“The laws of the United States…shall be the supreme Law of the Land….”

*U.S. Constitution, Article VI, cl. 2*

*Preemption and the National Labor Relations Act*

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Introduction

The Supremacy Clause of the United States Constitution provides that “the Laws of the United States which shall be made in Pursuance [of the Constitution] ... shall be the supreme Law of the Land.” U.S. Const., art. VI, cl. 2. It specifically invalidates and voids “the Constitution or laws of any State” that conflict with or interfere with acts of Congress. U.S. Const. art. VI, cl.2; Rose v. Ark. State Police, 479 U.S. 1, 3 (1986).

As Congress has become more and more partisan and legislation at the federal level has become more and more difficult to move forward, the states have stepped in and attempted to address rising issues. These efforts have often come into conflict with the pre-emptive impact of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (hereafter the “NLRA”). This paper will review the legal framework of NLRA pre-emption and examine its application to two specific state-level initiatives.

Basic Principles of NLRA Preemption

New York State Labor Relations Bd., 330 U.S. 767, 772-74, 776 (1947) (“[T]he power of the New York State to apply its policy” to permit unionization of foremen.).


With passage of the NLRA, Congress vested the National Labor Relations Board (hereafter the “Board”) with exclusive jurisdiction to resolve disputes arising under the National Labor Relations Act. The creation by Congress of a centralized expert agency to interpret and administrate the Act reflects its intent to create a uniform, national body of labor law. N.Y. Tel. Co. v. N.Y. State Dep’t of Labor, 440 U.S. 519 (1979). “Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.” Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

However, not every state law or initiative that touches on labor relations is preempted. “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” Maryland v. Louisiana, 451 U.S. 725, 746 (1981). “[T]he Court has recognized that it ‘cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between
employees, employers, and unions; obviously, much of this is left to the States.”


Guided by these principles, the Supreme Court has developed two lines of NLRA pre-emption precedent. Under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and its progeny, the NLRA pre-empts state regulation of the use of “economic weapons” (i.e. strikes, lockouts, picketing, etc.) that Congress intended to be left unregulated. The *Machinists* pre-emption doctrine recognizes that “Congress intended to give parties . . . the right to make use of ‘economic weapons,’ not explicitly set forth in the Act, free of governmental interference.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989) (quoting *Machinists*, 427 U.S. at 154).

The second line of NLRA pre-emption doctrine flows from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and preempts state regulation of “activity that the NLRA protects, prohibits, or arguably protects or prohibits.” *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 613-14 (1986) (*Golden State I*). This pre-emption doctrine “protects the primary jurisdiction of the NLRB to determine … what kind of conduct is either prohibited [i.e., constitutes an unfair labor practice under § 8] or protected by the NLRA” [by § 7]. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). *Garmon* pre-emption is “intended to preclude state interference with the National Labor Relations Board’s interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.” *Golden State I*, 475 U.S. at 613 (internal quotation marks omitted). In addition, *Garmon* “prevents States … from
providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.” *Wisconsin Dep’t of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

The Supreme Court’s most recent pronouncement on NLRA pre-emption is *Chamber of Commerce v. Brown*, 442 U.S. 60 (2008), in which it considered a California statute, AB 1889, which prohibits the use of state funds “to assist, promote, or deter union organizing.” Cal. Govt. Code Ann. §§16645.2(a), 16645.7(a). The Court ruled that the statute was pre-empted under *Machinists* because it regulated within “a zone protected and reserved for market freedom.” *Brown*, 442 U.S. at 2413, citing *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227 (1993) (*Boston Harbor*). It did not reach the question of whether the statute would be pre-empted under *Garmon*.

Specifically, the Court found that the statute constituted an impermissible effort by California to impose, upon contracting employers, its policy judgment that partisan employer speech necessarily interferes with an employee’s choice about union representation. In reaching its decision, the Court read the statute as promoting a specific labor policy which was, in its judgment, inconsistently applied to permit the use of state funds for “select employer advocacy activities that promote unions;” and which “chill[ed] one side of ‘the robust debate which has been protected under the NLRA,’” by imposing onerous record-keeping requirements, “deterrent litigation risks,” and “punitive sanctions for noncompliance” which “are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds.” *Brown*, 442 U.S. at 2415-2417 (*citing Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974).
An exception to NLRA preemption applies when a state affects the labor relations of companies from which it buys services in order to reduce the cost or increase the quality of those services. *Boston Harbor*, 507 U.S. at 231-33 (requiring a project labor agreement in bid specifications is not pre-empted), *Wisconsin Dep’t of Indus. v. Gould*, Inc., 475 U.S. 282, 290-91 (1986); *Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631, 633-35 (7th Cir.1996); *Hotel Employees, Local 57 v. Sage Hospitality Resources, L.L.C.*, 390 F.3d 206, 216 (3d Cir.2004); *Building & Constr. Trades Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d 28, 34-35 (D.C.Cir.2002). In such circumstances, the state has the same interest as any other purchaser because it is imposing conditions in contracts with its sellers which will benefit the state in its capacity as a buyer.

Application of this exception is illustrated in two decisions involving county and city ordinances in Milwaukee and Pittsburgh. At issue in *Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F. 3d 277 (7th Cir. 2005), was an ordinance passed by the county of Milwaukee in 2000 which required employers contracting with human services and public works agencies to enter into a labor peace agreement with a union seeking to conduct an organizing campaign among its workers. Milwaukee County, Wis., Gen. Ordinances ch. 31.02(a). The labor peace agreement was to include provisions in which both parties agreed not to engage in misrepresentations, the employer agreed to provide the union with a list of employee contact information and reasonable access to the workplace, and the union agreed not to engage in economic action against the employer.

The Seventh Circuit Court of Appeals rejected the county’s argument that the ordinance was in furtherance of its interest in avoiding service disruptions for critically
needed services to vulnerable residents. For one, according to the court, “there is nothing to suggest that ordinary contract remedies are inadequate [to avoid potential disruptions] or if so that labor-peace agreements are a reasonable means to the end of preventing such interruptions.” And, secondly, the ordinance was not limited to employees working on county contracts, but also applied to all other employees of the contractor. The court concluded that the requirement for “labor peace agreements in order to further its interest as a buyer of services cannot withstand scrutiny.” *Milwaukee County*, 431 F.3d at 282.

In *Hotel Employees, Local 57 v. Sage Hospitality*, 390 F.3d 206 (3rd Cir. 2004), the Court of Appeals for the Third Circuit held that a Pittsburgh ordinance that conditioned the grant of tax increment financing (TIF) on the company’s acceptance of a labor neutrality agreement requiring a no-strike pledge, was not pre-empted because the ordinance was specifically tailored to protect the city’s proprietary financial interest. The TIF monies were applied to pay down the debt and to finance additional development. Since the latter use was critical to the success of the project, and, according to the court, the ordinance “directly promotes and protects this interest” by ensuring that “labor strife does not damage the development.” *Hotel Employees*, 390 F.3d at 217. The court concluded that since the city had acted “as a reasonable investor in applying conditions to its multimillion dollar investment” through passage of an ordinance “specifically tailored response to a financial interest,” it was exempt from pre-emption. *Hotel Employees*, 390 F.3d at 217.

These general principles of NLRA pre-emption can be illustrated by their application to two current state-level initiatives. One is a statute entitled the Worker Freedom bill, (a/k/a Worker Privacy bill) and the second is a ballot initiative referred to
as “Save Our Secret Ballot.” The ballot initiative is clearly pre-empted.¹ The Worker Freedom bill is clearly not.²

The Worker Freedom Act is Not Pre-empted by the National Labor Relations Act.

Background

The Worker Freedom bill has been proposed in a number of states in recent years and enacted in two: Oregon and Wisconsin.³ It is aimed at preventing discrimination, including discharge, against workers who decline to participate in employer-conducted, forced meetings about religion or politics which are unrelated to job performance, including meetings about whether workers should form a union. Under current law, employees who object to attending such mandatory meetings can be legally fired.

The bill places no restrictions on employer speech. It does not bar any person or organization from speaking on any subject and does not regulate speech in any manner. Employers are free to voice their opinions, conduct meetings, give lectures, distribute

¹ The impact of pre-emption principles on the SOSBallot initiatives is discussed in the following student article, which concludes that such a state law would “most likely” be pre-empted: Note, Meghan Maskery Luecke, Not Taking Care of Business: State Responses to the Employee Free Choice Act, Preemption, and the NLRA, Missouri Law Review, Vol. 74 (2009) p. 1140. Available at: http://www.law.missouri.edu/lawreview/docs/74-4/MaskeryLuecke.pdf.
³ The Worker Freedom Act was passed and signed into law in Oregon [SB 519] ORS 659.780 and 659.785, effective January 1, 2010. It was immediately challenged by the Chamber of Commerce, which lost; its legal challenge was dismissed for lack of standing. Wisconsin enacted the Worker Freedom Act in 2010 [SB585/AB831 Wisconsin Act 290]; a challenge to this statute was filed in September 2010, by the Metropolitan Milwaukee Ass’n of Commerce and Wisconsin Manufacturers & Commerce in the U.S. District Court for the Eastern District of Wisconsin. Other states which have introduced the bill in recent years are Arizona, Connecticut, Maryland, Michigan, Missouri, North Dakota, Tennessee, Washington, and West Virginia. It was passed but vetoed by the Governor of Colorado in 2006, (HB 06-1314).
information and communicate in all ways possible. This bill prevents only the discharge
of or discrimination against workers who do not want to participate in forced
indoctrination on issues unrelated to their job performance. It specifically exempts
communications which are about work performance and related to the normal operations
of the business, and it contains commonsense exemptions for organizations whose
primary work is political or religious.

In addition to labor organizations, support for the bill comes from religious and
civil rights advocacy groups. Cited in support of the bill is evidence that industry groups
are increasingly involved in educating employees on political issues. “Big Business will
out-muscle organized labor in workplace political campaigning by 2010” is the
“ambitious claim” made by the Business Industry Political Action Committee [BIPAC--
an organization of businesses and trade associations that works to elect pro-business
candidates to Congress]. BIPAC is “using the Web to help companies and associations
get employees up to speed on industry issues,” reports the National Journal.4 Supporters
also point to the active establishment of a religious tone in many workplaces through the
hiring of “ministry companies” that assign chaplains to assist employees. The bill does
not affect such faith-based efforts, which can serve a valuable purpose, unless they cross
the line into coercive indoctrination and recruitment.5

The central operative provision of the Worker Freedom statute passed in Oregon,
provides:

4 National Journal, Under the Influence, Feb. 26, 2009; available at:
http://undertheinfluence.nationaljournal.com/2009/02/business-lobby-sets-ambitious.php; see also:
http://www.bipac.net/bipac/grassroots_samples/market_research_report.pdf
5 Community Chaplains of America, for example, in describing its work-based services, boasts about the
number of workers it has converted: “In striving to fulfill this mission [providing full time corporate
chaplains in workplaces across the U.S.], we have seen more than 16,000 people make life-changing faith
decisions.” Available at: http://www.commchap.org/
An employer . . . may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee: (a) Who declines to attend or participate in an employer-sponsored meeting or communication . . . if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters;

There are two important exceptions to the Act’s prohibition. The first recognizes that employers must be able to mandate attendance at meetings that are related to workers’ job performance, including work-related instruction, guidance, and training. A second exception applies to employees whose jobs require that they listen to speech about political or religious matters.

The Worker Freedom statute is not pre-empted under either the Garmon or Machinists doctrine of NLRA pre-emption and falls within allowed exceptions. The purpose of the Garmon doctrine is to protect the jurisdiction of the National Labor Relations Board. That jurisdiction is not threatened by this legislation. The statute does not regulate conduct actually or arguably protected or prohibited by the NLRA. It does not ban employer speech and does not prohibit employer communications. Rather, it proscribes only the discharge or discipline of employees who choose not to be forcibly required to listen to propaganda about matters of personal conscience unrelated to their job performance.

Even if the Garmon preemption doctrine did apply, so would the well-established exception to the doctrine for state regulation deeply rooted in the protection of important state interests. Garmon recognized that pre-emption principles must yield when the activity regulated is merely peripheral to federal concerns or where the state’s need to regulate is so obvious that one would not infer that Congress meant to displace the state’s

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power. Garmon, 359 U.S. at 243-44. The Worker Freedom statute involves a basic and compelling state interest – protecting citizens from being forced to listen to propaganda in the workplace concerning matters of conscience unrelated to job performance. The state’s interest in protecting the freedom of conscience of its citizens falls within the zone of state interests respected by federal law and the statute is therefore not pre-empted.

The Worker Freedom statute is also not pre-empted under the alternative Machinists theory of preemption, which holds that the NLRA preempts state regulation of the use of “economic weapons” (i.e., strikes, lockouts, picketing, etc.) that Congress intended be left unregulated. The Machinists preemption doctrine recognizes that “Congress intended to give parties . . . the right to make use of ‘economic weapons,’ not explicitly set forth in the Act, free of governmental interference.” Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110-11 (1989)(Golden State II)(quoting Machinists, 427 U.S. at l50). The statute does not fall under the “economic weapons” rubric of Machinists preemption.

Moreover, the Court has recognized an exception to Machinists preemption which applies to this statute: “[T]here is no suggestion in the legislative history of the [National Labor Relations] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards.” Metropolitan Life Inc. Co. v. Massachusetts, 471 U.S. 724 at 756 (1984). Congress did not intend to deprive the states of their authority to protect citizens from being fired for declining to listen to speech about religious or political matters. A state’s protection of employees in this regard constitutes a permissible minimum labor standard that is applicable to all employees and aimed at protecting their freedom of conscience.
A. The Worker Freedom Statute Does Not Regulate Conduct Which is Arguably Protected or Prohibited by the NLRA.

For *Garmon* pre-emption to apply, the Worker Freedom statute must affect rights or remedies under the NLRA or in some other way affect the NLRB’s jurisdiction. It does neither of these. The conduct barred by the Worker Freedom statute is not prohibited or arguably prohibited by the NLRA. The NLRB has repeatedly held that an employer does not commit a violation of federal law by requiring employees, under threat of discharge, to attend mandatory meetings to hear the employer’s views.\(^7\) These holdings make clear that the conduct regulated by the statute is not prohibited or arguably prohibited by the NLRA. In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), the court held that, inasmuch as the NLRB had decided in a specific case that an employer’s failure to post a notice listing certain NLRB rights did not constitute a violation of the Act, an Executive Order requiring a virtually identical posting was not preempted under the *Garmon* theory of preemption. The same is true here.

Likewise, the Worker Freedom bill does not regulate conduct protected or arguably protected by the NLRA. Section 8(c) of the Act is often cited in support of an employer right or protection, but that section provides only that the expression of views “shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter.” 29 U.S.C. § 158(c). In other words, Section 8(c) is not a source of protection (in contrast to § 7, 29 U.S.C. § 157), but merely a proviso limiting the sweep

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\(^7\) See *F. W. Woolworth Co.*, 251 NLRB 1111, 1113 (1980) (holding a forced meeting and forbidding workers from asking questions is not an unfair labor practice); *Litton Systems, Inc.*, 173 NLRB 1024, 1030 (1968) (“An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management’s noncoercive antiunion speech….”); *Babcock & Wilcox Co.*, 77 NLRB 577, 578 (1948).
of the prohibitions otherwise contained in Section 8. Moreover, Section 8(c) clearly addresses only expression. It does not apply if there is a “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158 (c). It is precisely such a threat of reprisal (as well as acts of reprisal) and only such adverse actions that are regulated by the Worker Freedom statute. Such threats and coercive acts expressly fall outside the scope of Section 8(c).

Garmon preemption is not appropriate for cases in which “the controversy presented to the state court is . . . different from . . . that which could have been, but was not, presented to the Labor Board.” Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978). Nothing in the statute deprives the Board of primary jurisdiction to determine whether employer communications are themselves coercive or otherwise prohibited under the NLRA. It does not present the possibility that “two potentially conflicting statutes” would be “brought to bear on precisely the same conduct.” Id. at 193-94 (internal quotations omitted). This is because there is no claim that an employee could file a charge with the NLRB based on conduct prohibited by the statute; there is no possible state proceeding to enforce the statute which would be identical to or implicate any NLRA adjudication. Enforcement of the Worker Freedom statute would not cause state courts to adjudicate issues under the NLRA.

Simply put, the two statutes prohibit different conduct. The dispositive question under the statute, whether employees were discharged or disciplined for not listening to

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8 The Congressional proponents of Section 8(c) cited Thomas v. Collins, 323 U.S. 516 (1945), to show that the provision would merely confirm a pre-existing first Amendment right. S.Rep. No. 80-105, at 23 (1947), reprinted in 1 NLRB Legislative History of the Labor-Management Relations Act, 1947, at 407, 429 (1948)(hereinafter “LMRA History”). Senator Taft told his fellow senators that Section 8(c) “in effect carries out approximately the present rule laid down by the Supreme Court of the United States.” 93 Cong. Rec. S3953 (daily ed. April 23, 1947), reprinted in 2 LMRA History at 1011. Not surprisingly, then, the Supreme Court characterized Section 8(c) in NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) as “merely implement[ing] the First Amendment.”
speech about politics or religion, would be decided independently of the dispositive questions under the NLRA. The statute does not provide an alternative forum for deciding any unfair labor practice issue under the NLRA as the conduct it bans is not actionable under the NLRA. As separate issues are addressed, adjudication of a case brought under the statute would not require state courts to define the contours of Section 7 or Section 8 of the NLRA.

Finally, the Worker Freedom statute does not create sanctions that depart from the uniform scheme contained in the NLRA’s remedial provisions as the NLRB can provide no relief for the harm sought to be remedied by the statute. It neither attempts to enforce the NLRA through additional punishment for the same violation, as in Wisconsin Dep’t of Indus. v. Gould, Inc., 475 U.S. 282 (1986), nor punishes employers for conduct that the NLRA would protect. As the Worker Freedom statute does not intrude upon the Board’s primary jurisdiction, it is not pre-empted under Garmon.

B. The Worker Freedom Statute Protects Interests Deeply Rooted in Local Feeling and Responsibility; it Falls Within an Exception to Garmon Pre-emption.

Even if a court concluded that the Worker Freedom statute did regulate conduct arguably protected or prohibited by the NLRA, it still would not be Garmon pre-empted because there is an exception to the Garmon doctrine that applies to this statute. In Garmon, the Court refused “to find withdrawal from the States of power to regulate where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act.” Garmon, 359 U.S. at 243-244; see also Belknap, Inc. v. Hale, 463 U.S. 491, 509 (1983)(“Under Garmon a state may regulate conduct . . . which is so deeply rooted in local law that the
courts should not assume that Congress intended to preempt the application of state law.”). State regulations and state tort claims which have been upheld on the basis of “compelling local interests” protect personal dignity just like the Worker Freedom statute, which protects workers’ freedom of conscience regarding religious and political matters.9

A state’s strong interest in protecting its citizens’ freedom of conscience is reflected in statutes across the country. Many states have enacted laws to protect their citizens against being forced to listen to unwanted speech. State statutes protect citizens against intrusions from certain door-to-door solicitors, sound trucks, and targeted residential picketing.10 A legislature can protect passengers on mass transit from being forced to view unwanted political propaganda posted on placards on transit vehicles;11 and those seeking medical care from verbal assaults by protesters.12 Even in the

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9 The “compelling local interests” exception has been recognized with respect to various types of injury to the person – both tangible and intangible – including that caused by defamation, international infliction of emotional distress and violence. Farmer v. United Bh. of Carpenters, Local 25, 430 U.S. 290 (1977) (state action for intentional infliction of emotional distress brought against union for alleged outrageous conduct not preempted); Linn v. United Plant Guard Workers of Am., Local 117, 383 U.S. 53 (1966) (defamation claim not preempted); International Union, UAW v. Russell, 356 U.S. 634 (1958) (state regulation of mass picketing and threats of violence not preempted); Sears, Roebuck & Co v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (trespass); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772 (9th Cir. 2001) (false imprisonment, false arrest and malicious prosecution arising out of a trespass arrest is not preempted by the NLRA due to deeply rooted local interests); Russell v. Kinney Contractors, Inc., 795 N.E. 2d 430 (Ill.App.Ct. 2003) (state common law action for false imprisonment is not preempted due to deeply rooted local interests, citing Radcliffe, supra.).

10 See Bread v. City of Alexandria, 341 U.S. 622 (1951)(canvassing by magazine salesmen prohibited); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949)(ordinance against sound trucks upheld; Frisby v. Schulz, 487 U.S. 474 (1988) (ordinance prohibiting targeted residential picketing sustained, explaining that “‘the State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society’” Id. at 484 (citing Carey v. Brown, 447 U.S. 445, 471 (1980)), because it puts citizens in the position of having “no ready means of avoiding the unwanted speech.” Id. at 487.


workplace, state laws protect workers from unwanted, hostile working environments.\textsuperscript{13} Although each of these cases implicates a different form of communication with widely varying content, they are uniform in protecting the freedom not to listen. The protection extended by the Worker Freedom statute is in keeping with this long history and demonstrated state interest.

In pre-emption cases concerning “interests deeply rooted in local feeling and responsibility,” the Supreme Court has explained that “the state’s interest in controlling or remedying the effect of the conduct is balanced against both the interference with the Board’s ability to adjudicate controversies committed to it by the Act and the risk that the state will sanction conduct that the Act protects.” Belknap, 463 U.S. at 498-99. In Belknap, the Supreme Court held that misrepresentation and breach of contract suits brought by workers who had been hired during a strike as permanent replacements for the striking union members and then discharged by the employer as a result of a later settlement agreement with the union were not pre-empted. As the Court explained, merely because “federal law permits . . . the employer to hire replacements during a strike” does not mean “that the employer’s otherwise valid promises [under state law] of permanent employment are nullified by federal law.” Belknap, at 500.

With respect to the Worker Freedom statute, just as in Belknap, the fact that federal law allows an employer to require employees to listen to its views regarding unionization on pain of discharge does not mean that the employer may disregard state law by firing employees who decline to listen. States can choose to protect individual

\textsuperscript{13} Robinson v. Jacksonville Shipyards, Inc. 760 F.Supp. 1486, 1535-36 (M.D. Fla., 1991)(protecting captive audience female employees from a hostile work environment); Resident Advisory Bd. v. Rizzo, 503 F.Supp. 383, 402 (E.D.Pa. 1980)(describing construction workers as “a captive audience, who must remain on the jobsite during the workday” and “are powerless to avoid bombardment by derisive speech and noise.”).
workers who are victimized by their employers in violation of a deeply-rooted local belief in freedom of conscience. For this reason, the Worker Freedom bill is not pre-empted by the NLRA.


Analysis under the Machinists theory of pre-emption is primarily focused on whether the state provisions will regulate self-help economic weapons available to parties engaged in a collective bargaining dispute.14 The inquiry is 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, 475 U.S. at 615 (quoting Machinists, 427 U.S. at 147-148 (quoting R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)). The Worker Freedom statute does not implicate the economic weapons available to either labor or management during a collective bargaining dispute. Machinists pre-emption has only infrequently been invoked in the organizing context. Nevertheless, in Chamber of Commerce v. Brown, 442 U.S. 60 (2008), the Supreme Court ruled that a California statute which prohibited the use of state funds for employer advocacy during a union organizing campaign was pre-empted because it “couple[d] its ‘use’ restriction with compliance costs and litigation risks that [we]re calculated to make union-related advocacy prohibitively expensive for employers that receive state funds. By making it exceedingly difficult for employers to demonstrate that they have not used state funds and by imposing punitive sanctions for noncompliance,

14 Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)(Executive Order banning permanent replacements pre-empted); Employers Ass’n., Inc. v. United Steelworkers, 32 F.3d 1297 (8th Cir. 1994) (state law barring employers from hiring permanent replacement workers during a strike is pre-empted); Machinists, 427 U.S. 132 (1976) (state ban on concerted refusal to work overtime to protest working conditions is pre-empted); Golden State, 475 U.S. at 613-14 (City’s conditioning renewal of taxi cab franchise license on its making bargaining concessions during contract negotiations is pre-empted).
[the statute] effectively reaches beyond ‘the use of funds over which California maintains a sovereign interest.’” *Brown*, 442 U.S. at 2416.

The Worker Freedom statute is not like the statute in issue in *Brown*. It does not restrict employer speech. It does not limit the right of an employer to say anything, and it does not regulate what the employer may say or when or how often the employer may say it. The statute protects from discharge and discipline those employees who choose not to listen. There are no record-keeping requirements, onerous or otherwise. In the Oregon statute, enforcement is limited to a private action by an aggrieved employee. Unlike the California statute at issue in *Brown*, the Worker Freedom statute does not burden employer speech with myriad litigation possibilities, oppressive paperwork requirements, or punitive enforcement mechanisms which, according to the Court in *Brown*, compelled a finding of pre-emption because of the pressures they create on employers to forego permissible speech. Under the Worker Freedom statute, employers are free to speak on any subject at any time so long as they follow a bright line rule – don’t fire any employee who merely declines to listen. Thus, the Worker Freedom statute, unlike the law at issue in *Brown*, does not in any way “frustrate effective implementation of the Act’s processes.” *Golden State*, 475 U.S. at 615.

In *Brown*, the Court emphasized “how important Congress deemed such ‘free debate’ . . . which suffuses the NLRA as a whole,” emphasizing that the NLRA “‘favor[s] uninhibited, robust, and wide-open debate in labor disputes,’” and that “‘freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.’” *Brown*, 442 U.S. at 2414 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272–273 (1974). The Worker Freedom statute does not infringe on the
free flow of information underlying employees’ exercise of their Section 7 rights and does not impair the employer’s ability to communicate with employees. It does not bar employer speech. Rather, it actually encourages free discussion. It promotes a marketplace of ideas by supporting an essential, critical element of such free exchange – freedom to acquire knowledge from sources of one’s own choosing. Liberty of the mind are freedom of choice combine to form the indispensable foundation of free and robust debate. Forced propaganda does not foster the free exchange contemplated by the NLRA and is deeply discordant with our democratic traditions.

D. The State’s Authority to Establish Minimum Working Conditions Permits It to Enact the Worker Freedom Statute.

The Supreme Court has recognized an exception to Machinists pre-emption where the states “traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1984) (quoting Slaughter-House Cases. 16 Wall 36, 62 (1873)). This power includes the “broad authority . . . to regulate the employment relationship to protect workers within the State.” Metropolitan Life Ins. Co., 471 U.S. at 756, (quoting DeCanas v. Bica, 424 U.S. 351, 356 (1976). For this reason, state minimum employment standards legislation has uniformly been held not be pre-empted by federal law.

The Worker Freedom statute falls comfortably within the non-pre-empted category of minimum employment standards legislation. The aim of the statute is to protect employees who choose not to be propagandized regarding issues of personal
conscience unrelated to job performance. A state can properly chose to establish this minimum protection for all its workers.

Examples of non-pre-empted minimum labor standards are abundant. They include child labor laws, minimum and overtime wage laws; ordinances that require successor contractors to hire their predecessors’ employees; and statutes requiring that employees be provided with severance pay when they are laid off, sick pay when family members are ill, and unemployment insurance, even during a strike. *Fort Halifax Packing v. Coyne*, 428 U.S. 1, 2-3 (1987) (state statute requiring severance pay is not preempted); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (state statute requiring minimum health benefits is not preempted); *Washington Serv. Contractors Coalition v. District of Columbia*, 54 F3d 811 (D.C. Cir. 1995), cert. denied 516 U.S. 1145 (1996) (substantive employee protection legislation preventing worker dislocation is not preempted).

Other minimum labor standards enacted by states which are not pre-empted establish restrictions on the employment at will doctrine which otherwise allows employers to terminate workers for any reason or no reason. *See, e.g., St. Thomas – St. John Hotel & Tourism Ass’n v. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000) (holding VI’s unjust discharge law is not preempted); *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (employer liable for firing employee for participating in jury duty). Most states bar employee discharges based on a set of protected characteristics. *See ORS chapter 659A.* (prohibiting discrimination in employment on the basis of many characteristics). No such law has been held pre-empted.
Like the Worker Freedom statute, these statutes lawfully extend without
differentiation to non-unionized and unionized workers, even those with collective
bargaining agreements. The protections of the Worker Freedom statute likewise apply to
all workers in the state regardless of union representation or union preference. The
statute protects every worker in the state from being fired or disciplined for choosing not
to be subjected to religious or political indoctrination in the workplace. It is a statute
which provides a minimum level of protection to all employees within the state and is
therefore not pre-empted.

**The SOS Ballot Initiatives Are Pre-empted by the NLRA.**

Currently pending in four states, Arizona, South Carolina, South Dakota and
Utah, are ballot initiatives that purport to protect secret ballot elections. Promoted by a
business-backed organization known as *Save Our Secret Ballots, sosballots.org*, the
initiative is being pushed in other states as well. Although the language has been subject
to revision as initiatives are processed through state procedures for ballot initiatives, the
language recommended by SOSballot.org is:

> The right of individuals to vote by secret ballot is fundamental. Where state or
> federal law requires elections for public office or public votes on initiatives or
> referenda, or designations or authorizations of employee representation, the right
> of individuals to vote by secret ballot shall be guaranteed.

The impetus for these initiatives is no secret. On its website, SOSballot.org, describes its
motivation as protecting the secret ballot against threats by “Big Labor”:

**Q. Is the right to a secret ballot being threatened? By whom?**
A. Yes. Big Labor wants Congress to end the requirement that secret ballots be
used by employees deciding whether to ask for union representation.
The reference is to the Employee Free Choice Act. Originally introduced in 2003, the House passed the Employee Free Choice Act by a vote of 241 to 185 in 2007. Three months later, a vote by 51 members of the Senate to bring it to a vote on the floor failed to stop a Republican filibuster.

The Employee Free Choice Act would streamline the representation process for workers wanting to form a union by allowing workers to decide whether to demonstrate their majority support for union representation through either an NLRB-conducted election or through signed authorization cards or petitions. It also strengthens NLRA remedies and provides a process to ensure that workers who choose to form a union are able to reach a first contract.

The language of the SOSBallot iniatives is not limited to elections for union representation, however. SOSballot.org admits that the language is broad and could encompass elections conducted by homeowner associations and even corporate elections for publicly traded companies. In addition, it could arguably prohibit assistance currently allowed under many state statutes for disabled voters and it could affect absentee voting procedures, including voting by deployed members of the U.S. armed services.

The measure faces serious pre-emption questions. SOSBallot.org admits that a challenge is likely:

15 Q. What kind of elections will this cover? How difficult is it to hold secret ballot elections? A. Under the S.O.S. Ballot proposal, only elections or the choosing of representation mandated by federal or state law will require secret ballots. While it will vary by state, some of the elections by secret ballot may include homeowner associations and corporate elections for publicly traded companies. These elections could be as simple as a paper ballot folded in half the same way we all elected our 8th grade class president. Available at: http://sosballot.org/faq.php
Q. Can a state constitutional amendment supersede a federal statute? Will this be challenged in court?
A. Yes, a state constitution can add to rights guaranteed by the federal constitution; it just can't subtract from guaranteed rights. Federal law does not automatically trump a state constitutional guarantee if the law does not specifically pre-empt states. The relevant constitutional standard in pre-emption cases is whether Congress intended to fully occupy the area of law to the exclusion of the states. Although the National Labor Relations Act generally pre-empts state laws, the US Supreme Court has ruled that state law may prevail if it safeguards important interests and does not disrupt the federal regulatory scheme. The US Supreme Court has recognized the right to vote by secret ballot and freedom of association as important interests.

If any SOSBallot initiatives actually pass, and if a challenge is made that the measure is pre-empted by the NLRA, it will certainly be voided. It is aimed at imposing a requirement that employees be restricted to an election process in order to designate a union as their representative for purposes of collective bargaining. It forecloses any other method of designating or selecting a collective bargaining representative. In so doing, it directly conflicts with the NLRA because it strips workers of their federal labor law rights and denies the NLRA an important remedial tool.

The NLRA does not and has never required a secret ballot election to determine union representation. It provides that union representatives may be "designated or selected for purposes of collective bargaining." 29 U.S.C. §159(a) (emphasis added). Consistent with this statutory language, the NLRB has provided for and regulated two paths to union representation: (1) the election process described in 29 U.S.C. §159(c)(1)(A); and, (2) the majority sign-up process in which support for representation may be demonstrated when a majority of employees sign union authorization cards indicating their choice for union representation.16 The latter process, which does not require an election to achieve union representation, may be undertaken pursuant to an

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agreement between an employer and labor organization or ordered by the NLRB as a remedy for an employer’s unlawful conduct upon a finding that no free and fair election can be conducted.\textsuperscript{17}

The non-election, majority sign-up method of selecting union representation has been in existence since 1935 when the National Labor Relations Act was first passed. It has been uniformly and consistently endorsed by the NLRB, by Congress,\textsuperscript{18} and by the Supreme Court. The “Court has repeatedly held that certification [by means of an election] is not the only route to representative status.”\textsuperscript{19}

In \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575 (1969), the Supreme Court affirmed that an employer’s duty to bargain can arise without an NLRB secret ballot election: “Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means,” such as signed cards or petitions. \textit{Gissel}, 395 U.S. at 596-597. The Court affirmed that the NLRB can order bargaining when a majority of workers has demonstrated support for a union by signing authorization cards and the employer has “succeeded in undermining a union’s strength and destroying the laboratory conditions necessary for a fair election.” \textit{Gissel}, 395 U.S. at 612. In such circumstances, according to the Court, “cards may be the most effective – perhaps the only – way of ensuring employee free choice.” 395 U.S. at 602.

\textsuperscript{17} II J. Higgins, \textit{The Developing Labor Law}, 2765-2767 (5\textsuperscript{th} ed. 2006) and cases cited therein.
\textsuperscript{18} When Congress passed the Taft Hartley amendments to the NLRA in 1947, it considered, but rejected [in conference], an amendment that would have required employers to bargain only with unions certified by the NLRB after a secret ballot election. The Secret Ballot Protection Act, HR 1176; S 478A, which would require a secret ballot election in order for workers to choose union representation, has been regularly introduced in Congress but has never had sufficient support to come to a vote.
The proposed SOSBallot measure’s assertion that a “vote by secret ballot shall be guaranteed” where federal law “requires designations or authorizations for employee representation,” is directly and absolutely contrary to federal labor law. It prohibits a process which the NLRA regulates, protects, enforces and orders. The NLRA not only protects and enforces employee representation, in appropriate circumstances, through a non-election process, but it affirmatively orders such non-election process to remedy unlawful conduct which so disrupts the election process that no free and fair election can be conducted. To ban this pervasive and integral element of the NLRA’s regulation of the representation process and to deny the NLRB this critical remedial power to enforce the NLRA’s protections, would fundamentally interfere with federal labor law and therefore pre-empts the ballot initiative.

Conclusion:

To the extent that our federal Congress continues its partisan gridlock, the states will increasingly become incubators and experimenters. In the labor law context, their initiatives will have to clear the hurdle of NLRA pre-emption. The more the states become active in addressing labor issues, the more the courts will have to consider and develop principles of NLRA pre-emption.