No. 06- 939

IN THE
SUPREME COURT OF THE UNITED STATES

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

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

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

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

Robert Fried
Thomas Lenz
Atkinson, Andelson,
Loya, Rudd & Romo
5776 Stoneridge Mall Rd.
Pleasanton, CA 94588
925-227-9200

Maurice Baskin
(*Counsel of Record*)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*

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INTERESTS OF THE *AMICI* [1]

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

Associated Builders and Contractors, Inc. ("ABC National") is a national trade association of more than 24,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis

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[1] Pursuant to Supreme Court Rule 37.2, the *Amici* state that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Pursuant to Supreme Court Rule 37.6, the *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.
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of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform work on government-funded projects. ABC filed a brief as *amicus curiae* in the Ninth Circuit on behalf of the Petitioners in this case, expressing the view that California's AB 1889 infringes on the right of employers to communicate with their employees in a manner protected by the National Labor Relations Act.

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

The American Health Care Association and the National Center for Assisted Living are the nation's leading long term care organizations. AHCA/NCAL and their membership are committed to performance excellence and Quality First, a covenant for healthy, affordable and ethical long term care. AHCA/NCAL represent more than 10,000 non-profit and proprietary facilities dedicated to

continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 2.5 million of our nation's frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, sub-acute centers and homes for persons with mental retardation and developmental disabilities.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

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

HR Policy Association brings together the chief human resource officers of more than 240 of the largest corporations in the United States.

Representing nearly every major industry sector, HR Policy members have a combined market capitalization of more than $7.5 trillion and employ more than 18 million employees world wide. The association's mission is to assist large employers in furthering critically important business and societal objectives.

Associated Builders and Contractors of California ("ABC California") is a non-profit association that represents its five individual California Chapters, the California and federally approved apprenticeship and craft training programs they sponsor, and their more than 1200 predominantly open shop (non-union) individual construction company members. Among these member companies are general contractors and subcontractors that perform work under contracts with California state agencies, local governments and private developers that receive state financial assistance. ABC California and its member chapters have played a central role in litigating against efforts by governmental entities in California to regulate private sector labor relations in the guise of ostensibly "neutral" public purposes.

The California Small Business Alliance is a non-profit, non-partisan coalition of California trade associations committed to providing small businesses with a single voice before all levels of government. Member organizations who have specifically lent their endorsement to this *amicus* brief are as follows:

California Autobody Association, a non-profit trade association comprised of approximately 1,100 individual and independent businesses within the automobile collision repair industry throughout California;

California Furniture Manufacturers Association, serving the interests of the furniture industry throughout California;

California Independent Petroleum Association, representing the diverse interests of its more than 400 members in the oil and gas industry;

Korean Dry Cleaners Laundry Association, assisting roughly 2,000 Korean-American dry cleaners in Southern California with their business problems interacting with the government;

Metal Finishing Association of Southern California, a non-profit trade association of management executives in the fields of metal finishing and related processes, representing more than 200 companies in Southern California;

Printing Industries of California, the trade association for the graphic arts community in California, representing more than 5,400 member companies in the state.

As further explained below, the *Amici* are jointly filing this brief in order to advise the Court of the significant adverse impact of the Ninth Circuit's decision on private sector labor relations throughout the United States and in California, due to the

pervasive nature of state and local government-funded programs. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici*, representing many industries and interests, have broad familiarity with state-funded programs and the likely adverse impact of AB 1889 on employer communications with employees. The Amici strongly support reversal by this Court of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

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

The *Amici* submit that the Ninth Circuit significantly understated the impact of AB 1889's administrative, accounting and reporting requirements on the ability of small businesses to communicate with their employees on the subject of labor relations. Many of the private employers who receive such funds, including many of the *Amici's* members, are small businesses who are completely reliant on government grants. Such employers have

not previously been held to lose their protected federal rights under the NLRA merely by accepting state funds and providing services benefiting state residents. The Ninth Circuit, however, in direct conflict with decisions of the Second and Seventh Circuits,[2] has so held in the present case.

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

Finally, the Ninth Circuit's holding that California's use of its spending power to regulate employer speech does not violate either of this Court's settled doctrines of labor law preemption, known as "*Garmon*" and "*Machinists*" preemption respectively, is plainly wrong. AB 1889 is preempted under both doctrines. AB 1889 certainly regulates speech that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*. The California law also regulates non-coercive activity that Congress intended to be governed "by the free play of economic forces" within the meaning of *Machinists*. The Ninth Circuit's

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

failure to find preemption of AB 1889 therefore compels reversal by this Court.

ARGUMENT

I. CALIFORNIA'S REGULATION OF PROTECTED SPEECH IN VIOLATION OF FEDERAL LABOR LAW WILL HAVE A SIGNIFICANT ADVERSE EFFECT ON BOTH EMPLOYERS AND EMPLOYEES AND MUST BE FOUND PREEMPTED

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

In *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986), this Court held that "[state] spending power may not be used as a pretext for regulating labor relations." The Ninth Circuit violated this settled principle in the present case by conceding that California's AB 1889 "sweeps broadly" beyond the state's proprietary interests so as to regulate private sector labor policy, Pet. App. 11a-12a, and by then failing to find such a law to be preempted by the National Labor Relations Act. To the contrary, the court of appeals should have been compelled to find labor law preemption under the settled holdings of this Court. Absent reversal by this Court, the Ninth Circuit's decision will open the door to pervasive state regulation of

private sector labor relations, undermining the NLRA through a crazy quilt of spending restrictions that will be modeled on AB 1889.

At the outset, the Ninth Circuit failed to address the broad scope of state spending covered by this law. In Fiscal Year 2007-08, the state of California is expected to spend more than $130 billion on grants and contracts. *See* Schedule 10 – Summary, http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html. Thousands of private employers in virtually every service, manufacturing and construction category are the recipients of such state funds, including many small business members of the *Amici*.

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

State spending on Medicaid represented the single largest increase in state expenditures in the 1990s, growing nearly 150 percent. Snell, *State Spending in the 1990s, National Conference of State Legislatures* (2003), http://www.ncsl.org/programs/fiscal/stspend90s.htm. Another recent study found that total state spending on healthcare in fiscal year 2002 amounted to more than $290 billion, of which Medicaid expenditures accounted for $201 billion.

See "State Health Care Expenditure Report," Milbank Memorial Fund, the National Association of State Budget Officers, http://www.milbank.org/ reports/ 2000shcer/index.html.[3]

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

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

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

laws subsequently passed in other states include Me. Rev. Stat. Ann. Tit. 22 § 1861 (2004) (prohibiting health care institutions from using state funds to "interfere with, inhibit or disrupt the free exercise of the right of all employees to organize"); and Ohio Rev. Code Ann. § 5119.62 (2004) (prohibiting community mental health agencies from using state funds "for the purpose of influencing employees with respect to unionization"); Florida Public Health Code 440.443(1).

The Petitioners have cited 13 different state legislatures that have considered legislation identical or similar to AB 1889 since publication of the Ninth Circuit's decision in 2006. Pet. Brief at 56, n.11-12. It is also worth noting that the following additional states have considered legislation similar to AB 1889 while the lower court challenges to AB 1889 have been *pending*: Arizona HB 2503 (2001) and HB 2548 (2002) (restricting the use of state funds by state contractors); Colorado SB 130 (2002) (same); Georgia SB 271 (1999)(restricting the use of state funds by employers); Hawaii, "Bill to Provide for State Neutrality in Union Organizing" (2003); Illinois HB 726 (2001)(prohibiting the recipients of state funds from using those funds to promote, assist, or deter unionization), HB 3395 (2003)(restricting the use of state funds, requiring that unions be given equal access to employees, and prohibiting captive meetings during working hours); Indiana Bill 1980 (2001)(prohibiting any employer with a reimbursement agreement with the state from using state funds to support or oppose unionization); Iowa HJ 215/256, HF 126 (2001) (prohibiting use of state funds by employer that was

reimbursed by the state, received grants from the state, had contracts with state, or participated in state programs); Louisiana SB 1078 (2001)(prohibiting employers from using state funds to assist, promote or deter unionization); Missouri HB 1816 (2000) (same), HB 2209 (2002) (same), HB 308 (2003) (same); New Hampshire SB 162 (2002)(limiting use of state funds by private contractors; specifies prohibited activities, including using state funds to "defend against unfair labor practice charges"); and North Dakota SB 2434 (2001)(providing limits on use of state funds for union organizing).[4]

By contrast, prior to enactment of AB 1889, there were *no* other state laws that so broadly regulated the ability of private employers to communicate with their employees on the vital subject of unionization. It can thus fairly be stated that only the pendency of this appeal is holding back a flood of state and local laws that would restrict private employer rights of free speech as never before. Failure to halt this tide now will certainly result in the balkanization of labor law that Congress and this Court have long sought to prevent. *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

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

As this Court has recognized in the past, little will be left of the NLRA's regulatory scheme if each state is free to use its spending power to impose its labor policy views on private sector employers. *Gould,* 475 U.S. at 288-89. The proliferation of state legislation around the country modeled on AB 1889, combined with the trillions of dollars of state and local spending that could be adversely affected by the Ninth Circuit's erroneous opinion, clearly demonstrates that the concerns this Court expressed in *Gould* and previous cases is in danger of becoming a reality. Certainly, the free speech rights of many thousands of private employers covered by the NLRA, who receive state and local funds not only in California but also in the other states listed above, depend on this Court's reversal of the Ninth Circuit's decision in this case.

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

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

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

The Ninth Circuit ignored substantial record evidence that many California employers receive all or virtually all of their operating revenues from the state for services provided under state programs. According to the record before the court, for example, over 500 employers in California rely exclusively upon Medi-Cal reimbursements, covered by AB 1889, for their operating revenue. J.A. 301. One such employer, Zilaco, Inc., submitted an affidavit to the district court declaring without contradiction that 100% of one of its facility's revenues was dependent on Medi-Cal, while a second facility was 90% dependent on state funds. J.A. 153. The employer was compelled to abandon all communications with its employees on the subject of unionization, after passage of AB 1889, as a matter of "survival." *Id.* Many of the *Amici's* members, in California and elsewhere, will be presented with the same draconian choice if the Ninth Circuit's decision is allowed to stand.[5]

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[5] The number of employers so affected is greatly increased in California by the state's expansive definition of "public funds," as set forth in California Labor Code Section 1720(b), which includes the following: "(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer; (2) Performance of construction work by the state or political subdivision in execution of the project; (3) Transfer by the state or political subdivision of an asset of value for less than fair market price; (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or

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

As construction industry representatives testified in California, AB 1889 poses "mammoth practical accounting problems." J.A. 308. "This is an accounting nightmare for all small business people, including subcontractors in as diverse fields as landscape contractors who would have as simple a job as reseeding a local football field, to large general contractors." *Id*. Similarly, a health care provider stated in an affidavit that "we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our

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other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision; (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis and (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision. See also California Public Utilities Code Section 333.14(h) (including production incentives and supplemental energy credits in the definition of "public monies.")."

financial accounting and record-keeping." J.A. 135, 158, 168.

The adverse effects of AB 1889 are thus not limited to the particular state programs for which state funds are received. In order to avoid onerous administrative costs and potential litigation, many employers receiving state funds under AB 1889 believe it necessary to cease all communications with employees on both state-funded and non-state projects, due to the difficulty of proving that no state funds have been commingled with non-state operations. A skilled nursing provider testified to the district court that "the burden and cost associated with [the necessary accounting] change was so extreme that we decided that we could not afford it." J.A. 158.

The coercive effects of AB 1889 are magnified by the creation of private causes of action against offending employers, causing them to face the prospect of litigation costs and potential treble damages if they risk any employee communications. *Id*. at 16645.8.

Indeed, the record of enforcement of the California statute reflects exactly such a coercive impact on employers' exercise of their free speech rights. As detailed in the Petitioners' Brief, at 49, unions filed numerous court complaints against employers under the law in 2001-2, claiming improper uses of state funds on non-state programs. J.A. 178-232. Rather than confront the administrative and judicial costs of defending such complaints, a number of employers either stopped all

communications with their employees or avoided entering into state contracts.[6]

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

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

The Seventh Circuit, in *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County, supra*, 431 F. 3d 277, held that it was necessary to

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[6] In one example cited to the Ninth Circuit, a California hospital felt compelled to waive its right to a secret ballot NLRB election immediately after the union filed a complaint against the hospital's use of state funds. J.A. 170.

[7] The *Amici's* citation to the Second Circuit's conflicting holding is not intended to express complete agreement with that court's analysis of all the possible circumstances in which state funding restrictions should be found preempted by federal law. Indeed, to the extent that the Second Circuit would allow states to condition private employers' use of grants in ways that would interfere with rights protected under Section 8(c), that court too has departed from this Court's labor law preemption standards, albeit in a more limited way than the Ninth Circuit.

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

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

C. The Ninth Circuit's Decision Violates This Court's Holdings On Federal Preemption And Threatens To Undermine Enforcement Of The NLRA.

The Ninth Circuit's failure to appreciate the severity of AB 1889's coercive impact on employers led to further error in the appeals court's application of this Court's labor law preemption doctrine to the California law. Having found the challenged statute to constitute "broadly sweeping," non-proprietary regulation of labor relations policy, the Ninth Circuit

should have held that AB 1889 was preempted by the NLRA under this Court's holdings in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and/or *Lodge 76, Int'l Assn of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). The Ninth Circuit's failure to find preemption under either *Garmon* or *Machinists* cannot be reconciled with this Court's precedents and again compels reversal.

At the outset, the Ninth Circuit's unanimous finding that AB 1889 is an exercise in regulation, not market participation, is indisputable and should be affirmed. Indeed, to the extent that the Respondents seek to revisit the Ninth Circuit's holding with regard to AB 1889's regulatory status, the Court should if anything conclude that the Ninth Circuit did not go as far as it should have in limiting the scope of the market participation doctrine, based upon this Court's project-specific application of the doctrine in *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.* ("*Boston Harbor*"), 507 U.S. 218 (1993).[8] In any event, the court of appeals properly

[8] In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999). the Fifth Circuit properly read *Boston Harbor* to require a finding of state regulation unless two factors are *both* present: (1) the law must be found to "essentially reflect the [public] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances" and (2) the law must "have a narrow scope … [to] defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing, supra*, 180 F.3d at 693. The Ninth Circuit needlessly converted this test for market participation into an either/or standard, giving the state two

found that the California law in no way reflects the state's interest in procurement of services in a manner typical of private actors; and the court also found correctly that AB 1889 was not narrowly drafted at all to meet any alleged proprietary purpose. Pet. App. 7a-12a. Thus, the Ninth Circuit's ultimate finding that AB 1889 constitutes regulation of private sector labor relations is plainly correct and should be affirmed.

1. *Garmon* Preemption Applies.

Unfortunately, having found correctly that AB 1889 regulates labor policy with respect to private employers, the Ninth Circuit proceeded improperly to blur the distinction previously established by this Court between permissible state market participation and prohibited state regulation of labor policy. *See Boston Harbor, supra,* 507 U.S. 218 (1993). In the *Boston Harbor* case, this Court declared that the distinction between market participation and regulation was crucial because "preemption doctrines apply …to state regulation." *Id*. at 229-231. The Court's *Boston Harbor* decision further reaffirmed the Court's previous holding in *Gould*, cited above, that regulatory use of the state's spending power remains preempted. *Id*.

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chances to escape a finding of regulation. Even under this overly generous test, the Ninth Circuit reached the inescapable conclusion that AB 1889 is an act of regulation, because *neither* of the above indicia of market participation is present.

In conflict with this Court's holdings, and despite having found AB 1889 to be "broadly sweeping" in its regulatory nature, the Ninth Circuit's analyzed *Garmon* and *Machinists* in such a way as to uphold AB 1889 in essentially the same manner as if market participation had been present, rendering *Boston Harbor's* distinction meaningless. The court of appeals' reasoning has been aptly described as relying on "extraordinary contortions" to reach the "analytically impossible conclusion" that AB 1889 is clearly regulatory yet not preempted. *See* Garrison and Pettygrove, *"Yes, No, and Maybe": The Implications of a Federal Circuit Split Over Union-Friendly State and Local "Neutrality" Laws*, 23 The Labor Lawyer 121, at 143, 149 (Fall 2007).

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

Employer communications that fall within the meaning of Section 8(c) of the NLRA are plainly "protected … or arguably protected" by the Act. As this Court has squarely held: "The enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966); *see also NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (referring to non-coercive anti-union solicitation as a "right protected by the so-called 'employer free

speech' provision of Section 8(c) of the [Act]"). The Ninth Circuit failed to address these precedents, and the appeals court's constrained reading of Section 8(c) plainly requires correction by this Court.

The Ninth Circuit declared that non-coercive speech is not "protected" by the NLRA but is instead guaranteed only by the First Amendment. Pet. App. 23a. The Second Circuit gave the proper answer to this unsupported assertion, as follows:

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

Id. at 98-99. As the Second Circuit further articulated, the language of Section 8(c) not only was intended to protect employers but also to insure that *employees* had access to information from both sides of the labor debate during any organizing campaign. *Id.* at 99. *See also See also, Metropolitan Milwaukee,* 431 F.3d at 280 (holding that the NLRB grants the right to employers to hold meetings in order to educate employees on the issue of labor representation.); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F. 3d 867, 875 (4th Cir. 1999) ("[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process."); *Southwire Co. v. NLRB*, 383 F. 2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the

union goes to the heart of the contest over whether an employee wishes to join a union.").[9]

2. *Machinists* Preemption Also Applies.

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

Again, the Second Circuit has most cogently explained why the Ninth Circuit has it wrong:

> Because the protection afforded by Section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and *Machinists* doctrine actually tend towards the same point: requiring [the state] to respect Congress intent to "leave some activities unregulated," *Machinists*,

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

> 427 U.S. 144, so that the parties may resolve their disputes by use of the economic weapons left to them.

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

As explained above, the Ninth Circuit primarily justifies the state's admitted regulation of employer conduct by returning to the contention that employers are free to forgo the state funds and engage in any speech permitted by the NLRA. Pet. App. 17a. But this ignores the fact that the exercise of state spending power to regulate private sector labor policy results in impermissible conflict with federal labor law by deterring employers in the exercise of their rights under the NLRA. *See Gould*, 475 U.S. at 286. *Healthcare Association, supra,* 471 F. 3d at 107; *Metropolitan Milwaukee, supra*, 431 F. 3d at 277. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (restrictions on lawsuits by private grantees deemed unconstitutional even when grantees were free to engage in such lawsuits with their own funds). Plainly, deterrence of protected employer communication with their employees is caused by the broadly sweeping provisions of AB 1889, such that preemption is required.

Finally, the Ninth Circuit plainly erred in relying on the inapposite holding of *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, this Court upheld certain abortion-related restrictions on the uses of *federal* grants based upon constitutional grounds having no relevance to issues of labor law preemption of state funding restrictions. As the Second Circuit noted, it may well be constitutional for the *federal government* to make a "value judgment favoring conduct other than the exercise of a protected right" and to restrict the use of public funds to exclude that protected conduct, but *Gould* prohibits a state from "leveraging its money to affect the contractor's protected activity beyond the contractor's dealings with the State." As this Court further held in *Gould,* the question of constitutional limits on federal spending "is an entirely different question from what States may do with the [National Labor Relations] Act in place." 475 U.S. at 290. The Ninth Circuit thus committed further error in this case by importing the inapposite Constitutional holding of *Rust* into the unrelated doctrine of federal labor law preemption.

CONCLUSION

For the reasons set forth above and in the Petitioners' Brief, the decision of the Ninth Circuit should be reversed and California's AB 1889 should be found preempted by federal labor law.

Respectfully submitted,

Robert Fried
Thomas Lenz
Atkinson, Andelson,
Loya, Rudd & Romo
5776 Stoneridge Mall Rd.
Pleasanton, CA 94588
925-227-9200

Maurice Baskin
(*Counsel of Record*)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*