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 FOR RESPONDENTS AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CALIFORNIA LABOR FEDERATION

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QUESTION PRESENTED

Whether California Government Code Sections 16645.2 and 16645.7, which prohibit employers from using state grant and program funds to assist or deter union organizing but do not restrict the use of other funds, are preempted by the National Labor Relations Act.

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STATEMENT OF THE CASE

1. Restrictions on the Use of Federal Money

This case involves a California law modeled on federal statutes. By those statutes, Congress prohibits recipients of certain federal grant and program funds from using that *federal* money "to assist, promote, or deter union organizing."

The National and Community Service Act states that "[a]ssistance provided under this subchapter

shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing." 42 U.S.C. §12634(b)(1); *see also* 45 C.F.R. §2540.100(c) ("What restrictions govern the use of Corporation assistance? . . . Corporation assistance may not be used by program participants or staff to assist, promote, or deter union organizing . . . ."); 45 C.F.R. §2520.65(a) ("While charging time to the AmeriCorps program . . . staff and members may not engage in the following activities: . . . Assisting, promoting, or deterring union organizing.").

The federal Workforce Investment Act requires "[e]ach recipient of funds . . . [to] provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. §2931(b)(7); *see also* 20 C.F.R. §663.730 ("May funds provided to employers for OJT or customized training be used to assist, promote, or deter union organizing? . . . No, funds provided to employers for OJT or customized training must not be used to directly or indirectly assist, promote or deter union organizing.").

The federal Head Start Programs Act contains a provision entitled "[n]eutrality concerning union organizing" that provides that "[f]unds appropriated to carry out this subchapter shall not be used to assist, promote, or deter union organizing." 42 U.S.C. §9839(e). *See also* U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Information Memorandum No. ACYF-IM-HS-00-11 (Mar. 27, 2000) ("Federal Head Start grant funds must not be used to 'assist, promote or deter union organizing.' This restriction only applies to the use of Federal Head Start funds. If a grantee uses non-Head Start funds and resources for these pur-

poses, such expenditures must be carefully documented and costs must be allocated in such a way as to ensure that there is no misuse of Federal funds.").

The federal Medicare Act contains a related provision that precludes employers from including the costs of lobbying their employees about unionization on the cost reports they submit to the government. *See* 42 U.S.C. §1395x(v)(1)(N) ("In determining such reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included.").

2. California Assembly Bill 1889

In 2000, California adopted Assembly Bill No. 1889 ("AB 1889"), codified at California Government Code Sections 16645-49, which includes restrictions on the use of *state* grant and program funds to "assist, promote or deter union organizing" that parallel the federal restrictions discussed above. The statutory preamble declares:

> 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. For this reason, *the state should not subsidize* efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using *state funds* . . . for the purpose of influencing employees to support or oppose unionization . . . .

Cal. Stats. 2000, ch. 872, §1 (emphases added).

Two separate restrictions contained in AB 1889 are at issue in this case: The restrictions applicable to state grant money (§16645.2) and to state program

funds (§16645.7). With respect to state grant money, Section 16645.2 provides that

> [t]he recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

Cal. Gov. Code §16645.2(a). As for state program funds, Section 16645.7 provides that

> [a] private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

Cal. Gov. Code §16645.7(a).

AB 1889 defines "state funds" as "money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov. Code §16645(d)(1). The phrase "assist, promote, or deter union organizing" is defined to include "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees. . . . [or w]hether to become a member of any labor organization." Cal. Gov. Code §16645(a)(1), (2).

The statute clarifies that its restrictions do not apply to labor relations expenditures that do not involve an employer lobbying its employees about whether to form or join a union: "(a) Addressing a grievance or negotiating or administering a collective bargaining agreement; (b) Allowing a labor organization or its representatives access to the employer's facilities or property; (c) Performing an activity

required by federal or state law or by a collective bargaining agreement; [or] (d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." Cal. Gov. Code §16647.

Recipients of state grant and program funds must "maintain records sufficient to show that state funds have not been used for . . . expenditures" to assist, promote or deter union organizing, and they must "provide those records to the Attorney General upon request." Cal. Gov. Code. §16645.2(c), §16645.7(c). But the statute expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov. Code §16648.

Recipients that spend state funds in violation of these spending restrictions are "liable to the state for the amount of any funds expended in violation of [the restriction] plus a civil penalty equal to twice the amount of those funds." Cal. Gov. Code §16645.2(d), §16645.7(d). Civil actions to enforce AB 1889 may be brought by the California Attorney General and by private taxpayers; all misspent funds and penalties recovered in such an action are paid to the state treasury. Cal. Gov. Code §16645.8.

3. District Court Proceedings

In 2002, a group of employer associations and employers (hereinafter "Petitioners"), filed suit in the Central District of California to challenge numerous provisions of AB 1889. J.A. 49, 94. They alleged, among other things, that AB 1889 is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-69. J.A. 124-25. The lawsuit named the California Attorney General and other state officials as defendants. J.A. 94-95, 117-18. The

American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation intervened as additional defendants. J.A. 9, 63. The defendants in the District Court are referred to hereinafter as "Respondents."

Petitioners moved for summary judgment shortly after filing their lawsuit. J.A. 55. They claimed that compliance with AB 1889 would be burdensome. J.A. 129, 135-36, 155, 158-59, 160-61, 163, 165-68. In opposition, Respondents submitted an expert declaration from a partner in a national accounting firm stating that the "accounting and recordkeeping requirements imposed by AB 1889 with regard to state funds are similar to requirements imposed in other contexts, particularly for federal grant recipients" and that complying with AB 1889 would be "significantly less burdensome" than complying with standard federal grant restrictions. J.A. 280-83.

The District Court granted partial summary judgment to Petitioners, concluding that Government Code Sections 16645.2 and 16645.7 are preempted by the NLRA because they "regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. 147a. The District Court concluded that Petitioners had not demonstrated standing to challenge any other AB 1889 provisions. Pet. 142a-144a. The District Court did not find that any facts about the compliance burdens imposed by AB 1889 were undisputed or resolve any issues about the interpretation of the new state law. *See* Pet. 140a-149a.[1]

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[1] Respondents had asked the District Court to abstain from hearing the case, pursuant to *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), to allow the state courts to

The District Court then entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) declaring California Government Code Sections 16645.2 and 16645.7 preempted by the NLRA and enjoining the State from enforcing those provisions. J.A. 85-86, 348-50. The District Court stayed the remainder of the case pending an appeal to the Ninth Circuit. J.A. 352-53.

4. Ninth Circuit Proceedings

On appeal, a Ninth Circuit panel initially issued a decision affirming the District Court's grant of summary judgment. Pet. 115a-139a. The panel then granted rehearing, withdrew its original decision, and issued a new decision that reached the same conclusion, this time over a dissent. Pet. 58a-113a, 157a-158a. The full Ninth Circuit decided to hear the case en banc. Pet. 156a. After hearing oral argument, the en banc panel voted 12-3 to reverse the District Court's grant of summary judgment and remand for further proceedings. Pet. 1a-57a.

A. The 12 judges in the en banc majority recognized that the case was before the Ninth Circuit on "a facial challenge" (Pet. 7a), and that "the California statute does not prevent an employer from using non-state funds to assist, promote, or deter union organizing." Pet. 18a. The majority also disagreed with the dissenters' interpretation of Sections 16645.2 and 16645.7 as restricting the use of funds that employers already have earned:

> The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections

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interpret the new law. The District Court denied the request. Pet. 145a-146a. There are no state court decisions interpreting AB 1889.

> 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services realized under a contract." . . . . [T]he California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given. Our construction of AB 1889 is readily apparent.

Pet. 34a (citations, internal quotation marks, and footnote omitted).

In this regard, the majority pointed out that the section of AB 1889 that addresses state contracts (§16645.4) was not before the Ninth Circuit on appeal, and that the California Attorney General had agreed Sections 16645.2 and 16645.7 would not restrict the use of *profits* employers earn from state grants and programs. Pet. App. 32a-33a n. 20 & 34a n. 22.

The 12 judges in the majority also rejected, as unsupported by the record, the dissenters' conclusion that Sections 16645.2 and 16645.7 impose onerous compliance burdens:

> Despite the absence of any finding by the district court that §16645.2(c) and §16645.7(c) are onerous, the dissent insists that these provisions entail "burdensome and detailed record-keeping," impose "seemingly impossible compliance burdens" and are "daunting." The dissent even suggests that these provisions require "an employer [to] create and maintain two completely separate accounting and payroll systems." The statute, however, does not require "employers to maintain records in any particular form,"

> §16648, and leaves employers free to design their own accounting and payroll systems however they wish, provide only that they have "records sufficient to show that state funds have not been used" to assist, promote or deter union organizing, §16645.2(c), 16645.7(c). Moreover, the only expert testimony in the record on these provisions states that they provide employers "flexibility in establishing proper accounting procedures and controls," impose no burden greater than numerous other common grant restrictions and in fact "appear to be significantly less burdensome than the detailed requirements for federal grant recipients. . . ."

Pet. 4a-5a n.2 (brackets in original).

Based on the posture of the case and the record before the Ninth Circuit, the en banc majority held that the District Court had erred in striking down Sections 16645.2 and 16645.7 on NLRA-preemption grounds.

The majority rejected the claim that the NLRA contains an "affirmative grant of speech rights" to employers. Pet. 24a. The majority pointed out that NLRA Section 8(c) "merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization." Pet. 23a (citation, internal quotation marks omitted).

The majority further concluded that the state provisions do not regulate activities that Congress intended to be unregulated, and therefore do not fall within the class of laws preempted by the NLRA under the doctrine known as *Machinists* preemption. The majority reasoned that "it is implausible that Congress intended the use of [government] funds to

be an area 'unregulated because left to be controlled by the free play of economic forces.'" Pet. 16a-17a (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). The majority observed that "the spending restrictions . . . are modeled precisely on those that Congress has enacted when prohibiting the use of federal funds to assist, promote or deter union organizing." Pet. 17a, 20a.

The majority also concluded that Sections 16645.2 and 16645.7 do not impermissibly intrude on the jurisdiction of the National Labor Relations Board ("Board") so they are not preempted under the doctrine known as *Garmon* preemption, which flows from this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Pet. 22a-30a. The majority reasoned that California had not sought to duplicate the role of the Board by regulating which activities are permissible during union organizing campaigns, but only how the State's own money may be spent. Moreover, because California declines to subsidize *all* employer lobbying about unionization regardless of whether the lobbying activities are permissible or impermissible under the NLRA, state enforcement proceedings would not involve the same issues that would be before the Board in unfair labor practice or representation proceedings. Pet. 25a-29a.

The en banc majority also reasoned that, "even if there were some risk of overlap," the AB 1889 provisions at issue involve "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. 30a (quoting *Garmon*, 359 U.S. at

243-44). The majority stated: "[T]he state . . . has a responsibility and a right to spend its treasure . . . based on principles and guidelines that its democratically elected legislature deems to be appropriate. . . . [T]he Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme intrudes upon so fundamental a state prerogative." Pet. 31a.

Finally, the en banc majority rejected the dissenters' conclusion that Sections 16645.2 and 16645.7 are invalid on their face because they violate employers' First Amendment rights. The majority relied on this Court's decisions holding that "'a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right.'" Pet. 33a (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983)).

B. The three dissenting judges (Judge Beezer, joined by Judges Kleinfeld and Callahan) would have held that Sections 16645.2 and 16645.7 violate the First Amendment (Pet. 37a-40a) and are preempted by the NLRA (*id.* 40a-57a).

Unlike the majority, the dissenters interpreted Sections 16645.2 and 16645.7 as restricting how businesses spend the profits they earn from dealing with the state. Pet. 36a, 38a-40a. And, unlike the majority (and despite the specific record evidence to the contrary in this summary judgment case), the dissenters believed that Sections 16645.2 and 16645.7 impose "significant compliance burdens." Pet. 45a-47a. Thus, unlike the majority, the dissenters treated the state provisions as "impel[ling] employers themselves to take a position of neutrality with respect to labor relations, in direct conflict

with employers' rights under the First Amendment." Pet. 37a.

SUMMARY OF ARGUMENT

California's AB 1889 leaves employers that receive state grant and program funds free to lobby their employees about whether to unionize. Like several similar federal statutes, AB 1889 merely precludes employers from using government funds to pay for the costs of that activity.

That being so, AB 1889 reflects California's legitimate interest in government neutrality—not impermissible hostility to the NLRA or to employer speech. This Court's precedents establish a fundamental distinction between the government prohibiting or penalizing private activity and the government declining to *subsidize* that activity. Political lobbying, for example, is at the core of the First Amendment, but the government need not subsidize lobbying in the tax code. *See Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983). Likewise, the Court had "little trouble in concluding" that the government's denial of food stamps to the families of striking workers was "rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." *Lyng v. UAW*, 485 U.S. 360, 371-72 (1988). AB 1889 serves a similar "legitimate governmental objective."

Petitioners claim the term "state funds" in AB 1889 is so broad it could cover even the profits they earn from dealing with the government. But the California Legislature declared that the purpose of AB 1889 is to avoid state subsidization of efforts to assist or deter union organizing. The state courts would

interpret AB 1889 in light of that purpose, the similar federal statutes on which AB 1889 is modeled, and the dictates of the First Amendment, so that it applies only to funds in which the State has an interest, not to an employer's own money.

Congress would not have intended the NLRA to preempt AB 1889. Congress' adoption of restrictions on the use of *federal* grant and program funds to "assist, promote, or deter union organizing" shows that the existence of such restrictions is not inconsistent with national labor policy.

As an initial matter, Petitioners are wrong that the NLRA is a source of employer speech rights that AB 1889 could infringe. The NLRA provides statutory rights to "employees"—not their employers. NLRA Section 8(c), by its plain language, simply accommodates the First Amendment by stating that noncoercive employer speech is not "evidence of an unfair labor practice." And, even if NLRA Section 8(c) were viewed as importing the First Amendment into the NLRA, the First Amendment still does not require the government to *subsidize* expressive activities.

AB 1889 also does not fall within the class of laws that are preempted by the NLRA because they regulate in areas Congress intended to be free from all regulation. California, like the federal government, must have rules about how its grant and program funds may be spent.

Nor does AB 1889 fall within the class of laws that are preempted because they interfere with the jurisdiction of the NLRB. The issue in a proceeding to enforce AB 1889 would be whether government funds have been mis-spent, not whether particular employer activities are permissible. There is no overlap with the NLRB's jurisdiction.

This case is not analogous to *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), in which a state legislature sought to debar employers that committed NLRA violations from doing business with the State. The purpose of the law in *Gould* was *punishment* and punishment for violating federal labor law. Here California is not punishing employers; the "refusal to subsidize certain protected conduct . . . . cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). AB 1889 also applies without regard to whether particular employer lobbying activity violates the NLRA.

Even if NLRA preemption doctrines otherwise were implicated, moreover, the Court has recognized that these judicially created doctrines cannot be applied inflexibly to state regulation that addresses deeply rooted local interests. Forcing California to subsidize private ideological activities from its treasury would be a serious intrusion on core state sovereignty.

Although Petitioners' central contention is that California has an obligation to subsidize their lobbying campaigns about unionization, they also argue that AB 1889 is preempted because the statute allegedly imposes onerous compliance burdens that would chill employers from using their own money for that purpose. The record evidence and this Court's precedents refute that argument.

AB 1889 merely requires recipients of state grant or program funds to maintain "records sufficient to show" that "state funds" were not used to assist or deter union organizing, and the statute provides expressly that those records need not be kept "in any particular form." The record evidence includes expert testimony that compliance with AB 1889 would *not*

be burdensome, and on an appeal from a grant of summary judgment the disputed facts must be resolved against Petitioners. This Court also has rejected claims that much more burdensome requirements for protecting against the misuse of government subsidies impermissibly chill the free speech rights of the recipients of those subsidies.

ARGUMENT

I. AB 1889 FURTHERS A LEGITIMATE STATE INTEREST IN AVOIDING GOVERNMENT SUBSIDIES OF PRIVATE LOBBYING ACTIVITY.

A. The Government's Decision Not to Subsidize Activities Does Not Reflect Impermissible Hostility to Those Activities.

Petitioners erroneously urge that California's declared motive for adopting AB 1889 renders the statute preempted on its face. According to Petitioners, California, unlike the NLRA, views all employer efforts to lobby employees about union organizing as interference with employee rights. *E.g.*, Pet. Br. 14, 30, 38, 41-42. But what the full preamble to AB 1889 declares is that "[i]t is the policy *of the state* not to interfere with an employee's choice about whether to join or to be represented by a labor union" and "[f]or this reason, *the state should not subsidize* efforts by an employer to assist, promote or deter union organizing." Cal. Stats. 2000, ch. 872, §1 (emphases added). Moreover, the two provisions of AB 1889 at issue here do not preclude employers from lobbying their employees about unionization. They merely preclude employers from

using *state* grant and program funds to pay the costs of that activity.

This Court's decisions establish a fundamental distinction between the government prohibiting or penalizing private activity and the government merely declining to subsidize that activity. A prohibition on political lobbying would violate core First Amendment rights, but the government can refuse to subsidize lobbying activity in the tax code. *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right. . . ."); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959). The existence of a constitutional right to obtain an abortion does not mean the government must pay for indigent women to obtain abortions, even if the government otherwise pays for their medical care. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). The government cannot infringe the associational rights of striking workers, but it can deny food stamps to families that become eligible because a worker is on strike. *Lyng v. UAW*, 485 U.S. 360, 368-69 (1988) ("[T]he strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right."). In short, a state's decision not to subsidize an activity—like California Government Code Sections 16645.2 and 16645.7—"cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. at 317 n.19.

Petitioners *selectively* quote from the preamble to AB 1889 (*e.g.,* Pet. Br. 30), and then build their entire argument on the misrepresentation that the purpose of the law is to preclude employers from lobbying

their employees about unionization. California's policy is government neutrality—not employer neutrality. *See* Cal. Stats. 2000, ch. 872, §1 ("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. For this reason, *the state should not subsidize* efforts by an employer to assist, promote, or deter union organizing.") (Emphases added). The view that the government would be interfering with free debate by subsidizing the costs of private lobbying or proselytizing activity is neither unusual nor illegitimate.

Congress restricts political lobbying by non-profit organizations that receive tax-deductible contributions not because our elected representatives are hostile to political activity but because Congress does not believe taxpayers should subsidize that activity. *See Regan*, 461 U.S. at 544 ("In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare."). To the same end, a federal statute known as the Byrd Amendment provides broadly that "[n]one of the funds appropriated *by any Act* may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement" to pay for certain lobbying activities. 31 U.S.C. §1352 (emphasis added); *see also* J.A. 288 (OMB requirement that all federal contractors and subcontractors must certify compliance with Byrd Amendment restrictions). Federal regulations also broadly disallow non-profit organizations that have grants, contracts or other agreements with any government agency from allocating the costs of political lobbying to their government grants or contracts, so that taxpayers do not wind up subsidizing this activity. *See* 70 Fed. Reg. 51927, 51938-39

(Aug. 31, 2005) (OMB Circular No. A-122: Cost Principles for Non-Profit Organizations); J.A. 290, 296-97.

Similarly, provisions in the federal Workforce Investment Act, National and Community Services Act, Head Start Programs Act, and Medicare Act that prevent federal money from being used to subsidize employer efforts to lobby their employees about unionization (*see* pp. 1-3, *supra*), are based on a government interest in neutrality—not employer neutrality but *government* neutrality. The AB 1889 provisions at issue are modeled on those federal laws.

Contrary to Petitioners' contention, it is not true that the government's *only* legitimate interest in avoiding subsidization of private speech occurs when the government seeks to advance a contrary viewpoint, as in *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the government sought to promote childbirth over abortion. There also is a separate, legitimate government interest in government neutrality and non-entanglement when it comes to private political and ideological activities. That interest in neutrality was the basis of the law upheld in *Regan*, which did not involve any government "message."

In *Lyng,* this Court referred with approval to the government's "concern about neutrality in labor disputes" and stated that it had "little trouble in concluding that" the government's denial of food stamps to the families of striking workers was "rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." 485 U.S.

at 371-72.[2] AB 1889 furthers a similar "legitimate governmental objective."

B. The Government May Impose Specific Rules About How Its Grant and Program Funds May Be Spent.

Petitioners are wrong that California's interest in not subsidizing efforts to assist or deter union organizing already is completely satisfied "by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses." Pet. Br. 35. That standard requirement leaves open the question whether, when the recipient of government subsidies is an employer, the employer's efforts to assist or deter union organizing by its employees—which can be very costly—are overhead expenses that can be paid for out of the government money.

The need to answer the question whether specific business expenses can be charged to the government as overhead under a government grant or in a government program explains why the federal government has pages of detailed rules on the subject, which cover such minutiae as whether government funds can used to pay for a glass of wine with dinner. *See* 2 C.F.R. Part 230, Appendix B; *see also* Office of

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[2] Indeed, in *Lyng*, this Court accepted as legitimate Congress' concern about the mere public *perception* that government funds were being used "to provide one-sided support for labor strikes," stating that the food-stamps-eligibility restriction "was intended to remove the basis for that perception and criticism." *Id.* at 371. The Court recognized Congress' finding that this perception "has damaged the program's public integrity" (*id.*) and concluded that "we are not authorized to ignore Congress' considered efforts to avoid favoritism in labor disputes." *Id.* at 372.

Management and Budget, Codification of Governmentwide Grant Requirements, www.whitehouse.gov/omb/grants/chart.html (last visited Feb. 3, 2008) (citations to the many provisions of the Code of Federal Regulations that contain rules about the permissible uses of government grant and contract funds).

Contrary to Petitioners' contention, the government cannot control the use of its funds solely by declining to reimburse private parties for certain costs already incurred (*see, e.g.,* Cal. Gov. Code §16645.1 (addressing cost reimbursements)), because there are a variety of circumstances in which the government provides subsidies that are not structured as reimbursements for specific costs already incurred by the recipient. The government may provide money in advance to subsidize the costs of job training, or medical research, or early-childhood education, or delivering legal services. Like the two state provisions here at issue, the federal use-of-funds restrictions on which California Government Code Sections 16645.2. and 16645.7 are modeled (*see* pp. 1-3, *supra*), do not merely address which expenses are "allowable" for later cost-reimbursement purposes. Nor are these federal provisions limited to grants. *See, e.g.,* 42 U.S.C. §12634(b)(1) (restricting use of funds "by program participants").

Petitioners also are wrong in contending that California could avoid subsidizing employers' efforts to lobby employees about union organizing by "generically and neutrally exclud[ing] costs relating to employee relations from programs and grants." Pet. Br. 35. That contention makes no sense at all, because normal "employee relations" costs are necessary overhead costs for recipients of grant and

program funds that have employees. They must run their operations, including by maintaining human resources departments, hiring and firing employees, and engaging in collective bargaining if their employees are unionized. This is reflected in standard *federal* rules for grants and contracts with nonprofit organizations, which allow employers to use government money to pay an appropriate share of the employer's "[c]osts incurred in maintaining satisfactory relations between the organization and its employees" (70 Fed. Reg. at 51938) and of its "[e]mployee morale, health, and welfare costs" (*id.* at 51936). By contrast, lobbying employees about whether to unionize, like political lobbying or religious proselytizing, is a purely optional, ideological activity.

Thus, that the California statute does not bar the use of state grant and program funds to pay the costs of *all* labor relations expenses is *not* inconsistent with the statutory purpose, which is avoiding state subsidies of employer campaigns to assist or deter union organizing, because the State does not wish to subsidize this optional, private lobbying activity.

Petitioners complain that California Government Code Section 16647 provides explicit clarification that the costs of certain labor relations activities are not covered by AB 1889, but none of those activities involve lobbying employees about unionization, so they would not be covered in any event.

"Addressing a grievance [and] negotiating [and] administering a collective bargaining agreement" (§16647(a)) are necessary activities for employers that already have union-represented employees. They do not involve lobbying employees about whether to unionize in the first place. Similarly,

"[a]llowing a labor organization or its representatives access to the employer's facilities or property" (§16647(b)) may be required by law or by a collective bargaining agreement or may otherwise be an ordinary expense in a unionized workforce.[3] Nothing in AB 1889 *requires* employers to allow such access to pro-union or anti-union advocates. And, if the employer goes beyond merely providing access and instead pays its employees to attend mandatory meetings to hear pro-union or anti-union speeches, that expenditure *would* be covered by AB 1889's restrictions on the use of state grant and program funds for persuader activities.

Nor does "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization" (§16647(d)) involve any lobbying activity. Under the NLRA, employers are free to decide whether to recognize a union voluntarily under procedures agreed upon with the union, such as on the basis of a card check, or to await the outcome of an election conducted by the National Labor Relations Board. *See* NLRA §9(c)(1)(A), 29 U.S.C. §159(c)(1)(A) (representation election only necessary when the "employer declines to recognize" the union); *ILGWU v. NLRB,* 366 U.S. 731, 739-40 (1961) (employer can recognize union without an election if authorization cards show union represents majority of workforce). Which path to choose is the employer's

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[3] *See, e.g., Sam Andrews' Sons v. Agricultural Labor Relations Bd.*, 47 Cal.3d 157, 173-81, 763 P.2d 881, 892-97 (1988) (agricultural employers required by California law to provide unions reasonable access to employees on company property); *Eby-Brown Co.*, 328 NLRB 496, 548 (1999) (access of employees' union representative to company premises is a mandatory subject of collective bargaining under the NLRA).

option; neither choice involves lobbying employees about whether to unionize; and AB 1889 treats the costs of both activities identically. If the employer lobbies its employees to sign authorization cards, by contrast, that persuader activity would be covered by AB 1889.[4]

The sum of the matter is that California, like the federal government, must have rules about how its grant money and program funds may be spent by recipients, including rules about whether government money can be used to pay the costs of lobbying employees about whether to support unions. There is no limiting principle to Petitioners' argument to the contrary. By Petitioners' logic, if a state permitted its grant or program funds to be used for ordinary and

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[4] To the extent Petitioners are complaining that AB 1889 does not apply to unions (except in their role as employers), that complaint is of no moment because Petitioners made no showing that unions receive state grant or program funds that they are using (or could use) to promote unionization. In *Lyng,* the statute permissibly prohibited only families of striking workers from receiving food stamps because there was no indication that *employers'* families were becoming eligible for food stamps because of strikes or lock outs. Congress did not discriminate by not expressly excluding them.

Moreover it is not true that employers invariably oppose unionization. Some employers incur costs to "assist" or "promote" union organizing, particularly where the rest of the employer's workforce already is unionized or the employer has a preference between competing labor organizations. *See, e.g.*, *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1003 (1994); *Schlabach Coal Co. v. NLRB*, 611 F.2d 1161, 1161 (6th Cir. 1979); *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1159 (D.C. Cir. 1978); *Rochester Mfg. Co.*, 323 NLRB 260, 261-64 (1997), *aff'd sub nom.*, *Cecil v. NLRB*, 194 F.3d 1311 (6th Cir. 1999) (table), *cert. denied*, 529 U.S. 1066 (2000).

necessary employee relations expenses, employers could use unlimited amounts of that government money to assist or deter union organizing.

C. The State Statute Applies to Funds in Which the State has an Interest.

Petitioners and their *amici* fight a strawman in arguing that California seeks to control the use of funds private employers already have "earned." The 12-judge majority on the Ninth Circuit already rejected that interpretation of Sections 16645.2 and 16645.7. Pet. 1a-2a, 32a-33a n. 20, 34a & n.22. There is no reason to believe the state courts will construe the statute differently: The AB 1889 provisions at issue are addressed solely to the use of "state funds;" the California Legislature's declared purpose in adopting the law was to avoid having the state "*subsidize*" the costs of assisting or deterring union organizing; and the state law was modeled on existing federal legislation. The California courts also construe statutes to avoid potential constitutional problems. *See Dyna-Med, Inc. v. Fair Empl. & Housing Comm'n*, 43 Cal.3d 1379, 1387, 743 P.2d 1323, 1327 (1987); *San Francisco Unified School Dist. v. Johnson*, 3 Cal.3d 937, 948, 479 P.2d 669, 675 (1971).

The record does not contain details about the specific state grants awarded to Petitioners and their members, but Petitioners do not dispute that there is a "standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses." Pet. Br. 35. Section 16645.2, in providing that the "[t]he recipient of a grant of state funds . . . shall not use *the funds* to assist, promote, or deter union organizing" (emphasis

added), simply makes clear that lobbying employees about unionization is not one of the "grant-related purposes and expenses" for which the State's grant money may be used. We are not aware of grants made by the State of California that permit the recipient to earn a profit from the grant money, but the Attorney General acknowledged in the lower courts that AB 1889's restriction would not apply to such profits. Pet. 32a-33a n. 20.

Similarly, the record does not contain details about how the restriction in Section 16645.7 applies to particular "state program[s]," but it is unlikely the term "state program" is intended to refer to the one-time purchase of widgets on the open market. (A separate provision of AB 1889, not at issue in this appeal, addresses state "contracts." *See* Cal. Gov. Code §16645.4). Rather, a state "program" would involve ongoing efforts by the state government to subsidize the costs of providing services (*e.g.*, health care, job training, education) to a segment of the population.

Some Petitioners (and/or their members), for example, receive funds from a state program set up by California to subsidize the costs of employee job skills training, which is administered by a state agency, the Employment Training Panel. D.Ct. Doc. No. 11 (Kronland Decl. Opp. Pl. Mot. Summ. J.), Ex. 4 (Dahlman Depo.) at 41:17-42:11; *id*., Ex. 9 (Rothrock Depo.), at 19:11-19; D.Ct. Doc. No. 40 (Stewart Decl. Supp. Pl. Mot. Summ. J.) ¶3; Cal. Unempl. Ins. Code §§10200-10217 (statutes establishing the program); 22 Cal. Code Regs. §§4400-4450 (implementing regulations). This program, which supplements programs funded by the federal Workforce Investment Act, has "provided over $1 billion to train more than

660,000 workers in over 60,000 California companies." Cal. Employment Training Panel, Program Overview, available at www.etp.cahwnet.gov/program.cfm (last visited Feb. 4, 2008). The purpose of this state program is to provide skills training to California workers "to promote a healthy labor market in a growing, competitive economy." Cal. Unempl. Ins. Code §10200.

This program does not contemplate that employer participants will earn a *profit* from the State's training subsidies; to the contrary, the Employment Training Panel is required to "establish requirements for in-kind contributions by either the contractor or the employer that reflect a substantial commitment on the part of the contractor or the employer to the value of the training." Cal. Unempl. Ins. Code §10206(b). Just as this Court acknowledged Congress' concern in *Lyng* that the perception the food stamp program was being used to subsidize striking workers "ha[d] damaged the program's public integrity" (485 U.S. at 371), so would public support for this worthy state training program be undermined if employers could use state training money to subsidize the substantial costs of assisting or deterring union organizing. Congress reached the same conclusion in adding a restriction on the use of funds under the similar federal Workforce Investment Act. *See* 29 U.S.C. §2931(b)(7).

Some of the Petitioners (and/or their members) also receive money from California's Medi-Cal program, which is intended to pay for health care for the indigent. *See, e.g.,* J.A.130, 156, 161, 166. The Medi-Cal funding scheme is complicated and functions differently for different types of heath care providers. For example, California makes interim payments to

some hospitals to help them meet cash flow during the fiscal year, then reaches a final settlement with them after the fiscal year has concluded. *See* 22 Cal. Code Regs. §51536 *et seq.*; *Redding Medical Center v. Bonta*, 75 Cal.App.4th 478, 480, 89 Cal.Rptr.2d 348, 349 (1999).[5] In light of the declared anti-subsidization purpose of AB 1889, the term "state funds" in Section 16645.7 would cover Medi-Cal funds in which the State retains an interest (such as the interim payments) but not profits once they have been "earned" by the recipient. *See* Pet. 32a-33a n.20 (noting the Attorney General's agreement that even a company "that receives 100% of its revenues from the state" could pay out a legitimate dividend, which would not constitute "state funds."). As *amicus curiae* American Hospital Association acknowledges, however, "the state reimburses hospitals less than their costs for providing care to Medi-Cal patients" (Amer. Hosp. Assn. Br. 4, 15, 17), so there may not be any profits from the Medi-Cal program.

In predicting how the state courts would apply AB 1889's restrictions to specific state funding streams,

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[5] Petitioners' Complaint alleged that AB 1889 could not be applied at all to Medi-Cal funds because this would violate the federal Medicaid Act. J.A. 125-26. The District Court did not reach that issue. Pet. 149a n. 8.

While this case was on appeal, California substantially revised the Medi-Cal funding scheme for subsidizing long-term care, which is the portion of the Medi-Cal program in which the individual Petitioners appear to have participated. Under the Medi-Cal Long Term Reimbursement Act, the State now uses a facility-specific, cost-based reimbursement methodology for long-term care providers. *See* Cal. Stats. 2003, ch. 875, §5 (adopting Cal. Welfare & Institutions Code §14126 *et seq.*).

it bears emphasis that Congress' restrictions on the use of federal money are, on their face, just as broad as AB 1889. The Byrd Amendment provides that "[n]one of the *funds appropriated by any Act* may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement" to pay a lobbyist in connection with certain federal actions. 31 U.S.C. §1352 (emphasis added). The Byrd Amendment also requires a written certification similar to the certification required by AB 1889. *Compare* 31 U.S.C. §1352 ("(1) Each person who requests or receives a Federal contract, grant, loan, or cooperative agreement from an agency . . . shall file . . . . (2) . . . (B) a certification that the person . . . has not made, and will not make, any payment prohibited by [the Byrd Amendment]") *with* Cal. Gov. Code §16645.2(c) ("the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing").

Yet the Byrd Amendment, like other broad federal restrictions on the use of government money, has been given a reasonable interpretation, consistent with accepted accounting practices and the First Amendment. For example, the Office of Management and Budget interprets the term "appropriated funds" in the Byrd Amendment to exclude profits and fees earned from dealing with the government. *See* 55 Fed. Reg. 24540, 24542 (June 15, 1990) (Office of Management and Budget, Governmentwide Guidance for New Restrictions on Lobbying) ("Profits and fees earned under Federal contracts . . . are not considered appropriated funds. Profits, and fees that constitute profits, earned under Federal grants, loans, and cooperative agreements are not considered appropriated funds."). AB 1889 is modeled on federal statutes, so the California courts are likely to give AB

1889 a similar interpretation. In any event, and as the Ninth Circuit recognized, how AB 1889 applies to specific funding streams is beyond the scope of Petitioners' facial challenge.

D. The State Does Not Have an Obligation to Subsidize the Activities of Organizations That Voluntarily Choose to Subsist on State Money.

Although Sections 16645.2 and 16645.7 deal only with the use of state funds, Petitioners contend that, for the subset of employers that receive *all their revenues* from the State, the provisions "operate[] as a total ban on federally-protected speech, no different than an outright prohibition." Pet. Br. 43. That is not correct. California does not preclude even those organizations that voluntarily choose to subsist entirely on state grant or program funds from assisting or deterring union organizing. Those organizations are free to use their profits, or any other non-state monies they may have, to pay the costs of lobbying employees about whether to unionize. An organization that voluntarily chooses to subsist entirely on state grants that include no profit component, however, is no more entitled to an additional government grant to pay for an anti-union campaign than it is entitled to receive a private grant for that purpose.

This Court rejected a similar "necessity" argument in holding that the States can decide not to subsidize the costs of abortions even if they subsidize other health care expenses for the indigent. *Maher v. Roe*, 432 U.S. at 474 ("[T]he indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.");

see also Lyng, 485 U.S. at 369 ("[E]ven where the Constitution prohibits coercive governmental interference with specific individual rights, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.") (citations, individual quotation marks omitted).

Likewise, hospitals that claim to be losing money on every Medi-Cal patient they treat (Amer. Hosp. Assn. Br. 4, 17), have no real cause for complaint if they decide to treat only Medi-Cal patients and cannot use their non-existent Medi-Cal profits to assist or deter union organizing. If Medi-Cal pays hospitals "only 83 cents for every dollar of care provided" (*id*.), then the hospitals must necessarily have other, non-Medi-Cal sources of funds. Those funds could be used to assist or deter union organizing.

II. CONGRESS DID NOT INTEND THE NLRA TO FORCE THE STATES TO SUBSIDIZE EMPLOYERS' EFFORTS TO ASSIST OR DETER UNION ORGANIZING.

The "purpose of Congress is the ultimate touchstone" of preemption analysis, *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), and "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) ("We are reluctant to infer preemption."). The NLRA contains no express provision preempting state and local laws, so Congress' intent regarding preemption must be gleaned from the structure and objectives of the NLRA. We now turn to that inquiry

and demonstrate that Sections 16645.2 and 16645.7 should not be held preempted.

A. NLRA Section 8(c) Does Not Create Affirmative Employer Speech Rights That Preempt State Laws.

As an initial matter, Petitioners and their *amici* get matters backwards in claiming that the NLRA "protects and encourages noncoercive *employer* speech about union organizing." Pet. Br. 14 (emphasis added). The NLRA protects employees, not employers. To the extent employers have speech rights, those rights stem from the First Amendment, and the NLRA merely accommodates them.

1. Congress adopted the NLRA in 1935 not to "protect[] and encourage[]" employers but because interstate commerce was imperilled by "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining." 49 Stat. 449, 449 (1935). The NLRA provides "employees" with federal statutory rights "to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives *of their own choosing*." 29 U.S.C. §157 (emphasis added). To secure those employee rights, Congress made it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. §157]." 29 U.S.C. §158(a)(1).

Nothing in the NLRA created employer rights that parallel the employee rights set out in NLRA Section 7. Congress also did not seek in the NLRA to provide companies with a special role in the selection of their employees' representatives, any more than Congress

sought to provide employees with a role in selecting company managers. Rather, by adopting the NLRA, Congress sought to protect employees' right to select representatives "of their own choosing" against interference *from their employers*.

After the NLRA was adopted, the National Labor Relations Board initially took the view that because the NLRA grants employees the right to choose "their bargaining representative free from employer interference," the NLRA imposes a "correlative" duty on the employer to "maintain complete neutrality with respect to an election." *American Tube Bending Co.*, 44 NLRB 121, 129 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943). This Court initially appeared to express sympathy with the Board's reasoning that *any* employer participation in union organizing campaigns is inherently coercive and upheld a Board requirement that employers remain neutral toward competing unions, stating that even "[s]light suggestions" of employer preference have "a telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 88 (1940).

This Court subsequently concluded, in *NLRB v. Virginia Electric and Power Co.*, 314 U.S. 469 (1941), and *Thomas v. Collins*, 323 U.S. 516 (1945), that the First Amendment precludes the government from punishing employers for seeking to persuade their employees about unionization, so long as the employers' actions are not coercive:

> [E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . When to this persuasion other things are added which

> bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired.

Thomas v. Collins, 323 U.S. at 537-38 (citations and footnotes omitted).

When Congress amended the NLRA in 1947 by adopting the Taft-Hartley Act, Congress conformed the NLRA with this Court's recent First Amendment decisions by adding NLRA Section 8(c), 29 U.S.C. §158(c). Section 8(c) does not create new rights. Instead, it modifies the provisions of the NLRA that create unfair labor practice liability by stating that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, *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) (emphasis added).

The congressional proponents of Section 8(c) cited *Thomas v. Collins* to show that the provision would merely confirm a pre-existing First Amendment right. S.Rep. No. 80-105, at 23 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 407, 429 (1948) (hereinafter "LMRA History"). Senator Taft told his fellow senators that Section 8(c) "in effect carries out approximately the present rule laid down by the Supreme Court of the United States." 93 Cong. Rec. S3953 (daily ed. April 23, 1947), reprinted in 2 LMRA History at 1011. Not surprisingly, then, this Court characterized Section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), as "merely implement[ing] the First Amendment."

A year after adoption of the Taft-Hartley Act, the Board itself interpreted Section 8(c) as just an evidentiary rule applicable to unfair labor practice proceedings, not a generally applicable rule that forbids regulation of employer speech. The Board held that it would overturn and re-run a union representation election if the employer's efforts to persuade its employees about unionization, although not including "threat[s]" or "promise[s]" (NLRA §8(c)), nonetheless interfere with the laboratory conditions necessary for employee free choice. *General Shoe Corp.*, 77 NLRB 124, 127 n.10 (1948) ("It should be noted that Congress only applied the new Section 8(c) to unfair labor practice cases. Matters which are not available to prove a violation of law, and therefore to impose a penalty upon a respondent, may still be pertinent, if extreme enough, in determining whether an election satisfies the Board's own administrative standards.").[6]

If NLRA Section 8(c) had created a type of generally applicable employer speech "right," then the Board could not have rules restricting activities that unquestionably fall within Section 8(c). But the Board's conclusion that NLRA Section 8(c) is just an evidentiary rule about unfair labor practice liability—and nothing more—is compelled by the

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[6] *See also Fiber Indus., Inc.*, 267 NLRB 840, 841 n.4 (1983) ("[I]t is well settled that Sec. 8(c) applies only to unfair labor practice proceedings"); *Borden Mfg. Co.*, 193 NLRB 1028, 1034 (1971) (rejecting employers' arguments that their speeches to employees "were protected by Section 8(c) of the Act," and holding that "Section 8(c) is not applicable to representation cases."); *see also Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 n.11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases.").

plain language of the provision. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Even if the plain language were not so clear, the Board's contemporaneous and consistent interpretation of Section 8(c) in formal decisions still would be entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).[7]

The NLRA, in short, does not "protect and encourage" *employer* speech. To the contrary, the Act protects and encourages "employees" in exercising their right to select representatives "of their own choosing," and the Act accomplishes this by regulating employer activities that interfere with this employee right. *See UAW-Labor & Employment & Training Corp. v. Chao,* 325 F.3d 360, 364-65 (D.C. Cir. 2003) ("[T]he activities described in §8(c) . . . are not 'protected *by*' the NLRA, except from the NLRA itself.") (emphasis in original).

2. In any event, even if NLRA Section 8(c)—which "merely implements the First Amendment" (*Gissel,* 395 U.S. at 617) by placing some limits on unfair labor practice liability—were viewed as a type of mini-First Amendment that accords certain employer speech about unionization the same protections from

[7] By contrast, the arguments set out in the United States' *amicus* brief are not entitled to deference. Congress entrusted the courts, not an agency, with the task of determining which state laws Congress intended the NLRA to preempt. The arguments in the *amicus* brief pertaining to labor preemption also are just a litigation position.

all government interference that the First Amendment provides for core political speech, the distinction between penalizing expressive activities and refusing to subsidize them is a well-established First Amendment distinction. *See Rust v. Sullivan,* 500 U.S. at 192-93, 196-97, 201-02; *Regan v. Taxation With Representation*, 461 U.S. at 545-46, 549-50; *Cammarano v. United States*, 358 U.S. at 512-13.

Petitioners assert that there is no difference between prohibiting the use of *state* funds to assist or deter union organizing and "*denying* funds to organizations that engage in that speech," except that one government action may be "less draconian" than the other. Pet. Br. 41 (emphasis in original). But the distinction between regulating the use of government money and precluding the recipients of government funds from engaging in protected activities with private money is precisely the fundamental distinction this Court has drawn. *See Rust v. Sullivan*, 500 U.S. at 196-197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the government has placed a condition on the recipient of the subsidy, rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."); *see also Harris v. McCrae*, 448 U.S. at 317 n.19. The distinction makes sense because, when the government acts solely to restrict the use of its subsidies, the scope of the restriction is co-extensive with the government's legitimate interests.

Thus, even if Congress had in fact intended Section 8(c) as a type of mini-First Amendment for employer lobbying efforts to assist or deter union organizing, that would not establish that Congress intended the

NLRA to require the States to *subsidize* such efforts when the First Amendment does not require government subsidies for even the most valuable political speech.[8] There still would be no explicit or implicit conflict between NLRA Section 8(c) and the California Government Code sections at issue, so NLRA Section 8(c) simply will not bear the weight that Petitioners and their *amici* place upon it.

B. AB 1889 Does Not Regulate Activities Congress Intended to Remain Unregulated.

The AB 1889 sections at issue also cannot be squeezed into the class of laws that are preempted by the NLRA under the so-called *Machinists* preemption doctrine. Under that doctrine, the States are foreclosed from regulating the use of "economic weapons" during labor disputes that Congress intended to remain wholly unregulated and, therefore, "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 147.

As a threshold matter, and by itself dispositive, "[t]he *Machinists* rule creates a free zone from which all regulation, whether federal or State, is excluded." *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 111 (1989) (citation, internal quotation marks omitted). Congress could not have intended *the per-*

[8] We note that in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), which (unlike this case) involved direct state regulation of speech during union organizing campaigns, the Court held that the NLRA does not preempt state-law defamation actions if, and only if, the plaintiff proves actual malice. The Court thereby extended to labor speech "by analogy" the same protections the First Amendment provides for speech about public officials (*id.* at 65), not *greater* protections.

missible uses of government funds—which is the issue that Sections 16645.2 and 16645.7 address—to be a "free zone from which all regulation . . . is excluded."

California and other states, like the federal government, must have rules about how government money may and may not be spent by recipients. Those rules must include some regulation of whether, for example, a company receiving a government grant to conduct medical research may use some of that grant money to pay for the costs of lobbying the laboratory employees about whether to unionize. Such rules regulate the use of government money, not the underlying activities. *See Regan*, 461 U.S. at 546 ("Congress has not . . . regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying."). Under Petitioners' theory, even the exclusion of persuader expenses from the category of reimbursable costs would be preempted under *Machinists*.

Equally to the point, *Machinists* preemption cases all concern attempts by state and local governments or the NLRB to regulate the use of "economic weapons" (*e.g.,* strikes, lockouts, picketing) by unions and employers. Such efforts are impermissible if the NLRA shows that Congress intended the "conduct . . . to remain a part of the self-help remedies left to the combatants in labor disputes." *Belknap, Inc. v. Hale,* 463 U.S. 491, 499 (1983).[9] Employer efforts to lobby

[9] *See, e.g., Machinists*, 427 U.S. at 135-36, 155 (state precluded from regulating union's concerted refusal to work overtime during collective bargaining negotiations); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 479, 490, 497, 500 (1960) (NLRB precluded from finding that union committed unfair labor practice by engaging in on-the-job slow-down and sit-in activities); *Chamber of Commerce v. Reich*, 74 F.3d 1322,

employees about whether to unionize are not an "economic weapon" in the sense used in the *Machinists* cases. *Cf. Chao*, 325 F.3d at 363 ("No claim is made that the posting of employees' *Beck* rights represents an economic weapon—certainly not one covered by *Machinists* preemption").

Machinists preemption also is a species of field preemption that "creates a free zone from which *all regulation*, whether federal or State, is excluded." *Golden State*, 493 U.S. at 111 (emphasis added). But employer efforts to assist or deter union organizing *are* regulated by the NLRB. As part of the NLRB's responsibility to supervise union representation elections, the Board *does* regulate employer lobbying efforts that, even if they do not involve a "threat of reprisal or force or promise of benefit," (NLRA §8(c)), still "destroy[] the laboratory conditions in which the Board must hold its elections and prevent[] the employees' expression of a free choice." *Dal-Tex Optical Co.,* 137 NLRB 1782, 1787 (1962); *see also General Shoe Corp.*, 77 NLRB at 127.

The Board will overturn the results of representation elections if the employer violates the Board's many rules that regulate speech that would be "protected" from unfair labor practice liability by NLRA §8(c). *See, e.g.*, *Peerless Plywood Co.*, 107 NLRB 427, 428-30 (1953) ("[W]e now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions

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1334, 1339 (D.C. Cir. 1996) (federal government's executive branch could not penalize employers for hiring permanent replacements during strikes); *Cannon v. Edgar*, 33 F.3d 880, 885-86 (7th Cir. 1994) (state could not require union and employer to negotiate to establish pool of replacement workers to be used during labor disputes).

alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed."); *Peoria Plastic Co.*, 117 NLRB 545, 546-48 (1957) ("[W]e have . . . consistently condemned the technique of calling all or a majority of the employees in the unit into the employer's office individually or calling upon them at their homes to urge them to reject a union as their bargaining representative as conduct calculated to interfere with the free choice of a bargaining representative *regardless of whether or not the employer's actual remarks were coercive in character*") (emphasis added); *Rosewood Mfg. Co.*, 263 NLRB 420, 420 (1982) (setting aside election because employers' campaign "linking the selection of the union with unprofitability, low productivity, subsequent plant closure, and loss of jobs" interfered with employee free choice—regardless of whether the employers' campaign "was . . . protected [from unfair labor practice liability] by Section 8(c) of the Act").

All that being so, AB 1889 does not implicate the *Machinists* doctrine.

C. AB 1889 Does Not Interfere with the Jurisdiction of the NLRB.

The AB 1889 provisions at issue also do not fall within the class of laws that are preempted under the *Garmon* doctrine, which precludes state and local regulation of activities that are "protected by §7 of the [NLRA] or constitute an unfair labor practice under §8 [of the NLRA]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). "The

Garmon rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (internal quotation marks omitted).

There is no serious argument that Sections 16645.2 and 16645.7 regulate activities "protected by §7" of the NLRA (*Garmon*, 359 U.S. at 244), because NLRA Section 7 provides rights to "employees"—not employers. *See* pp. 31-35, *supra*.

Nor do Sections 16645.2 and 16645.7 regulate activities that "constitute an unfair labor practice under §8" of the NLRA. Sections 16645.2 and 16645.7 regulate the use of government money, not labor relations activities. As in *Regan*, in which the Court recognized that "Congress has not . . . regulated any First Amendment activity[; it] has simply chosen not to pay for . . . lobbying" (461 U.S. at 546), California is not regulating NLRA activity; it has simply chosen not to pay with its state grant and program funds for Petitioners to lobby their employees about unionization.

California's regulation of the permissible uses of state money also does not involve the State drawing a different line than the Board between permissible and impermissible persuader activities. Sections 16645.2 and 16645.7 prohibit the use of state grant and program funds to pay for activities to assist or deter union organizing regardless of the form those activities take, so an enforcement proceeding under AB 1889 would not require the state courts to resolve any issues that Congress delegated to the NLRB for resolution.

The United States, as *amicus curiae*, asserts that because AB 1889's application to employers' non-coercive speech is preempted under the *Machinists* doctrine, the state courts enforcing AB 1889 would have to decide whether employer speech is coercive, and that this inquiry would intrude on the jurisdiction of the NLRB. U.S. Br. at 25-26. But we already have demonstrated that the AB 1889 provisions at issue are *not* preempted under the *Machinists* doctrine, so this entirely bootstrapped argument for *Garmon* preemption collapses as well.

This case also is not analogous to *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), in which a state legislature sought to punish employers for violating the NLRA by debarring employers that committed NLRA unfair labor practices from doing business with the State. No one disputed that the purpose of the law at issue in *Gould* was *punishment* and that the punishment was for violating federal labor law. *See* 475 U.S. at 287 ("the debarment statute serves plainly as a means of enforcing the NLRA" and "[n]o other purpose could credibly be ascribed").

The Court held that the States are precluded from creating a "supplemental sanction for violations of the NLRA" (*id.* at 288), even through the exercise of their spending power, because this interferes with the enforcement role Congress vested in the Board. *Cf. Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373-74, 376 (2000) (Massachusetts law that "impos[ed] a . . . state system of economic pressure against the Burmese political regime" by barring state agencies from purchasing from companies that conduct business in Burma, was preempted by federal sanctions law).

In this case, California has not sought to *punish* employers that assist or deter union organizing. California has merely declined to subsidize that activity. As this Court has held in many other cases, a "refusal to subsidize certain protected conduct . . . . cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. at 317 n.19. Sections 16645.2 and 16645.7 are not a supplemental "means of enforcing the NLRA" (*Gould*, 475 U.S. at 287), since the use-of-funds restriction is not dependent on whether the activity violates the NLRA. Nor are Sections 16645.2 and 16645.7 a means of enforcing a state-law regulation of permissible conduct during union organizing campaigns, since the use-of-funds restriction is not dependent on what form employer lobbying activity takes.

D. Congress Would Not Have Intended to Intrude on the States' Sovereign Authority to Control the Use of Their Own Funds.

Finally, even if NLRA preemption doctrines otherwise were implicated, the Court has recognized that these doctrines are judicially created and should not be applied inflexibly when state regulation involves "interests . . . deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244. Under such circumstances, the courts should not, "in the absence of compelling congressional direction, . . . infer that Congress ha[s] deprived the States of the power to act." *Id.*; *see also Belknap,* 463 U.S. at 498.

As the Ninth Circuit recognized, "a state's control of its purse strings is of at least as great a concern to the state as its power to regulate defamatory speech, violence, trespass, obstruction of access to property or

the intentional infliction of emotional distress" – all areas in which the Court has recognized that NLRA preemption principles cannot be applied inflexibly. Pet. 31a & n.19. The "vital field of financial administration," *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1947), is unquestionably within a state's proper sphere of authority when state funds are involved, and "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997); *see also Alden v. Maine,* 527 U.S. 706, 750-51 (1999) ("[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process" and "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State"). Forcing a state to *subsidize*, against its will, private political and ideological activities, is an intrusion on core state sovereignty.

Congress' adoption of restrictions on the use of *federal* grant and program funds to "assist, promote, or deter union organizing" shows that Congress did not believe that government subsidies are necessary for the NLRA to operate successfully. Petitioners criticize the Ninth Circuit for observing that "'[t]he fact that Congress itself has . . . imposed the same type of restriction . . . as a state seeks to impose . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies.'" Pet. 21a (quoting *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality opinion)). Petitioners point out, correctly, that these federal funding restrictions do not "implicitly repeal[] . . . the NLRA." Pet. Br. 40 n. 7. But there is no provision of the NLRA to

"implicitly repeal" because the NLRA itself says nothing about the preemption of state laws.

Rather, at least in the absence of an explicit conflict between a provision of the NLRA and a provision of state law, NLRA preemption doctrines must be based on judicial inferences about Congress' intent. Congress' own adoption of restrictions on the use of federal funds that are similar to AB 1889's restriction on the use of state funds makes it impossible to conclude that there is a "compelling congressional direction" to "infer that Congress ha[s] deprived the States of the power to act." *Garmon*, 359 U.S. at 244; *cf. Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intentions clear and manifest if it intends to pre-empt the historic powers of the States.") (internal quotation marks omitted).

III. THE RECORD AND THIS COURT'S CASES DO NOT SUPPORT PETITIONERS' ARGUMENTS ABOUT THE ALLEGED BURDENS AND CHILLING EFFECTS OF AB 1889.

A. Petitioners' central contention is that California can never, under any circumstances, preclude private employers from using state grant or program funds to assist or deter union organizing (at least not if those state grant or program funds can be used to pay ordinary employee-relations expenses). But Petitioners also appear to contend that, even if the core use-of-funds restrictions in Sections 16645.2(a) and 16645.7(a) are not by themselves preempted by the NLRA, these provisions still must be invalidated

because AB 1889's accounting requirements impermissibly chill employer speech.[10]

Whether compliance with AB 1889 would be too onerous, as Petitioners claim, is initially a factual question about the extent of those compliance burdens. And the record requires rejection of Petitioners' argument.

When Petitioners moved for summary judgment, they submitted a list of the material facts they asserted to be unopposed, none of which concerned accounting burdens. J.A. 337-47. Petitioners did proffer declarations in which their members stated in conclusory fashion that AB 1889 would impose onerous compliance burdens. *E.g.*, J.A. 135-36, 158-59, 163, 166-68. But Respondents properly objected to those declarations because they lacked foundation. D.Ct. Doc. No. 104 (Defendant's Objections to Evidence) ¶¶ 6, 8, 9, 12); D.Ct. Doc. No. 112 (Intervenors' Objections to Evidence) ¶¶ 9, 11, 19, 20, 23-26. Respondents also submitted expert testimony

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[10] Even if AB 1889's enforcement provisions did bring the measure into conflict with the NLRA, the proper remedy would be to sever the offending provision, not to strike down the entire statute. AB 1889's provisions are contained in separate sections of the statute, and the statute includes a very strong severability provision, Cal. Gov. Code §16649. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) ("In a pre-emption case such as this, the state law is displaced only to the extent that it actually conflicts with federal law") (internal quotation marks omitted). Petitioners have never sought such relief with respect to AB 1889's enforcement provisions. *Cf. Regan,* 461 U.S. at 544 n.6 ("We also note that TWR did not bring this suit because it was unable to operate with the dual structure and seeks a less stringent set of bookkeeping requirements. Rather, TWR seeks to force Congress to subsidize its lobbying activity.").

that AB 1889's "accounting and recordkeeping requirements . . . are similar to requirements imposed in other contexts," are "significantly less burdensome than the detailed requirements for federal grant recipients," and allow "flexibility in establishing proper accounting procedures and controls." J.A. 280-83. The trial court received no additional evidence on this issue before granting summary judgment to Petitioners, and the trial court did not address the alleged compliance burdens in its summary judgment decision. *See* Pet. 140a-149a.

On an appeal from an order granting summary judgment, all disputed facts must be resolved in favor of the non-moving party. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The Ninth Circuit therefore correctly dismissed Petitioners' arguments about accounting burdens as in direct conflict with the record on appeal. Pet. 4a-5a n.2.

B. Petitioners' complaints about onerous accounting burdens are also implausible. The state law does not require employers to file special reports or keep special financial records. All it requires is that "state funds" not be "commingled" with other funds (Cal. Gov. Code §16646(b)), and that the recipients of state grant and program funds "maintain records sufficient to show" that state funds were not used to "assist, promote, or deter" union organizing (§16645.2(c); §16645.7(c)). The state law provides expressly that it does not "require[] employers to maintain records in any particular form." §16648.[11]

[11] AB 1889's definition of which expenses count as lobbying expenses appears to have been borrowed from the Internal Revenue Code. *Compare* Cal. Gov. Code §16646 ("[A]ny expense . . . incurred for research of, or preparation, planning, or

By contrast, in *Regan,* a non-profit organization that wished to engage in First Amendment-protected lobbying activity was required to set up an entirely separate organization for that purpose. This Court rejected the argument that this requirement was so onerous as to chill protected activity: "[T]he two groups [must] be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. *This is not unduly burdensome.*" *Regan*, 461 U.S. at 544 n. 6 (emphasis added). Likewise, in *Rust v. Sullivan*, recipients of federal funds that wished to counsel patients regarding abortion were required to establish separate entities that are "physically and financially separate" from other activities; "[m]ere bookkeeping separation of [federal funds] from other monies is not sufficient." *Rust*, 500 U.S. at 180. In this case, the creation of separate entities is not required to comply with AB 1889.

Petitioners say that this Court has "sometimes invalidated" accounting requirements as an impermissible burden on protected speech (Pet. Br. 45), but this Court has *never* concluded that it is too burdensome for recipients of government subsidies to account for how they spend that government money. After all, as this Court has recognized, "[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the require

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coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity") *with* 26 U.S.C. §162(e)(5)(C) ("Any amount paid or incurred for research for, or preparation, planning, or coordination of [certain lobbying activities] shall be treated as paid or incurred in connection with such activity").

ments of the law." *Heckler v. Community Health Svs.*, 467 U.S. 51, 63 (1984). The sole decision that petitioners rely upon for this point, the plurality opinion in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), did not involve government subsidies at all. It involved an "as applied" challenge to a campaign finance regulation that controlled the use of purely private funds. The regulation would have required a small non-profit organization to adopt a much more formal structure to engage in political activity, and it also would have limited the organization to soliciting funds from its own few members, instead of from the general public. Those aspects of the campaign finance regulation—not the campaign finance disclosure obligations—were what led Justice O'Connor, who cast the deciding vote in the case, to conclude the regulation placed an impermissible burden on protected speech as applied to that small, informal, non-profit organization. *See* 479 U.S. at 265-66 (O'Connor, J., concurring).

By contrast, in this case the recipients of state grant and program funds should have no difficulty keeping track of their expenditures of public funds. They already must have systems in place to account for the expenditure of the government money they receive. Participants in the Medi-Cal program, for example, have been required for many years to maintain detailed accounting records and provide them to the State. *See, e.g.,* 22 Cal. Code Regs. §51511.2 (requiring "all skilled nursing and intermediate care facilities participating in the Medi-Cal program" to "maintain a uniform accounting system as specified by the California Health Facilities Commission," submit "[a]nnual cost reports . . . in the format prescribed by the State," and "maintain . . . financial

. . . records . . . in sufficient detail to substantiate the cost data reported," which "shall be made available to State . . . representatives upon request."). California's state Medi-Cal plan precludes Medi-Cal participants from including, on their cost reports, any expenditures to "assist, promote or deter union organizing" (J.A. 244-57), so Medi-Cal participants already would have to track the expenditures covered by AB 1889, and maintain exactly the financial records about which Petitioners are complaining.

Some of the Petitioners also receive money from the federal Workforce Investment Act. *See* D.Ct. Doc. No. 136 (Defendants' Request for Judicial Notice), Ex. 1; D.Ct. Doc. No. 109 (Decl. of Scott A. Kronland in Opp. to Pl. Mot. for Summ. J.), Ex. 7 at 11:6-13:12. That statute requires recipients to "provide to the Secretary [of Labor] assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. §2931(b)(7). Organizations that can comply with the federal act can comply with the state statute that is in pari materia when they receive employee training money from the program administered by California's Employment Training Panel. *See* pp. 25-26, *supra* (describing the state program). Petitioners also acknowledge that there is a "standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses" (Pet. Br. 35), so individual grants received by Petitioners' members already would require them to account for how they spend the government grant money they receive. Petitioners complain about burden, but it is a commonplace that employees whose salaries are paid in part with government money must track and allocate their time. *See, e.g.,* 45 C.F.R. §1630.3(d)

(cost principles for recipients of Legal Services Corporation funding).[12]

C. It also bears mention that, under this Court's decisions, labor unions—including small, local unions—must adhere to far more burdensome accounting requirements than those contained in AB 1889 if those unions wish to exercise their constitutional rights to spend dues money for political or ideological purposes. *See generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

To ensure that objecting non-members are not charged for political and ideological expenses, unions that spend money on such activity must, among other things, keep track of all expenditures, including on employee salaries, and break them down into "chargeable" and "non-chargeable" categories; issue an annual notice giving non-members sufficient information to decide whether to challenge the union's allocation of expenses; have their books audited; provide a procedure for non-members to

[12] Petitioners rely upon the California Governor's veto message for a "predecessor" bill to AB 1889 as evidence that AB 1889 would impose onerous compliance burdens. Pet. Br. 44. But that predecessor bill, unlike AB 1889, imposed significant burdens on employers, including reporting obligations. Cal. Assem. Bill No. 442, as enrolled Sept. 9, 1999 (1999-2000 Reg. Sess.), §16318(g)(4), (5). AB 1889 imposes no such obligations and specifies that records need not be kept "in any particular form." The same Governor who vetoed the predecessor bill as too burdensome then signed AB 1889, so the most natural inference from the legislative history is that the Governor was aware of this issue and did not believe the new bill, AB 1889, imposed serious burdens.

challenge the amount of the agency fee before an impartial decisionmaker; and hold disputed amounts in escrow while challenges are pending. *See Hudson*, 475 U.S. at 305-10 & n.18; *see also Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1048-49 (9th Cir. 2003); LABOR UNION LAW AND REGULATION 452-481 (BNA 2003). Yet labor organizations continue to engage in political activity.

This Court also rejected the claim that it would be too burdensome for the State Bar of California to comply with the accounting and audit requirements of *Chicago Teachers v. Hudson* to ensure that mandatory bar dues are not used to fund ideological, non-germane activities. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990) ("It is noteworthy that unions representing government employees have developed, and have operated successfully within [these] procedures for over a decade") (internal quotation marks omitted).

D. For similar reasons, Petitioners' contention that the penalty and private enforcement provisions of AB 1889 would chill their lobbying activity about unionization cannot be accepted on the present record. If it is not difficult to keep the records necessary to comply with this law, which are comparable to those required by the similar federal statutes, then Petitioners need not fear the penalties in the statute or private lawsuits. The state courts are competent to dispose of frivolous litigation.

There are many statutes that impose penalties for the misuse of government funds for political or ideological activities, and they have not chilled the recipients of government subsidies from continuing to engage in such activities. *See, e.g.*, 2 U.S.C. §437g(c)(4)(C)(II),(d) (authorizing penalties for viola-

tions of federal campaign finance law); 31 U.S.C. §1352(c) (establishing penalties for violating prohibition on use of federal funds for lobbying activity).

The authorization of private *qui tam* proceedings to recover mis-spent government money also has not chilled organizations from accepting such money. Unlike AB 1889, the federal False Claims Act even offers private litigants a share of the recovered funds as a bounty. 31 U.S.C. §3730(d). If AB 1889 did not include its own authorization for *qui tam* suits, California's little False Claims Act, Cal. Gov. Code §12650 *et seq.*, would appear to authorize such actions anyway against recipients of state grant and program funds that falsely certify compliance with AB 1889. To be sure, like every statute that contains a private enforcement provision, AB 1889 could be used for harassment purposes. But the state courts have authority to impose sanctions for abusive litigation (*see, e.g.,* Cal. Code Civ. Proc. §128.7), and there is no basis for distinguishing AB 1889 from all other statutes in this regard.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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