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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. The instant case is of central concern to Cato because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment rights.

STATEMENT OF THE CASE

This is a preemption case arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69. The petitioners argue that the NLRA preempts California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-49, in relevant part

[1] The parties' written consents to the filing of this *amicus* brief have been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to its preparation.

because it deters an activity – noncoercive speech about union organizing – that federal labor policy protects and encourages.

Specifically, AB 1889 prohibits employers receiving 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. This "use of funds" prohibition even applies to the payment of salaries, *id.* § 16646(a); speaking about unions to employees working on state contracts, *id.* § 16645.3(a); and meeting with employees on certain state property to discuss union-related issues, *id.* § 16645.5(a). It is noteworthy, the petitioners point out, that the significant exceptions to these restrictions all relate to employer speech and use of funds *favoring* union activity. Pet. Brief at 8. The petitioners also detail the various burdens AB 1889 imposes on employers, such as the need to maintain segregated accounting and salary-payment systems. *Id.* at 8-9.

While the petitioners' complaint prays for declaratory and injunctive relief on a variety of grounds, J.A. 122-26, the district court granted partial summary judgment to the petitioners based solely on NLRA preemption. In entering the partial final judgment that underlies this appeal, the court found "sections 16645.2 and 16645.7 to be preempted by the National Labor Relations Act and thus to be invalid under the Constitution's Supremacy Clause." J.A. 349. The court then enjoined the respondents from enforcing the relevant parts of AB 1889 against any

employer covered by the NLRA. *Id.* The court did not state any other basis for its order.

The parties did, however, approve a joint stipulation and order clarifying the issues that the court's partial final judgment teed up for appeal. The parties intended the stipulation to "facilitate a substantive ruling by the appellate court on whether [the relevant parts of AB 1889] are preempted by the [NLRA]." J.A. 352. The parties agreed not to raise any other issues on appeal, including "violation of the First Amendment provided however nothing herein shall preclude the parties from arguing First Amendment principles and case law solely as they relate to the impact or effect on the [NLRA] preemption doctrine." *Id*.

The Ninth Circuit issued three opinions. Ultimately the *en banc* majority reversed the district court not only on preemption grounds but on the First Amendment issue in holding that AB 1889 "does not infringe the First Amendment rights of grant and program recipients." *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1096 (9th Cir. 2006). The court found that "California has not 'denied' employers the 'right to engage in [union]-related activity,' but has 'merely refused to fund such activities out of the public fisc.'" *Id*. (citing *Rust v. Sullivan*, 500 U.S. 173, 198 (1991)). The dissent, on the other hand, noted that AB 1889 "abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns.'" *Id*. at 1098. "Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of

neutrality with respect to labor relations, in direct conflict with employers' rights under the First Amendment." *Id*.

SUMMARY OF ARGUMENT

Amicus believes that 1) this case should be decided on the NLRA preemption grounds that are heavily briefed by the petitioners and other *amici*; but 2) if the Court reaches the First Amendment issue, the statute should be struck because it imposes an unconstitutional condition on the receipt of state funds and burdens private speech in an area unrelated to the programs for which the funds are given.

1. The Ninth Circuit improperly reached the First Amendment issue. The district court order on appeal and the accompanying joint stipulation and order granting the parties' request for partial final judgment specifies that the only issue on appeal is preemption. Moreover, this is a case where the constitutional avoidance canon urges that the First Amendment issue be left alone for further proceedings below.

2. Petitioners have a broad right to speak and engage in expressive association relating to union activity. AB 1889 impermissibly forces private employers to choose between their livelihoods and these First Amendment rights by attaching speech-restrictive strings to State funds. Such conditions on State funds are unconstitutional because California

cannot directly legislate the speech restrictions they represent.

3. AB 1889 impermissibly burdens private speech that is wholly distinct from any programmatic interest the State has in the funding at issue (*e.g.*, Medi-Cal reimbursements and other payments for services rendered on State contracts). The program funds to which California attaches speech restrictions do not seek to advance any related governmental message. AB 1889 is thus not narrowly tailored to advance a State interest more compelling than the petitioners' First Amendment rights.

ARGUMENT

I. THIS CASE SHOULD BE DECIDED ON THE PREEMPTION ISSUE BECAUSE THE PARTIAL FINAL JUDGMENT APPEALED FROM DID NOT CONSIDER CONSTITUTIONAL ISSUES AND THIS COURT SHOULD NOT REACH THEM WHEN A CASE CAN BE DECIDED ON OTHER GROUNDS

We agree with the petitioners on the preemption issue. 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). As concerns this case, the NLRA preempts state regulation of activity: 1) that

Congress intended to remain unregulated, *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976); and 2) that Congress protected, prohibited, or arguably protected or prohibited by the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). In particular, when Congress amended the NLRA in 1947, it added a provision establishing 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 held that "the enactment of [§ 158(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, 62 (1966). As detailed by the petitioners and their other *amici*, this Court should thus find AB 1889 preempted by the NLRA.

More important for our purposes, however, this case should be decided on the basis of preemption *and on that issue alone*. First, the district court order that is the underlying basis for this appeal – technically a "partial final judgment," but essentially an interlocutory ruling certified for appeal – discusses its decision as purely a matter of NLRA preemption. J.A. 348-50. The court refers to its earlier grant of petitioners' motion for partial summary judgment as "find[ing] that California Government Code sections 16645.2 and 16645.7 are preempted by the National Labor

Relations Act" and, at the parties' request, codifies that ruling into an appealable order. J.A. 349. Notably, the joint stipulation and order granting the parties' request for the partial final judgment contains the parties' agreement that the appeal would not raise any issues beyond the above preemption ruling, including "violation of the First Amendment" (though the parties can use First Amendment-related arguments insofar as they relate back to a preemption). J.A. 352. Thus, this Court lacks jurisdiction to consider First Amendment doctrine beyond its tangential applicability to the relevant provisions of the NLRA.

Second, the Ninth Circuit erred when it devoted the third section of its *en banc* opinion specifically to the First Amendment. *Lockyer*, 463 F.3d at 1096 ("III. First Amendment"). This section is not, as the joint stipulation order allows, a discussion of free speech issues as they relate to preemption – as were earlier parts of the opinion, *id*. at 1087-89, 1092 – but a wholesale explanation of why, in the court's view, "AB 1889 does not infringe employers' First Amendment right to express whatever view they wish on organizing." *Id*. at 1096. Although the court claims it is merely responding to arguments raised by the dissent, the appropriate way to handle such arguments – the merits of which we discuss below – would be in a footnote dismissing them as improperly raised given the procedural posture.

Finally, this is a clear example of the long-held canon of statutory construction that constitutional

questions are to be avoided if other interpretations of the statute at issue are available. As the Court said in *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001), "when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Id*. at 545 (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989) and *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).

In short, assuming *arguendo* that the NLRA itself is constitutional and that the petitioners come under its regulatory jurisdiction, the first question is whether AB 1889 is preempted by the NLRA. Only if it joins the Ninth Circuit in reaching beyond preemption should this Court even consider the First Amendment issues.

II. AB 1889 VIOLATES THE PETITIONERS' PROTECTED FIRST AMENDMENT RIGHTS BY FORCING A CHOICE BETWEEN EXERCISING THOSE RIGHTS AND CONTRACTING WITH THE STATE

If this Court reaches beyond NLRA preemption – if it affirms the Ninth Circuit's application of *Machinists* and *Garmon* – it should still find for the petitioners because the AB 1889 unconstitutionally conditions their receipt and use of State funds on petitioners' renouncement of their First Amendment rights.

A. Broad First Amendment Protection of the Expressive Rights Asserted By the Petitioners Is Essential To Our System of Ordered Liberty

As has long been recognized by this Court, the First Amendment is "the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.). The theory of the First Amendment is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, dissenting). For half a century, this Court has also recognized the right to freely associate in order to advance shared ideas. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Focusing on the close link between free speech and free assembly, the Court in *Patterson* determined that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id*.

Protecting the freedom of speech and the freedom to associate for the purpose of exercising the freedom of speech secures two key benefits. First, it "preserve[es] political and cultural diversity and . . . shield[s] dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Second, by ensuring wide dissemination of information, it exposes error and allows

individuals and government to avoid unsound ideas more effectively and efficiently, illuminating ideas that might otherwise be ignored. *See*, *e.g.*, Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 557-58 (1991) ("The First Amendment is based on the belief that people will make better decisions if they are more fully informed . . . [and that] [n]ormally, the availability of greater information can only benefit economically rational individuals – the more information individuals have, the more knowledgably they can define their ends, calculate their means, and plan their actions.").

To secure these benefits, the First Amendment rejects a "paternalistic approach" to governance of the marketplace of ideas. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Farber, 105 Harv. L. Rev. at 557 n.15. To control the effects of bad speech, the First Amendment therefore counsels not more government regulation, but a larger constellation of private speakers.

The petitioners assert in their complaint that AB 1889 violates the First Amendment in an alarming number of ways. In relevant part: 1) It discriminates based on the content of speech by allowing state funds and property to be used for activities that promote unionization while burdening such expression concerning the merits of (or opposition to) unionization; 2) It requires companies that receive state contracts or grants or otherwise participate in applicable state programs *or even lease state property* to

choose between their right to do so and their free speech rights; 3) It levees a penalty for exercising constitutional rights; 4) It places administrative (and economic) burdens on those who exercise their free speech rights by requiring onerous record-keeping to show that constitutionally protected activities were not funded by state funds; 5) It chills free speech generally because of potential uncertainty over whether a given type of speech is covered by AB 1889; and 6) It imposes a prior restraint on constitutionally protected speech, based on the content of that speech. J.A. 122-23. Each of these, if true, is an impermissible use of state authority in that it empowers the government to shut down any and all opposition to a particular policy – in this case the promotion of unionization (a specific type of speech further protected by the NLRA).

Limiting the ability to speak about unions is just that heavy-handed approach to regulating the marketplace of ideas which the First Amendment was designed to forestall. Unionization may or may not be a good idea for employees depending on the circumstances of employment and the parameters of the proposed union activity. But there can be no doubt that preventing employers from speaking on the matter is an infringement of their most basic rights and undermines our constitutional order.

B. The State Is Not Allowed To Accomplish Through Its Spending Power What It Cannot Do Through Direct Legislation

California cannot directly penalize or restrict noncoercive employer speech, nor can it accomplish that same end through its spending power. For those employers in California receiving all their revenues from the State – most visibly, Medi-Cal providers – AB 1889 represents a total ban on union-related speech. If they wish to apply for, receive, and use State funds dedicated for public purposes and otherwise available to all qualified applicants on a nondiscriminatory basis, they must waive their right to such speech. For those employers who receive partial funding from the State who could in theory continue speaking through the use of non-State revenues, AB 1889 imposes burdensome regulatory requirements, such as the maintenance of separate accounts and time-keeping systems. Lacking a compelling interest in the restrictions that is integral to the programs at issue (*e.g.*, speech restrictions on defense or law enforcement contractors), the State cannot impose such unconstitutional conditions.

In *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest – especially, his interest in freedom of speech." *Id*. at 597. The basis for this conclusion is that otherwise the government could command indirectly "a result which [it] could

not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

Here, the State has enacted a statute that does precisely what *Perry* forbids: It denies employers the privilege benefit of contracting with the state if they will not limit their speech in a particular way. Like the mugger who says, "your money or your life," the State puts the employer to a choice between two of his entitlements, his right to participate, if otherwise qualified, in State programs, and his right to speak. He can enjoy one but not both rights. That kind of coercive proposition is the very mark of an unconstitutional condition. It amounts to gratuitous discrimination by the State against those who will not relinquish a right protected by the Constitution.

Finally, that it may be the declared policy of the State of California to encourage unionization is of no moment. As the *Velasquez* Court said, the State "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velasquez*, 531 U.S. at 547. Yet AB 1889 acts to amend the provisions of all State programs, as if each such governing statute contained a new section that restricts speech about unions. AB 1889 must fail

because such amendments add unconstitutional conditions to State program funding.

III. AB 1889 IMPERMISSIBLY BURDENS PRIVATE SPEECH THAT IS DISTINCT FROM ANY STATE PROGRAMMATIC MESSAGE INTEGRAL TO THE PROGRAM FUNDS AT ISSUE

The respondents' admitted – and only discernable – interest in passing this statute is in preventing (noncoercive) employer speech about unions from threatening employee choice. This interest, whether compelling or not, is in no way related to the State programs the use of whose funds AB 1889 regulates. That is, leaving aside that California's prescription for employee choice conflicts with that set up by Congress via the NLRA – which deems *employer* speech essential to informed employee decision-making – the programs whose funds are at issue here (*e.g.*, Medi-Cal) have no inherent union-related message the State has an interest in regulating. Thus, even if the State's interest were compelling, AB 1889 has not narrowly tailored a method of advancing that interest to minimize restrictions on free speech because there is no link between those funds and the State's employee choice message. Instead, by tying *all* state programs to a blanket ban on union-related speech, AB 1889 facially violates the First Amendment.

According to the Ninth Circuit's *en banc* majority, AB 1889 does not infringe employers' First Amendment rights because its speech restrictions are tied to the *use* rather than the *receipt* of funds – so "an employer has and retains the freedom to spend its own funds however it wishes." *Lockyer*, 463 F.3d at 1087-88. The issue is not, however, whether the employer loses *all* rights to speak (about unionization or otherwise), but whether the State can restrict the speech of private employers *at all* solely because they are paid for their work with State funds. Because the State's programmatic interest in the funds at issue ends when they are disbursed, the answer is no. *See id*. at 1099-1100 (Beezer, J., dissenting) ("[The State] has made a bargain for the provision of a limited set of benefits and the vendor has agreed to provide those goods and services, including labor, in exchange for money. Once the exchange has been made and payment has been received, that money can no longer be considered 'state funds.'").

The Ninth Circuit misreads this Court's precedent in cases like *Velasquez* and *Rust* – and thereby misses the two prerequisites for being able to impose speech restrictions on recipients of government funds: 1) The speakers at issue must be either government actors or private actors paid by the government to convey information; and 2) There must be a programmatic message attached to the funding – a certain type of information the money is meant to spread. AB 1889 lacks both of these elements.

In *Velasquez*, this Court overturned a restriction on speech supported by funds that carried no inherent governmental message. *Velasquez*, 531 U.S. at 1051-52 (Kennedy, J.) (Congress cannot forbid use of funds to challenge welfare laws after it appropriates them to organizations assisting indigent clients with, *inter alia*, welfare benefit claims). The case turned on this Court's findings that: 1) the speech at issue was private, rather than governmental speech; and 2) the funding at issue carried no programmatic interest in restricting that speech. *Id*., 531 U.S. at 548-49 ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the government's interest." *Velasquez*, 531 U.S. at 548-59 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

Here, as in *Velasquez*, the government has no programmatic interest in the funds or how they are used (beyond ensuring that they are expended on contracted-for services). Although the government is allowed to regulate speech that delivers its own message, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors." *Id*. at 541-42 (quoting *Rosenberger*, 515 U.S. at 834). And the petitioners' brief makes clear that AB 1889, while superficially neutral with respect to the type of union-related

speech it regulates, serves only to restrict anti-unionization speech. Pet. Brief at 31-32, 42.

The court below cites *Rust* for the propositions that "a restriction on the use of government funds for an activity does not compel cessation of the activity" and that California has not "denied" employers the right to speak about unions but has "merely refused to fund such activities out of the public fisc." *Lockyer*, 463 F.3d at 1098 (citing *Rust*, 500 U.S. at 198). But, again, the point is not that some employers (those who have revenue streams separate from state program funds *and* are willing to maintain two sets of books) can still speak about unions. Petitioners are harmed here because the State has attached arbitrary speech restrictions to funds not related to State speech.

The *Rust* Court upheld a restriction prohibiting doctors employed by federally funded family planning clinics from discussing abortion with their patients. *Rust*, 500 U.S. at 203. This Court has since explained, however, that the *Rust* counseling activities amounted to governmental speech, sustaining viewpoint-based funding decisions where the government is itself the speaker or where, like *Rust*, the government uses private speakers to transmit information related to its own programs. *Velasquez*, 531 U.S. at 541 (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000) and *Rosenberger*, 515 U.S. at 833). Although the government has the latitude to ensure that its own message is being

delivered, that latitude does not apply to restrictions on purely private speech. *Id*. at 542.

Whereas in *Rust* Congress established a statutory scheme providing grants for the provision of information and services relating to a given issue while at the same time declining to fund "an alternative program which seeks to deal with the problem another way," *Rust*, 500 U.S. at 193, the State of California has done neither with the funds regulated by AB 1889. Thus the *Rust* Court's explanation that Congress had "merely chosen to fund one activity to the exclusion of the other," *id*. (and the Ninth Circuit's corollary about the State not being required to fund private speech out of the public fisc) is inapposite where, as here, the State did not create a program to disseminate information in the first place.

This is neither a case where California funds employer advice on, say, career planning but forbids discussion of unionization nor one where it provides information about workplace regulations but not the regulations governing unions (either of which would make this a *Rust*-like situation). Instead, like *Velasquez*, the State has provided funding containing no programmatic message and then tries to control the speech of the recipients of that funding. Indeed, the instant restrictions are *more* constitutionally odious than *Velasquez*'s: While the latter were at least related to the purpose of the funds – promoting legal claims for welfare benefits – AB 1889 restricts funds paid for State contracts, Medi-Cal reimbursements, and myriad other purposes that have nothing to do

with union-related activities or employee rights under labor law.

In a reversal of the *Rosenberger* scenario – where the State provided grants to promote a diversity of ideas but then discriminated in distributing that funding on the basis of viewpoint, 515 U.S. at 829-30 – AB 1889 restricts private speech unrelated to any message the State funds are designed to convey. As the petitioners argue, "since the State has achieved its fiscal interest by limiting public monies to whatever activities it deems related to the purpose of the government-funded program, the State has no additional fiscal interest in telling private recipients how to spend the money they fairly received in exchange for providing this public service." Pet. Brief at 36.

The State here is not using its funds to speak, disseminate information, or otherwise advance a message about unions. California thus has no relevant programmatic interest in the funds at issue and AB 1889 imposes burdens on speech that do not survive strict scrutiny.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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