*”), does not apply, and the state’s regulatory exercise of its spending power is subject to ordinary preemption analysis.

More fundamentally, as discussed in Part II *infra*, the decision below is completely at odds with this Court's repeated admonition that a state may not use either its spending or regulatory power to alter the NLRA's balance between labor and management. AB 1889's regulatory burden on employers who seek to discuss the drawbacks of unionization obviously and directly impedes Congress's decision, embodied in section 8(c) of the NLRA, to authorize employers to express opinions to deter union organizing efforts, so long as they contain "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Since such regulatory efforts would plainly be preempted if they were done through direct regulation, California has sought to accomplish the same objective through the backdoor by attaching conditions to state funds. But, as the Court's unanimous decision in *Gould* made clear concerning a similar backdoor effort to leverage public coffers to impose a regulatory burden unrelated to any legitimate proprietary interest, using the power of the purse to disrupt the labor-management balance struck by Congress is also preempted.

As a practical matter, moreover, the decision below, if left unattended, will have a particularly significant negative effect on national labor policy and relations. As discussed in Part III *infra*, following the lead of California and New York, at least fifteen other states have proposed legislation that would impose similar spending restrictions on employers' noncoercive labor speech. It is therefore particularly important that the Court clarify now the respective state and federal roles in labor-management regulation and foreclose states' ongoing efforts to displace both Congress's judgment concerning the desirability of noncoercive employer speech and the NLRB's preeminent role in shaping a uniform, integrated, and federal regulatory scheme for labor relations.

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SECOND AND SEVENTH CIRCUITS AND DISREGARDS THE CONSIDERED VIEWS OF THE NLRB

A. There Is A Circuit Split On Whether The NLRA Protects Noncoercive Employer Speech About Union Organizing From State Interference

The Ninth Circuit determined in this case that neither *Machinists* nor *Garmon* preemption applied to AB 1889 because noncoercive employer speech about union organizing is *not* an activity that the NLRA intended to “protect” or keep free from governmental regulation. The *en banc* court held that *Garmon* was inapplicable because noncoercive employer speech about unionization is not “arguably protected” by the NLRA: “[S]ection 8(c) [of the NLRA] does not *grant* employers speech rights” but merely prohibits “noncoercive speech from being used as evidence of an unfair labor practice.” Pet. App. 23a (emphasis in original). The Ninth Circuit also determined that *Machinists* did not apply to AB 1889 because “employer speech in the context of organizing” is not an area intended to be free from regulation, but rather is “extensive[ly] regulat[ed]” by the NLRB. Pet. App. 19a.

In contrast, the Second Circuit held shortly thereafter that state interference with noncoercive employer speech is subject to preemption under both *Machinists* and *Garmon*, and rejected the Ninth Circuit’s contrary interpretation of section 8(c) of the NLRA. *See Healthcare Ass’n of N.Y. State, Inc. v. Pataki*, ___ F.3d ___, 2006 WL 3499469 (2d Cir. Dec. 5, 2006). It therefore held preempted portions of New York Labor Law section 211-a which, like AB 1889, provides that “no monies appropriated by the state” to employers may be used “to encourage or discourage union organization.”

In conflict with the Ninth Circuit, the Second Circuit held that, under *Garmon*, “section 8(c) itself protects employer speech and that state action impinging on this protection may be preempted.” *Healthcare Ass’n*, 2006 WL 3499469, at *7. It expressly rejected the Ninth Circuit’s holding in this case that “section 8(c) is a mere place-holder [for the First Amendment] with no labor law function of its own.” *Id.* Rather, the Second Circuit recounted that “[m]any courts . . . 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 *9 (collecting cases). It also specifically rejected the Ninth Circuit’s assertion that noncoercive employer speech is not “protected” by section 8(c) because the protection is in the form of immunity from an unfair labor practice finding: “It is surely a familiar concept that one way of granting rights is to state that the government cannot punish certain conduct. For instance, the First Amendment does not explicitly grant freedom of speech, but instead says that ‘Congress shall make no law . . . abridging the freedom of speech.’” *Id.* at *10. The *Healthcare Association* court thus held that “section 8(c) embodies a policy of encouraging free speech in the labor context” and that “such a policy necessarily entails freedom from state meddling.” *Id.*

With respect to *Machinists* preemption, the Second Circuit held that portions of the New York law were invalid for the same reasons they ran afoul of *Garmon* preemption. The court recognized that these two doctrines are “conceptually complementary” since “*Garmon* preemption applies to conduct that is regulated by the NLRA and *Machinists* preemption applies to conduct that the NLRA left unregulated.” *Healthcare Ass’n*, 2006 WL 3499469, at *18. In the context of noncoercive employer speech, they “tend toward the same point” because “the *protection* afforded by section 8(c) is to leave employer speech largely *unregulated*.” *Id.* (emphasis added). According to the court,

Congress, in section 8(c), took a “laissez-faire” approach to noncoercive employer speech, thereby prohibiting both NLRB and state restrictions on such speech. *Id.* at *17.

In short, the Second Circuit squarely (and correctly) held that Congress’s decision to restrict only coercive speech about unions demonstrates both that noncoercive speech was “left to the free play of economic forces” under *Machinists* and that such speech is “protected” by the NLRA against state interference under *Garmon*. This is clearly irreconcilable with the Ninth Circuit’s holding that allowing NLRB regulation of *coercive* speech somehow indicates a desire to permit state regulation of *noncoercive* speech, *see* Pet. App. 19a, and its conclusion that noncoercive speech was unprotected by 8(c), *see* Pet. App. 23a.

As discussed in Part I.B *infra*, the Seventh Circuit and the NLRB also expressly agree that the NLRA preempts state regulation of noncoercive employer speech—such as a law that forbade employers from “requir[ing] their employees to attend meetings . . . in which the employer expresses his opposition to unionization”—because “federal law *allows*” such speech. *Metro. Milwaukee*, 431 F.3d at 280 (emphasis added). This Court should therefore grant certiorari to resolve this conflict, particularly since the Ninth Circuit’s determination that neither *Machinists* nor *Garmon* precludes state regulation of noncoercive employer speech plainly authorizes *direct* state and local regulation of this speech.

B. There Is A Circuit Split On Whether State Spending Decisions That Interfere With Noncoercive Employer Speech Are Preempted

The Ninth Circuit also held that, even if *Garmon* and *Machinists* preemption were applicable to direct regulation of noncoercive employer speech, AB 1889 does not burden such speech because “an employer has and retains the freedom to spend its own funds how it wishes; it simply may not spend state grant and program funds on its union-related advocacy.” Pet. App. 17a. This alternative holding conflicts

with the Second Circuit's decision in *Healthcare Association* that New York Labor Law section 211-a was preempted insofar as it prohibited employers from using public funds that they had "earned" to speak about unionization. *Healthcare Ass'n*, 2006 WL 3499469, at *12.²

Specifically, the Second Circuit held that states could not impose restrictions on "an employer's use of monies earned from state contracts" or from other state programs where the state's reimbursement of the employers can "avoid [union-related] expenses by designating such costs as non-reimbursable." *Healthcare Ass'n*, 2006 WL 3499469, at *15. Thus, states cannot impose funding restrictions where its "reimbursement obligations . . . do not include any costs associated with [prohibited employer speech about unionization]." *Id.* at *19.³ Such limitations impermissibly "deter[] employers from the exercise of their rights under section 8(c)." *Id.* at *15.

² The Second Circuit held that New York Labor Law section 211-a was not preempted insofar as it applied to money that the state had given employers as a "gift." *Healthcare Ass'n*, 2006 WL 3499469, at *12 n.7. It also assumed, apparently because the plaintiffs did not challenge restrictions on "grants," that "grants" were such "gifts." *Id.* at *12. This conclusion does not affect the conflict with the Ninth Circuit, since that Circuit upheld AB 1889's restrictions on monies *earned* under state programs and the like. We nonetheless note that the vast majority of grants are not mere gratuities. Most grantees earn their money by providing to the state either a direct benefit (*e.g.*, grantee makes proposals for improving state infrastructure) or a societal benefit that inures to the health and welfare of state citizens (*e.g.*, grantee researches a cure for AIDS). NLRA preemption, moreover, turns on the straightforward question whether the state is exercising its spending power in a regulatory manner that interferes with federal labor policy, not on the amorphous issue whether the funds restricted were intended as gifts or in exchange for services rendered.

³ The Second Circuit remanded the case for factual determinations regarding the exact nature of the funds regulated by New York Labor Law section 211-a. *See Healthcare Ass'n*, 2006 WL 3499469, at *16.

Accordingly, the Second Circuit preempted restrictions attached to “money earned by the employer,” such as money from a contract or earned in exchange for service to the public, such as reimbursement for providing health care. In such situations, the state’s money is plainly not “subsidizing” any employer speech and any employer expenditures related to union organizing cannot possibly increase the state’s costs. Therefore, “the State’s asserted proprietary interest in saving money is inapplicable.” *Healthcare Ass’n*, 2006 WL 3499469, at *19.

In contrast, the *en banc* majority in the Ninth Circuit upheld restrictions on “money earned” from “state programs,” including, as noted in the Statement *infra*, Medi-Cal reimbursement for health care services in nursing homes and the like. *See* Pet. App. 35a n.23. Had the Ninth Circuit employed the Second Circuit’s analysis, it would have deemed such restrictions on reimbursements to health care providers preempted, particularly since, as the *en banc* majority itself emphasized, “allowable costs under MediCal” expressly exclude “activities directly related to influencing employees respecting unionization.” Pet. App. 35a n.23 (emphases deleted); *see also* Dkt. 32 (SER 47-49). Since the public money provided for the reimbursement excludes from the outset any cost related to unionization, there is simply no *fiscal* reason to attach an additional spending restriction on the reimbursement money that is provided. Because the state’s programmatic costs cannot possibly increase by virtue of the employer’s union-related expenditures, AB 1889’s restriction on the monies provided do not, as the Ninth Circuit conceded, in any way “reflect California’s interest in the efficient procurement of goods and services.” Pet. App. 11a. The statute’s spending restriction is simply a naked attempt to leverage state funds to deter employers from trying to influence employee choice about whether to join a union.

For this reason, the Ninth Circuit’s holding here also directly conflicts with the Seventh Circuit’s holding in

Metropolitan Milwaukee. In that case, the Seventh Circuit held preempted under the NLRA a county ordinance that regulated the labor relations of employers that contracted with the county. The court specifically condemned the provision of the ordinance that forbade contracting employers from holding meetings “intended to influence an [employee’s] decision in selecting or not selecting a bargaining representative” because federal law “allows” such meetings. 431 F.3d at 280. Relying upon this Court’s decision in *Gould*, the Seventh Circuit held that “the spending power may not be used as a pretext for regulating labor relations” and that a state “cannot use its spending power as a handle for regulating the labor relations of recipients of County money.” *Id.* at 278-80. Because the county’s “motive” behind the spending restriction was “dissatisfaction with the balance that the [NLRA] strikes between labor and management,” rather than fiscal savings, the court held that its effort to “give the union a leg up” relative to what “federal law permits” is “the kind of favoritism that the [NLRA] anathematizes.” *Id.* at 280. Thus, as the dissenters below pointed out, the *en banc* decision here is irreconcilable with *Metropolitan Milwaukee*’s holding that “regulations that specifically target and substantially affect the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds.” Pet. App. 51a (Beezer, J., dissenting). AB 1889 is no less pretextual than the ordinance held preempted in *Metropolitan Milwaukee*.

The NLRB made precisely this point in its *amicus* brief to the Ninth Circuit, arguing that AB 1889 was preempted because, “while [the statute] is nominally about state spending decisions, [it] is really an impermissible regulatory attempt to substitute California labor policy for existing federal labor policy.” NLRB *Amicus* Brief at 7. Specifically, the Board explained that the stated premise of AB 1889—that “employer speech for or against unionization is inherently an interference with employee choice”—is

contrary to longstanding federal labor policy, which “favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice.” *Id.* at 6-7. The NLRB thus concluded that AB 1889 should be preempted because “California . . . is using its spending powers to handicap employer speech rights that Congress believed to be a positive force in informing employee choice.” *Id.* at 13. This “reasonable construction” by the Board is entitled to “considerable deference,” *NLRB v. City Disposable Sys. Inc.*, 465 U.S. 822, 829 (1984), because, as this Court has frequently recognized, “[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy,” *Beth Israel Hosp. v NLRB*, 437 U.S. 483, 500 (1978).

Thus, according to the Seventh Circuit and the NLRB, use of the state spending power to interfere with the employer freedoms that the NLRA authorizes—specifically, the right to speak against unionization in a noncoercive way—is preempted. In contrast to the Ninth Circuit, the Seventh Circuit invalidates spending restrictions, such as AB 1889, whose true purpose is influencing labor-management relations, rather than a proprietary purpose satisfying the “market participant” exception. This Court should grant certiorari to resolve this conflict, as well as the conflict with the Second Circuit’s *Healthcare Association* decision, and to clarify the appropriate application of preemption analysis to regulatory exercises of the spending power.

II. THE NINTH CIRCUIT’S DECISION IS IN CONFLICT WITH THIS COURT’S PREEMPTION PRECEDENTS

This Court’s precedents squarely foreclose the Ninth Circuit’s conclusions about the general scope of NLRA preemption and the circumstances in which spending restrictions are preempted.

First, it is crystal clear that state laws are preempted if they alter or have the potential to alter the labor-management

balance struck in the NLRA by prohibiting employers, unions, or employees from engaging in conduct—such as noncoercive employer speech—that is expressly authorized by the federal Act. Such state laws impermissibly stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Machinists*, 427 US at 151 (internal quotation marks and citation omitted); accord *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). More fundamentally, a hodge-podge of differing state labor regulations undermines the basic “purpose of the Act, [which] was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.” *Nash-Finch*, 404 U.S. at 144 (internal quotation marks and citation omitted). This “settled preemption principle,” applicable to all state laws, has its “greatest force” with respect to a state law, such as AB 1889, “regulating the relations between employees, their unions, and their employer.” *N.Y. Tel. Co. v. N.Y. State Dep’t of Labor*, 440 U.S. 519, 533 (1979) (plurality opinion); *Boston Harbor*, 507 U.S. at 224.

Thus, as every other lower court and the NLRB have recognized, state restrictions on employer actions that are expressly blessed by the NLRA, such as AB 1889’s restriction on noncoercive speech, are preempted under *Machinists* and/or *Garmon*. Since the NLRA prohibits only employer speech that tends to coerce employees, noncoercive speech cannot be restricted by states under *Machinists* because Congress intended that such speech be “one of the economic devices of . . . management” which “neither a state nor the NLRB” has any “flexibility” to “brand unlawful.” *Machinists*, 427 U.S. at 144, 149. For essentially the same reason, the Ninth Circuit erred in

concluding that noncoercive speech was not “protected” under *Garmon*.⁴

The Ninth Circuit avoided this inescapable conclusion only by engaging in semantic gamesmanship. Specifically, it found that *noncoercive* employer speech was not intended to

⁴ The *en banc* majority reasoned that noncoercive speech is not “protected” by the NLRA because section 8(c) simply immunizes an employer from liability for engaging in such speech, rather than creating a “right” for employers analogous to employees’ rights under section 7 of the Act. Pet. App. 22a-23a. But, of course, the NLRA does not “protect” an *employer’s* freedoms by granting them any “rights” relative to their employees. Since, prior to the NLRA, employers already had the freedom to dictate employees’ wages, hours, and terms and conditions of employment by virtue of their status as employers, it would make no sense to phrase their freedom to do so as a “right” “bestowed” by the federal government. Rather, employer freedoms, such as the freedom to engage in noncoercive speech, are “protected” by the NLRA by preventing government interference with that freedom, just as the First Amendment “protects” citizens’ speech by preventing “Congress” from interfering with it. See *Healthcare Ass’n*, 2006 WL 3499469, at *7. This is why the Court has unambiguously stated that “non-coercive anti-union solicitation” is a “*right protected* by the so-called ‘employer free speech’ provision of § 8(c) of the [NLRA].” *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (emphases added). Similarly, in applying *Garmon* preemption in *Linn*, this Court recognized that “the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management,” 383 U.S. at 62, and limited state libel claims arising out of labor-management disputes to those involving malice and actual harm in order to “guard against . . . unwarranted intrusion upon free discussion envisioned by the Act,” *id.* at 65.

Equally irrelevant is the *en banc* majority’s observation that the free speech protected by 8(c) is “guaranteed by the First Amendment.” Pet. App. 23a. It matters not whether section 8(c)’s “intent to encourage free debate on issues dividing labor and management” was enacted because Congress thought that such free speech is beneficial public policy or because it thought that this policy was compelled by the First Amendment. See *Linn*, 383 U.S. at 62. The only relevant point is that section 8(c) creates statutory protection for such speech in the labor context.

“be free from *all* regulation” under *Machinists* because the NLRB can regulate *coercive* employer speech. Pet. App. 19a. But, of course, this simply confirms that noncoercive speech is one of the “peaceful methods” available to an employer to deter unionization “free from government interference.” *Machinists*, 427 U.S. at 154; *Golden St. Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989).⁵ As the *en banc* majority itself noted, this Court has squarely held that:

[*Machinists*] cases rely on the understanding that in organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated and *how much it should be left unregulated*: The States have no more authority than the Board to upset the balance that Congress has struck between labor and management

Pet. App. 15a (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985)) (emphases added). Since Congress left noncoercive speech unregulated, the states may not “upset that” balance” under *Machinists*.

The Ninth Circuit alternatively held that the statute’s regulation of noncoercive employer speech was not preempted because California’s regulatory goal was accomplished by imposing conditions on state funds, rather than through a generally applicable regulation affecting all employers. *See* Pet. App. 17a-19a. As this Court has squarely held, however, the fact that a state seeks to interfere

⁵ Even the *en banc* majority recognized that *Machinists* preempts a state law that, in the *collective bargaining* process, regulates employer action, including employer speech, that is permitted by the NLRA, even though the NLRB obviously regulates *prohibited* activities relating to the collective bargaining process. Pet. App. 13a-15a. The same is true for the union organizing process. Indeed, there is no support for the *en banc* majority’s eventually aborted suggestion that *Machinists* is limited to collective bargaining. *See* Pet. App. 16a.

with NLRA-authorized actions through its “spending power rather than its police power” is a “distinction without a difference.” *Gould*, 475 U.S. at 287. Rather, since the “proper focus” is on “the conduct being regulated,” not the method of regulation, it would “make little sense” to allow otherwise improper state interference with the NLRA’s uniform scheme “simply because it operates through state purchasing decisions.” *Id.* at 289 (quoting *Lockridge*, 403 U.S. at 292); *see also Garmon*, 359 U.S. at 243 (“[J]udicial 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.”).

Under *Gould*, it is impermissible for states to leverage public money to impose burdens on employers that are in addition to the proscriptions of the NLRA. *See* 359 U.S. at 287-89. Here, by burdening employers’ noncoercive speech, AB 1889 imposes burdens that are plainly in addition to the NLRA’s prohibition of coercive or retaliatory speech. Contrary the Ninth Circuit’s view, it is no answer to suggest that California is simply refraining from “subsidizing” employer speech that it finds objectionable. By that logic, Wisconsin, in *Gould*, was simply refraining from subsidizing with its contracting dollars those who had repeatedly violated federal labor law. Indeed, Wisconsin’s interference was far less disruptive of the federal scheme than AB 1889 because it only affected those who had *violated* federal norms, not, as here, those who are engaging in activity expressly permitted by federal law. In short, where, as here, spending restrictions are purposely designed to regulate labor relations, rather than to further state’s proprietary interests, such funding conditions are preempted.⁶

⁶ For similar reasons, there is nothing to the Ninth Circuit’s unprecedented assertion that states have a “deeply rooted” interest in depriving employers of the ability to spend money on union-related activity merely because those funds were received from the state. Again,

To be sure, the burden here is often less draconian than that in *Gould* because the state does not completely prohibit noncoercive employer speech, but only prohibits using a subset of the employers' funds for that purpose (*i.e.*, those received from the state). The Ninth Circuit viewed this distinction as dispositive. Although apparently agreeing that requiring employer neutrality towards unions as a "condition for receipt of state funds" would be impermissible interference, it found that "restricting the use of state funds" was acceptable because it did not constitute an impermissible burden on First Amendment rights. Pet. App. 17a. But this entirely misses the point. State imposition of *any* serious burden on NLRA-protected speech or activities interferes with conduct that Congress wanted unregulated, and is thus preempted. And there can be no question that AB 1889 imposes significant burdens with both the purpose and effect of coercing employer "neutrality" towards unionization.

Most obviously, with respect to employers, such as petitioner Zilaco Inc., that receive all or virtually all of their revenues for services provided under state programs, the statute does act as a *complete* ban on noncoercive speech. *See* Statement, *supra*. Such employers will simply not have

the state has no interest, deeply rooted or otherwise, in regulating management's action towards unions because that is a federal concern. The "deeply rooted" interests recognized by *Garmon* and other cases are general state policies unrelated to industrial relations, which incidentally affect management-union relations. *See, e.g., Garmon*, 359 U.S. at 247. Although states do have a legitimate interest in efficient and cost effective services, the court below itself acknowledged that this was not the purpose or effect of AB 1889. *See* Pet. App. 11a. Finally, states do not traditionally or typically impose conditions on an employer's use of its own money *after* it has received that money from the state for services rendered. To the contrary, it is a rare exception to the states' normal indifference to how recipients of state funds spend dollars received under contracts or state programs, and one which raises serious constitutional concerns. *See* pp. 27-28 *infra*.

sufficient funds from non-state sources to engage in the speech expressly authorized by the NLRA.⁷

In addition, AB 1889 plainly imposes severe burdens even on employers that do have sufficient funds from non-state sources to engage in NLRA-protected speech. The Ninth Circuit dismissed this argument solely on the grounds that the restrictions would not impose an impermissible First Amendment burden under *Rust v. Sullivan*, 500 U.S. 173 (1991). See Pet. App. 33a-34a. This analogy to First Amendment “unconstitutional conditions” cases, however, is misguided for two related reasons.

First, *Rust* and its progeny upheld funding restrictions because legislatures can “insist that public funds be spent for purposes” that further the government’s legitimate programmatic ends. *Rust*, 500 U.S. at 196. Consequently, this “allows the Government to specify the [speech] deemed necessary for its legitimate objectives” and to require that grantees refrain from other speech. *Legal Servs. Corp. v.*

⁷ The *en banc* majority’s sole response was its dismissive assertion that this complete ban was “solely the consequence of the employer’s free-market choice” because “nothing prevents the employer from raising additional funds from a non-state source.” Pet. App. 18a. Of course, it is equally true that “nothing prevents” a citizen from pursuing non-state employment and that nothing prevented the contractors in *Gould* from seeking non-state contracts. But this hardly negates the fact that forcing public employees or contractors to choose between either exercising their speech rights or foregoing public funds constitutes a serious burden on those rights. Indeed, in the First Amendment context, the Court has directly equated the rights of public employees and public contractors to be free from spending restrictions designed to prevent or penalize protected speech. See *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (“[T]he similarities between government employees and government contractors with respect to [free speech rights] are obvious.”) And, of course, this Court has “long since rejected Justice Holmes’ famous dictum, that a policeman ‘may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.’” *Id.* (citation omitted).

Velazquez, 531 U.S. 533, 548 (2001). But here California does not have any *legitimate* regulatory interest in coercing or influencing an employer’s federally-protected, non-threatening speech concerning unions. As established above, Congress affirmatively determined that noncoercive employer speech should not be regulated, so the state’s effort to influence and burden such speech is preempted. The fact that the state’s policy of coercing employer neutrality towards unions might not infringe the employer’s First Amendment rights in no way answers the salient preemption question whether that policy impermissibly conflicts with federal labor policy. As *Gould* made clear, the only nonpreempted interest justifying state spending restrictions are proprietary interests that would be followed by any private market participant. Since the Ninth Circuit rightly held that the statute here does not even purport to reflect such fiscal interests, it is preempted.

Second, and in any event, the First Amendment cases plainly establish that limitations on a private entity’s use of public funds do impose a “substantial restriction” on the private actor’s speech—even if that restriction is constitutionally justified by the government’s need to control its programmatic message. See *Velazquez*, 531 U.S. at 544. In *Velazquez*, for example, the Court found that restrictions on the lawsuits that could be brought by private LSC grantees with public funds were unconstitutional, even though those grantees were free to engage in that litigation with their own non-federal funds placed in “affiliate organizations.” See *id.* at 556 (Scalia, J., dissenting). Here, a state-funded legal services provider, or even a private law firm paid by the state for representing the state’s legal interests, would be barred from using those funds to deal with union organizing. This plainly constitutes a burden at least equivalent to that involved in *Velazquez* and the state’s interest is much weaker here, since spending money on *internal* employee relations would not in any way affect or distort the legal services provided.

More specifically, in order to expend funds received from non-state sources, employers must abide by AB 1889's burdensome regulatory regime, bearing the cost of creating segregated accounts for funds derived from a state grant or program, and establishing a separate accounting system that tracks each expenditure related to union organizing and traces it to non-"state" funds. This Court has repeatedly held that the cost and practical difficulties of complying with regulations requiring such separate, segregated accounts "make[s] engaging in protected speech a severely demanding task" that "burdens First Amendment rights." *FEC v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 255-56 (1986) (invalidating under the First Amendment federal statutory requirements to "establish a 'separate segregated fund'" and to comply with "[d]etailed record-keeping and disclosure obligations" in order to engage in independent political expenditures). While the Court has at times upheld laws requiring that speech be conducted through segregated accounts, it has only done so when "justified by a compelling state interest" and has uniformly recognized that such requirements "burden expressive activity." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990). It therefore simply cannot be disputed that AB 1889's requirement that "private" funds be segregated to engage in union-related activities creates a severe burden and "disincentive" to engage in such activities. *Id.* AB 1889 therefore plainly "stands as an *obstacle* to accomplishment and execution of the full purposes" of the NLRA, regardless whether it constitutes an unconstitutional burden under the First Amendment. *Livadas*, 512 U.S. at 120 (internal quotation marks and citation omitted; emphasis added).

In addition, AB 1889 authorizes taxpayer lawsuits, which may, for example, be brought by unions to gain leverage in an ongoing organizing dispute with an employer. A union can hale an employer into court simply by alleging that the employer's recordkeeping is "[in]sufficient," a critical term that AB 1889 does not define. At that point, the employer is

faced with the legal costs of defending itself, and the near-certainty of a discovery request into its financial and business records. More important, the employer faces the prospect of *treble* damages payable to the state and an award of attorney's fees.⁸

Moreover, whereas AB 1889 induces employers to capitulate to unionization by offering state funds for "voluntary recognition agreements," it deters employers from resisting union organization by imposing costly administrative requirements that must be followed on pain of treble damages. AB 1889 is thus an example of a "funding scheme [that] is 'manipulated' to have a 'coercive' effect on those who do not hold the subsidized position" on unions. *Velazquez*, 531 U.S. at 552 (Scalia J., dissenting) (quoting *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998)).

Finally, the Ninth Circuit's analysis is premised on the fundamentally erroneous notion that money which an employer receives from the state for services rendered to the state or its citizenry somehow remains the *state's* money. But as the dissenting opinion below and the Second Circuit have correctly noted, money received from the state for goods or services is not the state's money any more than money received from a private purchaser remains the private purchaser's money after it has been transferred to the employer. Pet. App. 85a-87a (Beezer, J., dissenting); *Healthcare Ass'n*, 2006 WL 3499469, at *14-15. This is particularly true since the employer speech regulated here relates to its own internal operations, not to any message that the employer would deliver to the public as part of a government-funded program. Thus, "there is no

⁸ This concern is not hypothetical; before AB 1889 was enjoined by the district court, several unions filed or threatened to file lawsuits against employers. See, e.g., Pet. App. 64a-65a; Dkt. 30 (SER 26-45).

programmatic message of the kind recognized in *Rust*” which government-funded service providers need to adhere to, so that the program can work as planned. *Velazquez*, 531 U.S. at 548. There is, indeed, no nexus at all between the government’s programmatic goals and the employer’s union-related speech and thus, unlike *Rust*, no conceivable basis for suggesting that the employer’s speech “amount[s] to governmental speech.” *Id.* at 541.

In sum, contrary to this Court’s clear precedents, the Ninth Circuit erred in holding that even direct regulation of noncoercive speech is not preempted by the NLRA’s express authorization of that speech and also in its alternative holding that the state’s prohibition against engaging in such speech with state-derived funds is not a cognizable burden on that activity.

III. THIS CASE RAISES AN IMPORTANT QUESTION THAT WILL HAVE A SIGNIFICANT EFFECT ON FEDERAL LABOR POLICY

As this Court has explained, Congress enacted the NLRA, “a comprehensive national labor law,” because of “the perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict.” *Lockridge*, 403 U.S. at 286. The NLRA contains no express preemption provision, and it has therefore fallen on the judiciary to “translate[] into concreteness” which state regulations are, and which are not, displaced by supreme federal labor law. *Garmon*, 359 U.S. at 241. That is a vital task that merits this Court’s consideration, as this Court has frequently noted in granting certiorari in NLRA preemption cases. *Livadas*, 512 U.S. at 116 (granting certiorari “to address the important questions of federal labor law implicated by the [state’s] policy”); *N.Y. Tel.*, 440 U.S. at 527 (granting certiorari because of “[t]he importance of the question” whether the NLRA preempted a state unemployment-benefits law); *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 237-38 (1967) (granting certiorari

“because of the important constitutional question involved, specifically whether the [state law] violates the Supremacy Clause of the Constitution (Art. VI cl. 2) because it allegedly ‘frustrates’ enforcement of the [NLRA]”).

AB 1889 is part of a concerted effort to spur union organizing by both silencing anti-union employer speech and subsidizing employer neutrality in organizing campaigns. Accordingly, certiorari review here is particularly critical. As shown in Part I.B *supra*, AB 1889 is a viewpoint-based restriction that specifically targets anti-union speech. AB 1889’s threat of union lawsuits and treble damages will chill speech that Congress and the NLRB deem essential if employees are to make informed decisions whether or not to bargain collectively. Notwithstanding AB 1889’s direct and substantial interference with the federal scheme governing union organization, the Ninth Circuit here held that ordinary NLRA preemption analysis does not apply to regulatory exercises of the state spending power. That holding leaves a gaping hole in NLRA preemption given the amount of money states and localities expend each year (California, for example, annually expends over \$127 billion, *see* <http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html> (last visited Jan. 4, 2007)). Indeed, because the *en banc* court held that noncoercive employer speech is not an activity that is protected under *Garmon* or an activity left free from regulation under *Machinists*, its holding authorizes even *direct* regulation of noncoercive employer speech. It is thus no surprise that the General Counsel for respondent AFL-CIO called the Ninth Circuit’s ruling “‘a real win for organizing.’” 185 Daily Lab. Rep. (BNA) A-8 (Sept. 25, 2006).

AB 1889, moreover, is but one of a number of similar enacted and proposed state statutes that, in the aggregate, will impose substantial and idiosyncratic administrative burdens on employers that choose to oppose unionization. In addition to New York Labor Law section 211-a, similar legislation has been proposed in Arizona, Connecticut,

Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, North Dakota, Oregon, and Pennsylvania. Dkt. 66 (SER 77-281). Counties and any other local governmental entities with spending power may also follow suit. *See, e.g., Metro. Milwaukee*, 431 F.3d at 277. If AB 1889 “is valid, nothing prevents other States from taking similar action,” and “[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*, 475 U.S. at 288-89. The *en banc* majority’s sweeping opinion upholding AB 1889 threatens precisely the type of variegation that the NLRA intended to stamp out. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U.S. 485, 490-91 (1953). AB 1889, in sum, is the wedge that will allow other states and localities to irremediably alter the federal labor policy favoring noncoercive employer speech, and this Court needs to intervene now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel

January 5, 2007

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

GLEN D. NAGER
MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners