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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Federal Statutes

Federal Regulations

TABLE OF AUTHORITIES
(continued)

Page

State Statutes

Respondents' briefs have narrowed and focused the issues here, through concessions which demonstrate that reversal is required. Respondents concede that AB 1889 does not further any fiscal interest in cost savings or programmatic efficiency. And they do not dispute that AB 1889 burdens employers wishing to speak about union organizing. These concessions end this case. This Court's precedents are unequivocal: Non-proprietary exercises of the spending power impinging on congressional labor policy—here, unhindered debate about union organizing—are preempted. Acceptance of respondents' implicit invitation to reverse this established precedent would wreak havoc on the NLRA's paramount goal of establishing national uniformity by authorizing 50 states and over 3,000 counties and localities to pursue their own idiosyncratic labor policies through spending restrictions. Tellingly, respondents have *no* response to the debilitating balkanization of national labor policy that would result from their position.

A. Respondents Concede That AB 1889 Does Not Further Any Fiscal Interest

Respondents have abandoned their principal argument below that AB 1889 serves a proprietary interest exempt from preemption under *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"). Respondents now concede that AB 1889's spending restriction was not designed to achieve cost savings or programmatic efficiencies. Rather, California imposed a spending restriction on, or "refus[ed] to subsidize," employer speech about unionization solely because "the legislature believed [that such speech] may interfere with an employee's

choice about whether to join a union." Brief for State Respondents ("Cal. Br.") 16, 38. This view is echoed by the sponsor and author of AB 1889, intervenor California Labor Federation: AB 1889 implements California's labor policy judgment that "the government would be interfering with free debate [about unionization] by subsidizing the costs of private lobbying or proselytizing" about union organizing. Brief for Respondents AFL-CIO and California Labor Federation ("AFL-CIO Br.") 17. In short, the purpose of the spending restriction is to protect *employees* from "interference," not to protect *California's* treasury or the integrity of its programs.

The plain language of AB 1889 compels these concessions, making clear that the funding restriction is imposed because it "is the policy of the state not to *interfere with an employee's choice* about whether to join or to be represented by a labor union" and, "*[f]or this reason*," the State will not "subsidize" activity that it views as constituting such interference—*i.e.*, "efforts by an employer to assist, promote, or deter union organizing." 2000 Cal. Stat. ch. 872, § 1. Thus, all parties now adopt the Ninth Circuit's conclusion that it is "clear that the legislation's purpose is to prevent 'state funds and facilities' from being used to subsidize an employer's attempt to influence employee choice about whether to join a union" and does not "reflect California's interest in the efficient procurement of goods and services." Pet. App. 11a.

Consequently, while it is certainly true that "the State has an obvious and strong interest in controlling costs and ensuring that state funds are used for those activities that the State believes will most effectively further [the programmatic] purpose"

(Cal. Br. 22), this is of no relevance here because all agree that this fiscal interest is *not* being furthered by AB 1889. Rather, AB 1889 fulfills the labor policy purpose of "refus[ing] to subsidize" an activity the State views as undesirable (or at least unworthy of subsidization) because it purportedly interferes with employee choice.

Indeed, respondents' defense of AB 1889 is that it is analogous to specific benefit restrictions designed to express a legislative value judgment concerning the activity being denied support, of the sort at issue in all the constitutional cases respondents rely upon. Like the "refusal to subsidize" special interest lobbying or abortion, AB 1889 is concededly and obviously not designed to decrease expenditures or increase tax revenues. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983) (denying tax benefit because Congress was concerned that groups would "lobby to promote the private interests of their members"); *Harris v. McRae*, 448 U.S. 297, 319 (1980) (Hyde Amendment's denial of abortion funding was "a reflection of 'traditionalist' values towards abortion"). Rather, like those restrictions, AB 1889 advances the policy purpose of refusing to assist activities viewed as affirmatively harmful, or at least sufficiently controversial to offend a cognizable segment of taxpayers, much as the Hyde Amendment's restriction on abortion funding was animated by policy concerns about abortion, not the additional spending caused by funding abortions.

Since a labor policy "purpose" is the only one "advanced in support of," or that can "credibly be ascribed" to, AB 1889, this is the end of the case. *See*

Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986). The fact that the labor policy regulation is in the form of a "refusal to subsidize" under the spending power, rather than the police power, is—as the *Gould* Court unanimously held—a "distinction without a difference." *Id.* at 287. And the interference with federal labor policy here is more direct and harmful because it adversely affects activities that the NLRA *authorizes*, whereas the debarment in *Gould reinforced* the NLRA's proscriptions by refusing to subsidize serial violators of the federal Act.

1. Undaunted by *Gould*'s dispositive holding, respondents nevertheless defend AB 1889 through rhetorical slogans that this Court has repeatedly made clear are facially insufficient, in the preemption context, to justify state efforts to withhold public benefits. Specifically, respondents argue that AB 1889 is not a spending restriction that provides a disincentive to engage in noncoercive speech about unions, but a "refusal to subsidize" that "merely" withholds incentives for engaging in that speech. AFL-CIO Br. 14, 16; *accord* Cal. Br. 15-16. And since, according to the constitutional funding cases, government sometimes has a legitimate interest in withholding such incentives in order to remain "neutral" concerning activity some taxpayers view as undesirable, respondents maintain that California, *ipso facto*, has a legitimate labor policy interest in withholding funds for the nonthreatening employee speech it views as improperly interfering with employee choice. *See* Cal. Br. 19; AFL-CIO Br. 19.

The basic flaw in this argument is that, while the government may sometimes deny funding to achieve

"certain *permissible* goals" under the Constitution, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (emphasis added), it is not "permissible" for a state to advance an interest that—although legitimate "in the *absence* of the NLRA," *Gould*, 475 U.S. at 289 (emphasis added)—is inconsistent with the comprehensive federal scheme established by that Act, *see Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). Withholding state funds "necessarily discourages" (*Rust*, 500 U.S. at 194) activities that the NLRA encourages. This deterrent effect is impermissible, regardless whether the state's motive for imposing it is to remain "neutral" by not "subsidizing" employer activity, because the NLRA requires that certain interactions between unions and employers—such as noncoercive speech about union organizing—"be left [to] the free play of contending economic forces" without *any* governmental regulation. *See Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140 n.4 (1976) ("*Machinists*") (internal quotation marks omitted).

More specifically, respondents' "refusal to subsidize" argument is, dispositively, irreconcilable with *Gould*. To use respondents' nomenclature, all Wisconsin was doing in that case was "refusing to subsidize," through its contracting dollars, employers that repeatedly committed unfair labor practices. Surely the State had a legitimate interest in withholding subsidies for such manifestly improper behavior, in the absence of the NLRA. Indeed, this is precisely the argument that was made in defense of the statute in *Gould* by Wisconsin and the AFL-CIO, in terms which almost precisely echo respondents'

argument here.[1] Nevertheless, this Court found that this was an improper use of the spending power because such a refusal to subsidize sanctioned those excluded from the "subsidy" and states are not permitted to establish labor policy that frustrates the NLRA's carefully reticulated scheme. *See Gould*, 475 U.S. at 287-88.

As this reflects, respondents' notion that "refusals to subsidize" somehow escape preemption proves far too much, and indeed creates an even broader loophole than that established by the Ninth Circuit below. A *Gould*-like funding cut-off is, if anything, a more straightforward "refusal to subsidize" than the "use" restriction here, since the cut-off has no effect on an employer's *private* funds (through AB 1889-type prohibitions on "commingling" and the like), but simply constitutes a decision to not fiscally support those who violate federal labor laws. Respondents' extensive reliance on *Regan* confirms this overreaching since the statute there made refraining from lobbying with *private* funds a "condition . . . for *receipt*" (Pet. App. 17a) of the tax-deduction subsidy. *See* 461 U.S. at 543-44. Thus, the legislation in

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[1] Wisconsin in *Gould* cited *Harris* for the proposition that "the duty not to interfere with the absolute constitutional right of a woman to abort does not require Congress to pay for it," and argued that the NLRA did not require it to "contribute to the profits of miscreants by hiring them." Brief for Appellants, No. 84-1484, at 31. As *amicus*, the AFL-CIO similarly defended Wisconsin's "decision not to do business with repeat violators of the NLRA" with reference to *Harris*, *Regan*, and *Maher v. Roe*, 432 U.S. 464 (1977), and argued that "it is inconceivable that the [NLRA] compels the course of conduct that aids the labor-law violator." Brief of AFL-CIO, No. 84-1484, at 9, 10, 22.

Regan contained those features which even the Ninth Circuit agreed would cause a funding restriction to be preempted. Indeed, under the regime advocated by respondents, a state could pass legislation preventing companies from deducting union-related expenses as "ordinary and necessary" business expenses, or otherwise manipulate the tax code to deter activity protected by the NLRA. All of this would fall under the "refusal to subsidize" rubric.

Relatedly, California's supposed "desire to remain 'neutral' . . . does not determine pre-emption" because *all* state decisions to withhold or restrict public benefits from those engaged in NLRA-authorized activities can be characterized as "neutral," in the sense that such decisions prevent associating the public fisc with the private activities. *Livadas*, 512 U.S. at 120, 129. The fact that AB 1889's spending restriction is purportedly motivated by California's desire to not support noncoercive employer speech—*i.e.*, to remain "neutral"—in no way changes the fact that singling out this activity for "non-support" will discourage such activity. Such skewing of employer (or union) incentives to engage in NLRA-authorized activity "stands as an obstacle" to the "objectives" of "federal law." *Id.* at 120 (internal quotation marks omitted). Consequently, as *Livadas* explains, such "professions of 'neutrality'" cannot salvage a law from preemption, as reflected in the fact that this Court preempted the withholding of public benefits in that case, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), and in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), even though all could be "re-described as following a 'hands-off' policy." 512 U.S. at 129-30. All these

points were made in the opening brief (pp. 26-28, 38-40), but respondents simply ignore them.

Of course, AB 1889 is not remotely "neutral" under any proper understanding of that term. First, it singles out expenditures relating to union speech without any effort to restrict similar employee-relations expenditures. Second, it affirmatively allows expenditures to, *inter alia*, facilitate *union* access to promote organizing or voluntarily *recognize* a union. *See* Cal. Gov't Code § 16647(b), (d).

2. For all these reasons, and the reasons noted in the opening brief (pp. 51-54), respondents' attempted analogy to constitutional funding cases is entirely misplaced.

First, *Gould*, *Livadas*, *Golden State*, and *Nash* all preempted refusals to subsidize or to withhold benefits. This would not have been possible if the constitutional funding cases really stood for the proposition that refusals to subsidize do not constitute a burden sufficient to trigger NLRA preemption.

Second, the constitutionality of a state law says nothing about the entirely different question of whether the NLRA preempts the law. The issue in the constitutional cases is whether funding restrictions that further "permissible goals" unduly burden a citizen's rights; the issue in the preemption cases is whether the state goals are "impermissible" because they are inconsistent with federal labor policy. This precludes respondents' heavy reliance on *Lyng v. UAW*, 485 U.S. 360 (1988). Unlike the states, Congress is not constrained by the NLRA, so its decision to amend the Food Stamp Act to the detriment of striking workers needed to comply only

with the Constitution. *See id.* at 371. *Lyng* does *not* address whether a similar labor policy would be a "legitimate governmental objective" for a state (AFL-CIO Br. 19 (internal quotation marks omitted)), and *Livadas* clearly holds that it is not. *See* 512 U.S. at 116-17.

Third, the only relevance of the constitutional cases is that they all *confirm* that funding restrictions burden the activity singled out for de-funding. All the First Amendment cases recognize that a funding restriction "necessarily discourages" speech by the recipient. *Rust*, 500 U.S. at 194. Similarly, the *Lyng* Court found it "difficult to deny" that Congress' denial of food stamps to striking workers "works at least some discrimination against strikers and their households," 485 U.S. at 371, because "[d]enying [food stamp] benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union," *id.* at 368; *see also Maher*, 432 U.S. at 474 (denial of funding "may make it difficult . . . for some women to have abortions"). And the AFL-CIO in *Gould* candidly conceded that states may "affect private conduct through contractually-based incentives and disincentives," such that Wisconsin's refusal to deal constituted a "'penalty.'" Brief of AFL-CIO, No. 84-1484, at 9, 22.

Accordingly, the statement in *Harris* that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity," 448 U.S. at 317 n.19, in no way suggests that funding restrictions do not impose a burden. *See* Cal. Br. 17; AFL-CIO Br. 16. This statement simply reflects the truism that funding

restrictions are not *equivalent* to affirmative penalties because the latter constitute a more direct interference and, since no financial support is involved, cannot be justified as an effort to "define the limits" of a government program. *Rust*, 500 U.S. at 194; *see generally Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) ("*FAIR*"). This in no way supports the absurd proposition that denying funding to engage in an activity does not discourage that activity—otherwise *Gould* would necessarily have reached a different result.

In any event, even assuming that a refusal to fund, "without more," imposes no burden, AB 1889 does far more than refuse to provide public funds. AB 1889 provides public funds *in exchange for* important programmatic services and then limits the recipient's *use* of those funds, as well as burdening *privately-derived* funds through onerous segregation requirements, enforced through treble damages and attorney's fees. It surely would have been a "burden" if the Hyde Amendment prohibited a recipient's *use* of money obtained from a welfare program, or public employment or contracting, to pay for abortions. The burden would have been even more obvious if the Hyde Amendment prohibited recipients from using their *own*, privately-derived funds to pay for an abortion, unless those funds were kept in a segregated account to avoid "commingling" with publicly-derived funds, upon pain of treble damages and attorney's fees. AB 1889 is not simply a failure to "*enhance* [the] ability to speak," *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372, 2382 (2007) (describing *Regan*; emphasis added), it *diminishes* petitioners' speech.

Similarly beside the point is that, at times, this Court has upheld such spending restrictions against constitutional challenge. It has done so on the ground that the Constitution does not require the government to *avoid* such deterrence, because the government is entitled to "define the limits of [its] program" and citizens are not entitled to receive money for speech which is outside the scope of that program. *Rust*, 500 U.S. at 194.[2] Here, there is no basis for excusing the deterrent effect, because states are *not* entitled to artificially limit their programs to discriminatorily exclude NLRA-authorized activity and petitioners *are* entitled to receive money for performing services *within* the scope of the state's program, without having to overcome obstacles to NLRA-authorized speech. Moreover, AB 1889's cross-cutting restrictions are unnecessary to preserve any programmatic message: It is "not a plausible fear" that an employer's *internal* communications with its employees will dilute the message of state-funded programs or be attributed to the State. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841-42 (1995).

Finally, AB 1889, if anything, is more an exercise of the State's police power than its spending power, although the point is irrelevant in light of *Gould*. The Act restricts the *use* of money within the

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[2] Respondents note (Cal. Br. 55-56; AFL-CIO Br. 18) that there are other constitutionally adequate reasons for not subsidizing an activity. But AB 1889 is a restriction on the *use* of grant and program funds, and such restrictions have been upheld only where necessary to preserve programmatic message. *See Rust*, 500 U.S. at 194; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

recipient's possession because of the "source" of that money. Analogously, federal campaign finance laws formerly placed restrictions on the expenditure of funds depending on their "source," yet these laws were not exercises of Congress' spending power. *See*, *e.g.*, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) ("soft money" could be spent only on generic party-building activities, not on candidate-related activities). To be sure, the difference here is that the State is the "source" of the funds now in petitioners' bank accounts, but the fact remains that AB 1889 regulates how petitioners may *use* those funds. And the Act's segregation requirement and its imposition of treble damages and attorney's fees are clearly exercises of the State's police power. In contrast, Wisconsin in *Gould* used only its spending power to deter violations of the NLRA—its refusal to do business did not affect the contractors' private funds or otherwise restrict them. *See* 475 U.S. at 283-85.

B. Respondents Do Not Dispute That AB 1889 Burdens Employer Speech

Respondents do not suggest that AB 1889 is a hortatory enactment which imposes no burdens upon employers wishing to speak about union organizing. Although they attempt to *minimize* those burdens, this is of no moment because they do not (and cannot) deny that AB 1889 "impinge[s] on" speech that Congress intended to leave unregulated. *Machinists*, 427 U.S. at 146 (internal quotation marks omitted).

1. The State offers *no* response to the absolute ban that AB 1889 works on union-related speech by employers receiving *all* of their revenue from a state program, like petitioner Zilaco, Inc.'s CherryLee

facility. J.A. 166; *see also* J.A. 301. For such employers, AB 1889 conditions their continued operations on relinquishing their right to speak about union organizing.

Nor does the AFL-CIO (p. 29) deny that this is a burden, but, echoing the Ninth Circuit (Pet. App. 18a), asserts that this is the result of petitioners' "voluntary cho[ic]e." The fact that the burden results from a "voluntary choice," however, does not alter the fact that it is a burden. And this Court has made clear that state laws are preempted if they create an "unappetizing choice" between the exercise of NLRA rights and the receipt of state benefits. *Livadas*, 512 U.S. at 117 (discussing *Nash* and *Golden State*); *cf. FAIR*, 547 U.S. at 59 ("[T]he government may not deny a benefit to a person on a basis that infringes . . . speech *even if he has no entitlement to that benefit*.") (internal quotation marks omitted; emphasis added). Indeed, under the AFL-CIO's theory, California could prohibit any NLRA-protected activity because the burden would be the result of a "voluntary choice" to remain in the State.

2. Respondents also do not deny that AB 1889 burdens those employers that have private funds with which to speak about union organizing. The most respondents say is that AB 1889's regulatory requirements are "*less* onerous" than those upheld in the First Amendment cases. Cal. Br. 47 (emphasis added); *accord* AFL-CIO Br. 48. But the question is not whether the State has imposed the *most onerous burden* possible on employer speech, it is whether AB 1889 has any "real effect" on NLRA-authorized speech. *Livadas*, 512 U.S. at 119. Respondents do not dispute that it does.

Respondents concede that AB 1889 requires employers wishing to express their views about union organizing with non-"state" funds to create, and pay all union-related expenses out of, separate accounts. Cal. Br. 49-50; AFL-CIO Br. 47. That requirement burdens speech, a point on which all of this Court's campaign finance cases are in accord. *See* Brief for Petitioners ("Br.") 45-46 (collecting authority). Respondents address *one* of those cases, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), and argue that the burden on the "small non-profit organization" there was *greater* than that on petitioners here. AFL-CIO Br. 49; *accord* Cal. Br. 48-50. But this is nonresponsive to the fact that AB 1889's segregation requirement imposes a cognizable burden. As *Austin v. Michigan Chamber of Commerce*—which respondents ignore—makes emphatically clear, the "organizational and financial hurdles in establishing and administering a segregated political fund" have the effect of "burden[ing] expressive activity," such that they must satisfy strict scrutiny. 494 U.S. 652, 657-58 (1990). Similarly, *Regan*'s suggestion that a far simpler segregation requirement was not "*unduly* burdensome" hardly suggests the absence of a burden. 461 U.S. at 544 n.6 (emphasis added).

Also, AB 1889 does more than impose segregation requirements. It requires detailed tracking of employee time and accounting of how the segregated funds are spent. Respondents acknowledge that similar "accounting requirements," imposed on unions to track expenditures of compulsory dues, are quite "burdensome." AFL-CIO Br. 51; accord Cal. Br. 51 n.8. AB 1889 also imposes severe penalties on employers if a court subsequently decides they

misallocated "state" funds to union organizing. Respondents have no response to this Court's opinions (*see* Br. 48-49) recognizing the chilling effect on speech caused by the risk of litigation and exemplary damages. *See also Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007) (the "fear" of "an antitrust lawsuit and the risk of treble damages" would cause underwriters to "act in ways that will avoid . . . conduct that the securities law permits or encourages").

Finally, it is important to note that the Byrd Amendment—which respondents otherwise liken to AB 1889—does *not* require the creation of a segregated account for the covered funds because it utilizes the exact *opposite* presumption of that found in AB 1889: "To the extent a person can demonstrate that the person has sufficient monies, other than Federal appropriated funds, the Federal Government shall assume that these *other monies* were spent for any influencing activities unallowable with Federal appropriated funds." 55 Fed. Reg. 24,540, 24,542 (June 15, 1990) (emphasis added); *accord* 48 C.F.R. § 3.802(a)(2) (Federal Acquisition Regulations). Indeed, the standard rule for federal grants and contracts with non-profit organizations is to preclude federal agencies from "requir[ing] separate depository accounts for funds provided to a recipient." 2 C.F.R. § 215.22(i).

C. Respondents' "Sovereign Interest" Discussion Is Irrelevant

Inexplicably, respondents argue at length about the State's need to "control[] program costs" and "ensur[e] the highest quality in the delivery of services." Cal. Br. 26; *accord* AFL-CIO Br. 23. But

this entire discussion is irrelevant because it is conceded and indisputable that AB 1889's purpose was *not* to achieve such economies, but to further a preempted labor policy "purpose." *Gould*, 475 U.S. at 287. Thus, even if AB 1889 had the unintended consequence of some fiscal savings, this would not save it from preemption. As the opening brief explains (pp. 38-39) and respondents ignore, this Court has held preempted state actions that frustrate federal labor policy even if they *also* advance reasonable fiscal interests. The restrictions on benefits in *Livadas* and *Nash*, for example, obviously had the effect of "conserv[ing] the State's money," *Livadas*, 512 U.S. at 127, but that did not excuse their "tendency to frustrate the purpose of Congress," *Nash*, 389 U.S. at 239.

1. In any event, it is not even *theoretically* possible that AB 1889 serves a fiscal interest.

First, there is no conceivable fiscal justification for AB 1889's imposition of a *use* restriction on grant and program funds that provide *reimbursement* to employers for the provision of "critical public services to California residents." Cal. Br. 26.[3] Any cost-savings interest would already have been achieved through negotiations on price or allowable costs. For example, as the AFL-CIO points out (pp. 49-50), reimbursement to some health-care providers under Medi-Cal does not "include expenditures to assist, promote, or deter union organizing." J.A. 244-257. Since such health-care providers never *receive* any

[3] This is true whether payment is made before or after the provision of services.

state money covering union-related activities, AB 1889 cannot *reduce* state expenditures under this program. The State is out the reimbursed amount regardless how it is used. *See* Br. 36.

Second, the exception to this general rule is where, as noted in the opening brief (p. 35), the state has a legitimate fiscal interest in ensuring that *advanced* grant funds are not misspent on a non-grant-related purpose. But here as well, AB 1889 cannot serve any fiscal interest. Any *fiscal* decision concerning union-related expenditures will have already been made, one way or the other, in the specific grant to which AB 1889 applies. If, on one hand, a grant *allows* cost reimbursement for union-related expenses, like other aspects of managing the grantee's workforce, *this* is the fiscal decision and reflects the view that paying for such indirect costs efficiently furthers the grant's purpose. Because AB 1889's use restriction is *contrary* to that fiscal decision, it cannot be justified as a fiscal interest. If, on the other, a contract does *not* allow cost reimbursement for union-related expenses, then AB 1889 cannot serve a fiscal interest because the grant does not pay for any union-related activity, so there is no need for AB 1889 to prevent such "waste."[4] Either way, it is clear AB 1889 serves no fiscal goals. In all events, there is no rational *fiscal* interest in the State's policy of prohibiting

[4] The decision to single out union-related expenses for non-reimbursement may indicate a purpose to regulate labor-management relations, not a legitimate proprietary interest. That issue is not presented here as AB 1889 is a cross-cutting restriction on use that concededly falls outside of *Boston Harbor*.

expenditures *opposing*, but allowing expenditures *facilitating*, union organizing.

2. Even more perplexing is respondents' extended discussion whether certain of petitioners' funds, received from the State in exchange for valuable public services, have retained or "los[t] their character as state funds." Cal. Br. 34. Respondents' thesis seems to be that the State has a "sovereign interest" in all funds that the State provides to the petitioner except for "profits" (so long as the "profits" are not potentially subject to recapture as "overpayments"). And, the argument continues, since the State has a "sovereign interest" in all such monies except "profits," then AB 1889's restrictions on non-"profit" funds somehow serves a non-preempted interest. *See* Cal. Br. 21-32; AFL-CIO Br. 19-29. To the extent this argument is comprehensible, it is plainly wrong.

Again, the question is not whether California retains a "sovereign interest" (whatever that may mean) in the monies transferred to petitioners, but whether it has a proprietary or fiscal interest in *prohibiting* petitioners' *use* of those funds for union-related speech. Since it is conceded that the State has no such interest, the metaphysical question of whether particular dollars transferred to petitioners have "lost their character as state funds" is beside the point. In any event, the "profits" distinction drawn by respondents for the first time in this Court simply confirms AB 1889's invalidity and is irreconcilable with the statute's plain language.

First, since AB 1889's restriction on the use of a small subset of grant or program funds ("profits") concededly interferes with the NLRA, it necessarily

follows that its restriction on the rest of those funds does so as well. If California has no non-preempted interest in prohibiting the use of, for example, $100 of a $1,000 grant (or however the State defines "profit") for union-related speech, it necessarily has no such interest as to the other $900. If anything, the $100 "profit" would seem to be more reasonably characterized as a "subsidy" than the $900, which merely covers the private recipient's out-of-pocket expenditures. While it is wholly illogical to draw *any* distinction between the $100 and the $900, there is certainly no rational basis for concluding that the State has a *greater* claim on the $900 because it is *less* of a "subsidy" and *more* the "State's" money than the $100 "profit."

Second, respondents' proposed exclusion of "profits" is also irreconcilable with the actual text of AB 1889. AB 1889 does not distinguish between "profit" and other monies but applies to "*any* money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov't Code § 16645(d)(1) (emphasis added). Respondents maintain that a carve-out for "profits" is necessitated by the canon of constitutional doubt, but can identify *no* decision of any court that has attached any significance to the distinction between "profits" and "state" funds. *See* Cal. Br. 33-34; AFL-CIO Br. 24. In all events, this would not be a "plausible interpretation[] of [the] statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Third, although AB 1889 was vigorously enforced for over two years and its validity has been litigated for another five, the *first* mention of a possible exception for "profits" came in the State's Brief In

Opposition.[5] This argument is therefore waived. *See*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Fourth, respondents' supposed "saving" construction would only *add* to AB 1889's already Byzantine regulatory burdens. In addition to "state" and non-"state" funds, employers would also have to separately account for and segregate "profit" and "potential overpayments." The State does not even define "profit," let alone explain how it is to be determined in California's myriad and individualized grants and programs. An employer, for example, might project that it would clear $60,000 "profit" on a $500,000 grant. If that projection proved overly optimistic or if there was an alternative way of calculating profits, the $60,000 estimate would expose the employer to a union lawsuit questioning the employer's accounting, seeking intrusive discovery, and demanding treble damages and attorney's fees. Indeed, under respondents' proposed reading of AB 1889, an employer could *retroactively* violate AB 1889 by expending on union-related activity "profit" that turns out—in the final

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[5] The AFL-CIO (p. 27)—but not the State—misleadingly claims that the State agreed that AB 1889 did not apply to "profits" in the Ninth Circuit. All the State conceded, in response to a specific question at *en banc* oral argument, was that if a corporation receiving only "state" funds made a dividend payment, and the shareholder returned that money to the corporation, AB 1889 would no longer apply to that money. Pet. App. 32a n.20. This concession had nothing to do with "profits"; it simply acknowledged that AB 1889's restrictions do not extend to "state" money transferred to a third party.

accounting at the end of the fiscal year—to have been "overpayment." Cal. Br. 35 n.5.

3. In a transparent effort to obtain a remand, respondents argue that AB 1889 cannot be held preempted because this is a "facial" challenge and there has not been full factual exploration of whether all recipients earn "profits" or whether it is "unduly difficult" for employers to speak about union organizing. Cal. Br. 33, 44-46; *accord* AFL-CIO Br. 29, 45-47. But these facts are not material. It is conceded and indisputable that AB 1889 furthers a labor policy purpose and affects employers' incentives to engage in NLRA-authorized activity. Consequently, there are no valid applications of AB 1889 and no amount of factual development can salvage it from preemption under the governing legal standard.

An unfocused, individualized evidentiary "inquiry" into the precise *magnitude* of the burden suffered by petitioners will tell the Court nothing that cannot readily be gleaned from the face of the statute itself. Those petitioners with exclusively state funds cannot speak about unionization at all, while those with lesser amounts may do so only by complying with difficult and amorphous administrative requirements, enforced through *qui tam* litigation and severe civil penalties. These truisms will not in any way be illuminated by further litigation where petitioners describe the requirements in negative terms and respondents use more favorable adjectives. Even accepting as true the declaration of Nicholas Ross—which is the *only* evidence to which respondents point as creating dispute (Cal. Br. 45; AFL-CIO Br. 46-47)—there is no dispute that AB

1889's accounting requirements alone are burdensome: Mr. Ross simply says they are "less burdensome" than federal law. J.A. 283. And Mr. Ross did not even address, much less dispute, the deterrent effect caused by AB 1889's *qui tam* and civil penalty provisions. *See* Br. 50 n.8.

As noted, the deterrent effect of segregated funds, litigation, and punitive remedies are patent, and have been routinely recognized by this Court without full-blown trials to confirm the obvious. Indeed, although respondents attempt to distinguish *MCFL* as an "as applied" case (Cal. Br. 48; AFL-CIO Br. 49), the Court there and in *Austin* ascertained the burden on speech solely by reference to the textual commands of the relevant statutes. *See Austin*, 494 U.S. at 658; *MCFL*, 479 U.S. at 253-55. Similarly, the statute in *Gould* was found facially invalid, without analysis of the effect it had on other contractors, much less any effort to determine the statute's effect on every state contractor, as respondents suggest is required here. *See* 475 U.S. at 288.

Respondents' call for individualized factfinding also reveals a fundamental miscomprehension of the prohibited effect of AB 1889 and the nature of NLRA preemption. To adequately safeguard federal labor policy, this Court addresses "potential conflict" in "classes of situations," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959), and demarcates zones of activity that are not "regulable by States," *Machinists*, 427 U.S. at 149. The prophylactic nature of NLRA preemption "*precludes* an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of

occurrences." *Garmon*, 359 U.S. at 242 (emphasis added).[6]

D. Respondents Miscomprehend Congressional Policy, *Machinists*, And *Garmon*

California (pp. 14, 18) does not dispute that noncoercive employer speech about unionization is an area that Congress intended to be left unregulated under *Machinists*. The AFL-CIO and respondents' *amici* contend otherwise: They would have this Court authorize every state and locality to *directly* prohibit and regulate nonprejudicial employer speech, and enforce those regulations through onerous civil penalties, creating a patchwork of conflicting rules governing employers' involvement in union organizing. This attempt to gut a key facet of the NLRA is meritless.

1. The AFL-CIO suggests (pp. 31-35) that Congress somehow did not intend for noncoercive employer speech to be "unregulated" (*Machinists*, 427 U.S. at 144) on the federal level because section 8(c) "merely" prohibits the NLRB from treating such speech as an unfair labor practice or evidence of one. But it is difficult to envision how Congress could have *more* directly manifested its intent that conduct be unregulated than by expressly prohibiting the NLRB from regulating or penalizing it as an unfair labor practice. As the opening brief notes (p. 22), section 8(c) is a far more direct and unequivocal expression of

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[6] In all events, if the Court agrees that the preemption issue turns on such case-by-case adjudication about "profits," etc., reversal is nevertheless required because the Ninth Circuit upheld AB 1889 as not preempted in *all* circumstances affecting grant or program funds. *See* Pet. App. 36a.

congressional intent than that at issue in *Machinists* itself, where there was no statutory language or legislative history suggesting a desire to leave "partial strike activity" unregulated. In contrast, as the Court has frequently noted, "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management" and reflects "federal policies favoring uninhibited, robust, and wide-open debate in labor disputes." *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966); *accord Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974). Accordingly, there is nothing to the AFL-CIO's argument that, although the NLRB cannot regulate or penalize employers for engaging in nonthreatening speech about unions, states and localities are entirely free to do so.

The AFL-CIO also suggests (pp. 34-35) that there is no policy against regulating noncoercive employer speech because section 8(c) is not phrased as granting employers a "right" to engage in that speech. This is, of course, entirely meaningless semantics because the question is whether Congress intended to preclude regulation, not whether it did so, as in the Second Amendment, by bestowing a "right" on the potentially regulated or, as in the First Amendment, by prohibiting the relevant regulatory body—"Congress"—from making a "law" which infringes on the activity to be unregulated. In all events, this Court has referred to "non-coercive anti-union solicitation" as a "*right* . . . protected by the so-called 'employer free speech' provision of § 8(c)." *NLRB v. United Steelworkers*, 357 U.S. 357, 362 (1958) (emphasis added).

The AFL-CIO's next, equally irrelevant semantic argument (pp. 35-37) is that section 8(c) somehow does not express federal labor policy because Congress thought that prohibiting regulation of nonthreatening employer speech was required by the First Amendment. The only relevant issue under the Supremacy Clause, however, is whether Congress has adopted a federal labor law policy precluding restriction of noncoercive employer speech. Whether Congress did so because it independently believed that employees are best informed about unionization through robust and uninhibited debate or because it thought that the First Amendment compelled such a free marketplace of ideas, is of no consequence. If this Court determined tomorrow that the federal government could constitutionally regulate noncoercive employer speech, this would not affect the proscription against such regulation in the NLRA, nor its preemptive effect under *Machinists*.

The AFL-CIO's next irrelevant observation (pp. 34, 39-40) is that, when exercising its responsibility to ensure fair representation elections under section 9 rather than its authority to regulate employer's interference with unionization under section 8, the NLRB asks whether the employer's speech is such that it "renders improbable a free choice" in the election, *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), rather than whether the employer's speech is outside the protections of section 8(c) because it contains a "threat of reprisal," 29 U.S.C. § 158(c). But there is no cognizable difference between these two standards. Consequently, the NLRB's test for assessing whether employees' free choice has been eliminated is whether the employer's speech has been prejudicial or coercive. Thus, in the election context,

the NLRB will "not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964) (internal quotation marks omitted); *see also Rosewood Mfg. Co.*, 263 N.L.R.B. 420, 420 (1982) (employer speech "was coercive, thereby destroying the laboratory conditions"); *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1240 (1966) (explaining that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice"); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1787 (1962) (employer speech contained "clear threats").[7] In all circumstances, as the Solicitor General confirms, the NLRB "distinguish[es] *coercive speech* that violates section 8(a)(1) or is prejudicial to a fair election, from *non-coercive* speech that enhances employee free choice and is therefore immune from regulation." Brief for United States as *Amicus* ("U.S. Br.") 24 (internal citations omitted; emphasis added). The NLRB's construction of the NLRA's policies and their preemptive effect are "entitled to considerable deference." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483,

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[7] As in public elections, the NLRB imposes various time, place, and manner restrictions on speech preceding a representation election. *See*, *e.g.*, *Peerless Plywood Co.*, 107 N.L.R.B. 427, 428-30 (1953) (no speeches 24 hours before election). Such restrictions no more suggest that noncoercive employer speech may be regulated than do analogous restrictions in public elections suggest that political speech about elections may be regulated.

500 (1978); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).[8]

Finally, respondents argue that "the state's choice[] of how to spend its funds" is not an area that Congress intended to be "free from regulation." Cal. Br. 13, 17 (internal quotation marks omitted); *accord* AFL-CIO Br. 37-38. This is true, but noncoercive employer speech is to be free of regulation and thus, under *Gould*, the NLRA preempts a State's "choice" to "spend its funds" in a way that intentionally interferes with the NLRA. *See* 475 U.S. at 287-89.

2. To the extent that respondents argue that AB 1889 survives preemption as applied to coercive employer speech, they are wrong. As shown in the opening brief (p. 28), AB 1889 imposes penalties on coercive employer speech *in addition* to those imposed by the NLRA, in contravention of *Gould*. Respondents' only response is their facially erroneous argument that *Gould* is distinguishable because it did not involve a "refusal to subsidize." *See* Cal. Br. 58; AFL-CIO Br. 42-43. Also, as the Solicitor General explains (pp. 25-26), any effort to partially preserve AB 1889's application to *coercive* speech would necessarily run afoul of *Garmon* because a California court, before applying AB 1889, would first have to

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[8] Even if there were a federal policy of allowing regulation of nonthreatening employer speech in the election context, AB 1889 obviously applies outside that context and is thus preempted under *Machinists* to that extent. And, *within* the election context, AB 1889 imposes penalties *in addition to* those in the NLRA, and authorizes state courts to determine what constitutes speech "prejudicial to an election," so it would be preempted under *Garmon*. *See Gould*, 475 U.S. at 288.

draw a line between coercive and noncoercive speech, in conflict with the primary jurisdiction of the NLRB.

Nor does AB 1889 fall within the "deeply rooted" exception to *Garmon* preemption. *See* Cal. Br. 59-61; AFL-CIO Br. 43-44. The "deeply rooted" interests recognized by *Garmon* are general state policies, unrelated to labor relations, that are necessary to "the maintenance of domestic peace." *Garmon*, 359 U.S. at 247; *accord Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). AB 1889 directly targets labor-management relations, not any general fiscal interest in cost effective services. As in *Gould*, this Court is not "faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." 475 U.S. at 291.

3. Finally, respondents' repeated citation of three *federal* programs with similar use restrictions provides them no aid. *See*, *e.g.*, Cal. Br. 2; AFL-CIO Br. 1-3. Congress is not "preempted" from creating tailored exceptions to federal labor policy in specific contexts, and these *ad hoc* statutes do not purport to override the longstanding federal labor policy of robust debate about union organizing. *See* Br. 40-41 n.7. Unlike AB 1889, moreover, these use restrictions do not contain pro-union exceptions, require the creation of segregated accounts, or impose civil penalties. *See* 29 U.S.C. § 2931(b)(7); 42 U.S.C. §§ 9839(e), 12634(b); U.S. Br. 20-21. The Medicare Act provision upon which respondents also rely is only a limitation on *reimbursements* and imposes no

restriction on the *use* of those reimbursements. *See* 42 U.S.C. § 1395x(v)(1)(N).[9]

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The judgment of the Court of Appeals should be reversed.

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[9] The suggestion by respondents' *amici* that these isolated statutes, out of the multitude of federal spending programs, and an *unofficial* 1980 report by a House subcommittee, reflect a consistent federal policy of "neutrality" is preposterous. *See* Brief for the State of New York *et al.* 21-27; Brief of AARP *et al.* 8-12. The rules governing federal grants and contracts to non-profit organizations notably do *not* disallow reimbursement for employer speech about union organizing. *See* 2 C.F.R. § 230, App. B. And the imposition of such a restriction in the Federal Acquisition Regulations on January 19, 2001 was quickly repealed. *See* 66 Fed. Reg. 66,986, 66,990 (Dec. 27, 2001).

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