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., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATE RESPONDENTS

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QUESTION PRESENTED

Whether California Government Code sections 16645.2 and 16645.7, which prohibit state grant and program fund recipients from using those state funds "to assist, promote, or deter union organizing," are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169.

PARTIES TO THE PROCEEDINGS

Respondents accept the listing of the Parties to the Proceedings set forth in the Brief for Petitioners except that the reference to respondent Frank G. Vanacore should be to John Fukusawa as the Chief of the Audit Review and Analysis Section of the California Department of Health Care Services (formerly known as the Department of Health Services), and the reference to respondent Diana M. Bonta should be to Sandra Shewry, Director of the California Department of Health Care Services.

The California Department of Health Care Services (formerly known as the Department of Health Services) is not a respondent in this matter. Although originally a defendant, the District Court dismissed the agency from this action. J.A. 66-67, Docket Entries 82 & 83 (District Court Dismissal). The petitioners did not appeal the dismissal of the Department of Health Services, and the Department was not named in respondents' notice of appeal. J.A. 83, Docket Entry 175 (Notice of Appeal).

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STATEMENT

1. The California legislature enacted Government Code sections 16645-16649[1] (AB 1889) to implement California's policy to remain neutral on union organizing. 2000 Cal. Stat. ch. 872, § 1. In order to avoid subsidizing employers' activities to support or oppose union organizing, the statute prohibits employers from using state funds and facilities for those purposes. *Id.* As the legislature declared in AB 1889's preamble, "the state should not subsidize efforts by an employer to assist, promote, or deter union organizing" 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." *Id*.

The provisions of AB 1889 that are at issue in these proceedings are those which prohibit an employer's use of state grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. These provisions allow recipients of state grant and program funds to spend their non-state funds to lobby employees about union organizing. Government Code 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

[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2008 supplement.

deter union organizing." Cal. Gov't Code § 16645.7(a) (emphasis added); *see also* Cal. Gov't Code § 16645.2(a) ("[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.").

These provisions of AB 1889 were modeled after several federal laws that similarly restrict the use of federal funds. Those laws include the federal Head Start Programs Act, which prohibits the use of appropriated funds "to assist, promote, or deter union organizing," 42 U.S.C. § 9839(e) (2008); the Workforce Investment Act, which requires "[e]ach recipient of [grant] 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) (2008); and the National and Community Service Act, which provides that "[a]ssistance [available under a grant] provided under this subchapter shall not be used by program participants . . . to assist, promote, or deter union organizing," 42 U.S.C. § 12634(b)(1) (2008). Each of these federal laws was expressly referenced in the legislative committee's bill analysis prepared for the California Assembly. J.A. 75, Docket Entry 125 (Request by Intervenors for Judicial Notice).

AB 1889 contains several enforcement provisions that apply to its restrictions on the use of state grant and program funds. Employers who receive state grant or program funds must certify that those state funds will not be used to assist, promote or deter

union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Recipients must also "maintain records sufficient to show that *state funds* have not been used" for those purposes and must provide those records to the California Attorney General upon request. Cal. Gov't Code § 16645.2(c) (emphasis added); *see also* Cal. Gov't Code § 16645.7(c).

"For purposes of accounting for expenditures" under AB 1889, "if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis." Cal. Gov't Code § 16646(b). However, this legislation expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

An employer who violates AB 1889 is liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), and 16645.8(d). Civil actions may be brought by the California Attorney General or by any taxpayer, on behalf of the people of the State of California. Cal. Gov't Code § 16645.8(a).

2. This writ of certiorari proceeding arises from the ruling on a motion for summary judgment filed below by petitioners, seven business associations and three businesses that operate skilled nursing facilities (collectively referred to as "the Chamber of Commerce").

The district court granted, in part, the Chamber of Commerce's summary judgment motion, concluding that California Government Code sections 16645.2 and 16645.7 are "preempted [by the National Labor Relations Act (NLRA)] because [they] regulate[ ] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a, 149a. The district court entered a partial final judgment declaring Sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoining respondents from enforcing those provisions. J.A. 349.

3. The Ninth Circuit initially issued a panel opinion affirming the district court. Pet. App. 114a. On rehearing, the court withdrew that opinion and issued a new opinion, again affirming the district court, but this time with a dissent. Pet. App. 58a. The Ninth Circuit then reheard the case en banc. The en banc court issued a 12-3 decision that reversed the district court's grant of partial summary judgment and remanded the case for further proceedings. Pet. App. 1a, 36a.

The en banc court began its analysis by explaining that a facial challenge to legislation is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" Pet. App. 7a (*quoting Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). After determining that AB 1889's grant and program provisions do not fall within the "market participant exception" to NLRA preemption, the

en banc court held that AB 1889's grant and program provisions are not preempted under the "*Machinists*" or "*Garmon"* preemption doctrines, referring to the doctrines established in, respectively, *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists*) and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*). Pet. App. 11a-36a.

Central to the en banc court's holding that AB 1889 is not preempted under *Machinists* is the distinction between restrictions on "the *use* of state funds," which do not preclude the recipient from using its own funds to engage in activities the state does not wish to subsidize, and conditions placed upon "the *receipt* of state funds," such as requiring recipients to remain neutral in union organizing disputes as a condition of receiving state money. Pet. App. 17a. The court recognized that the AB 1889 provisions at issue fall within the former category. *Id*. Accordingly, the en banc court determined that AB 1889's grant and program provisions are not preempted under *Machinists*, because that doctrine "requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces,'" in a "'zone free from all regulations, whether state or federal.'" Pet. App. 13a (*quoting Machinists,* 427 U.S. at 140 and *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226 (1993) (*Boston Harbor*)). As the en banc court explained, it is

"implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a.

The en banc court also reasoned that because *Machinists* "applies *solely* to zones of activity left free from *all* regulation," the National Labor Relations Board's (NLRB) "own extensive regulation of organizing activities demonstrates that *organizing* – and employer speech in the context of organizing – is not such a zone." Pet. App. 19a.[2] The majority further explained that the very similar restriction on the use of federal government funds adopted by Congress (see p. 2, *supra*) is inconsistent with the view that California is regulating "'conduct intended to be unregulated.'" Pet. App. 20a-21a (*quoting Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) (*Golden State I*)).

With respect to *Garmon*, the Ninth Circuit held that California's law does not interfere with employer speech rights protected by 29 U.S.C. § 158(c) (Section

[2] The majority also explained, earlier in its opinion, that although case precedent "strongly suggest[s] that the *Machinists* doctrine is not likely to apply to organizing," it "need not resolve whether *Machinists* extends to preempting a state action that potentially affects organizing, because even if it did, AB 1889 would not be preempted under the *Machinists* doctrine." Pet. App. 16a.

8(c) of the NLRA). Pet. App. 23a-25a. The en banc court reasoned that Section 8(c) "does not *grant* employers speech rights" in the sense necessary for *Garmon* preemption. Pet. App. 23a. The en banc court observed that Section 8(c), which clarifies that an employer's noncoercive speech does not constitute an unfair labor practice, "'merely implements the First Amendment.'" Pet. App. 23a (*quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). The en banc court correctly applied this Court's First Amendment jurisprudence, which permits restrictions upon the use of government funds so long as "employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds." Pet. App. 25a.

The en banc court also concluded that AB 1889's grant and program provisions do not intrude on an area that is "arguably – but not definitely – prohibited or protected" by the NLRA in the manner prohibited by the *Garmon* doctrine. Pet. App. 25a (citation omitted). The en banc court recognized that, under AB 1889, a California state court "would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA." Pet. App. at 28a. The majority thus concluded that there is neither a sufficient identity of issues nor a risk that a state tribunal, while applying state law, could misinterpret federal law so as to warrant preemption. Pet. App. 28a-29a.

The en banc court also determined that AB 1889 would fall within the *Garmon* preemption exception for the regulation of interests "'deeply rooted in local feeling and responsibility. . . . '" Pet. App. 30a (*quoting Garmon*, 359 U.S. at 243-44). The en banc court reasoned that "a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given . . . is of at least as great a concern to the state as its power to regulate" in other areas held to fall within this exception. Pet. App. 31a (footnotes omitted).

Three dissenting judges would have held AB 1889 to be preempted under both the *Garmon* and *Machinists* doctrines on the ground that it "stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA." Pet. App. 36a. In reaching this conclusion, the dissenters interpreted AB 1889 as "co-opt[ing]" the payment received from the State for goods and services and "profit" realized under a contract. Pet. App. 36a. The majority rejected this interpretation, pointing out, in its discussion of the First Amendment, that the appeal involved a facial challenge only, and further, that the contract provisions of AB 1889 were not before the court. Pet. App. 34a, n. 22.

The majority further noted that "[t]he dissent also disregard[ed] the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies." Pet. App. 35a, n. 23. The majority also observed that respondents had acknowledged that the law's restrictions

would *not* apply to employers' own funds, including, for example, "legitimately distributed corporate dividend[s]" reinvested in the corporate entity, which the majority recognized would be, "itself, the fruit of the receipt of state grant or program funds." Pet. App. 32a-33a, n. 20.

SUMMARY OF ARGUMENT

The Chamber of Commerce contends that AB 1889's grant and program provisions are facially unconstitutional because their restrictions on the use of state grant and program funds to assist, promote or deter union organizing are preempted by the NLRA under the *Machinists* and *Garmon* doctrines. The Chamber of Commerce, however, has failed to establish that no set of circumstances exists under which AB 1889 would be valid. This is the standard that is applicable to facial challenges.

AB 1889's grant and program provisions are not preempted under either the *Machinists* or *Garmon* preemption doctrines. The controlling inquiry under *Machinists* is whether AB 1889 is regulating in an area that Congress intended to be controlled by the free play of economic forces. AB 1889 does not regulate in such an area. AB 1889 was enacted to ensure that California does not subsidize an employer's efforts to assist or deter union organizing, in order to preserve California's neutrality in such matters. This is a legitimate governmental interest.

AB 1889 only restricts an employer's use of *state* funds to assist, promote or deter union organizing. Employers who receive state grant and program funds are free to engage in activities to support or oppose union organizing, provided they do so with non-state funds. AB 1889 also does not condition receipt of state grant or program funds on an employer remaining neutral on union organizing activities. AB 1889's restrictions on the use of state funds are thus nearly identical to other government funding restrictions that have been held to be consistent with the First Amendment. And, because AB 1889 does not regulate an employer's free speech rights, there is no reason to believe that California is intruding on an area Congress intended to be left to the free play of economic forces. A state's decision on how best to use its funds is not a matter that is left to the free play of market forces.

AB 1889 only restricts the use of state funds, over which California maintains a legitimate interest, and thus does not control the use of an employer's *own* funds in violation of the *Machinists* doctrine. To the extent that California disburses grant and program funds, it does so to advance public interest goals. In order to control costs and to preserve the integrity of the projects financed by state grant and program funds, California maintains a legitimate interest in those funds until such time as the grant recipient or program participant has provided the State with the service the State has funded, and in the manner required by the grant or program. California has a sovereign right to ensure that its taxpayers' grant

and program funds are not diverted from their intended purposes and, instead, used by the recipients to assist or deter union organizing. Moreover, AB 1889 does not restrict the use of any excess funds, including profit, that grant or program fund recipients may retain under the rules that are applicable to a specific grant or program.

The Chamber of Commerce has also failed to demonstrate that AB 1889's record-keeping and enforcement provisions would objectively chill employers from engaging in conduct to deter or support union organizing using their own funds. AB 1889's record-keeping provisions are flexible and reasonable. This Court has upheld far more burdensome requirements for recipients of government subsidies. Additionally, whether the record-keeping provisions are burdensome is a factual issue that is in dispute, and which remains unresolved in this facial challenge. Moreover, AB 1889's enforcement provisions are reasonable and measured.

AB 1889's grant and program provisions are also not preempted under the *Garmon* doctrine. The goal of the *Garmon* doctrine is to preserve the NLRB's jurisdiction. Thus, *Garmon* prohibits state regulation of conduct that is actually or arguably protected or prohibited by the NLRA. Even were the NLRA construed as affirmatively providing employers with a free speech right independent of the First Amendment, AB 1889 does not regulate speech and thus would not violate any such NLRA-guaranteed free speech right. AB 1889 also does not regulate an employer's *coercive* speech, conduct that is prohibited

by the NLRA and that falls within the NLRB's jurisdiction. The inquiry before a state court in an AB 1889 enforcement action would be restricted to whether state funds were used by the employer to assist or deter union organizing, not whether the speech in which the employer engaged was coercive. As such, AB 1889 does not intrude on the NLRB's jurisdiction in a manner prohibited by *Garmon*.

Finally, *Garmon* preemption may be avoided where the state statute at issue concerns an interest deeply rooted in local feeling and responsibility. AB 1889's grant and program provisions fall squarely within this recognized exception to *Garmon* preemption. AB 1889 advances California's right to control its public fisc in the same manner that Congress has done so, with respect to the federal fisc, in other statutes upheld by this Court. Requiring California to subsidize an employer's efforts to assist or deter union organizing would be a serious intrusion on that right. Congress has not authorized, through the NLRA, such a significant intrusion on California's sovereignty.

ARGUMENT

I.

AB 1889'S GRANT AND PROGRAM PROVISIONS ARE NOT PREEMPTED UNDER THE *MACHINISTS* DOCTRINE

The *Machinists* preemption doctrine is a form of field preemption that prohibits regulation in areas

that Congress, by implication, intended "'to be controlled by the free play of economic forces.'" *Boston Harbor*, 507 U.S. 218, 225 (*quoting Machinists*, 427 U.S. 132, 147). The "crucial inquiry" under *Machinists* is whether the state is curtailing or entirely prohibiting economic weapons of self-help that "Congress meant to be unregulable" and, thus, "would frustrate effective implementation of the [NLRA's] processes." *Machinists*, 427 U.S. at 147-48 (internal quotations and citations omitted). By prohibiting the regulation of weapons of self-help that employers, unions, or employees may utilize, the *Machinists* doctrine preserves Congress's "'intentional balance between the uncontrolled power of management and labor to further their respective interests.'" *Boston Harbor,* 507 U.S. at 226 (*quoting Golden State I,* 475 U.S. 608, 614 (1986)).

As explained below, because AB 1889's grant and program provisions neither restrict employers' use of their own funds nor condition receipt of state grant and program funds on employers' forgoing any rights to engage in speech regarding union organizing issues, California's statute neither regulates in an area that Congress intended to be left controlled by the free play of market forces nor curtails a weapon of self-help that Congress intended to be free from regulation. Accordingly, AB 1889 is not preempted by the NLRA under the *Machinists* preemption doctrine.

A. AB 1889's Grant and Program Provisions Do Not Regulate the Use of Employers' Own Funds Nor Condition Receipt of State Grant and Program Funds on Employer Neutrality

The Chamber of Commerce asserts that AB 1889's grant and program provisions are preempted by the NLRA under the *Machinists* doctrine because Congress intended to prohibit states from regulating non-coercive speech in which an employer may choose to engage using its own funds. Petitioners' Br., 20-22. Assuming the Chamber of Commerce is correct that non-coercive speech is an economic weapon of self-help that Congress intended to be left entirely unregulated, AB 1889 does not regulate employer speech. AB 1889 simply bars employers from using state funds to bankroll such speech.

Preliminarily, it is insufficient to simply characterize AB 1889 as "regulatory" in order to successfully establish that it is preempted. *See Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 758 (1985) (*Metropolitan Life*) (Massachusetts's mandated-benefit law, characterized as a "law which regulates insurance," held not preempted under *Machinists*, as applied to a plan negotiated pursuant to a collective bargaining agreement). Indeed, although this Court has observed that "in passing the NLRA, Congress largely displaced state regulation of industrial relations" (*Wisconsin Dept. of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986)

(*Gould*)), the Court has also recognized that it "'cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously much of this is left to the States.'" *Metropolitan Life,* 471 U.S. at 757 (*quoting Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971)).[3] Thus, in order to determine whether AB 1889 curtails an employer's right to self-help in the manner prohibited by *Machinists,* one must carefully ascertain exactly what conduct AB 1889 actually limits.

AB 1889 implements the State's decision not to subsidize, with state funds, employers' efforts to assist, promote or deter union organizing. Accordingly, the core provisions of AB 1889 restrict *state* grant and program funds from being used to pay for expenses a grant recipient or program participant voluntarily incurs when it elects to influence its employees on whether or not to join a union. Cal. Gov't Code § 16645.2(a); Cal. Gov't Code § 16645.7(a). AB 1889 does not restrict an employer's right to

[3] Accordingly, to the extent that the Chamber of Commerce and its supporting amici imply that the critical inquiry in this case is whether California is acting as a "market participant" or as a "regulator," they are incorrect. The question of whether California, through AB 1889, is acting as a market participant for purposes of that recognized exception to *Machinists* preemption is an issue distinct from whether California's statute, whether or not regulatory, is preempted by the NLRA. *See Metropolitan Life,* 471 U.S. at 758 and *Boston Harbor*, 507 U.S. at 224.

engage in any free speech in which it may wish to engage, including lobbying its employees about the employer's views regarding a union organizing campaign or influencing its employees about whether or not they should join a union. AB 1889 only requires that the employer use its own funds to pay for the expenses incurred in engaging in such activities.

AB 1889 also does not condition receipt of state funds on an employer taking a position of neutrality with respect to union organizing. To the contrary, an employer is free to accept state grant and program funds and, simultaneously, incur unlimited expenses to influence its employees about whether or not to join a union, so long as it pays for those expenses with non-state funds. Thus, the Chamber of Commerce's characterization of AB 1889 as "foist[ing] its own labor policy of employer silence on union organizing. . . . " is inaccurate. Petitioners' Br., 16. Because employers retain the right to use non-state funds to engage in union lobbying activities, notwithstanding their receipt of state grant and program funds, no labor policy with which they disagree is being "foisted" upon them.

Further, contrary to the Chamber of Commerce's contention, there is a fundamental and sound distinction between a *restriction* on the *use of state funds* and a *denial of state funds* to those who engage in speech with their *own* funds. *See* Petitioners' Br., 41. First, as this Court has long recognized in the First Amendment context, within broad limits, the government's refusal to subsidize an activity does not

constitute regulation of that activity. *See Rust v. Sullivan*, 500 U.S. 173, 193 ("[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . . "); *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983) ("Congress has not infringed any *First Amendment* rights or regulated any *First Amendment* activity. Congress has simply chosen not to pay for [plaintiff's] lobbying."); *see also United States v. American Library Association,* 539 U.S. 194, 212 (2003) (plurality opinion) ("[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." (citations omitted)).

Second, and more fundamentally, as the en banc court recognized, it is "implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces, "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a (*citing Boston Harbor*, 507 U.S. at 225-26). The NLRA does not grant employers a right to subsidize their speech with state funds. To the contrary, the *Machinists* preemption doctrine only preserves the use of "weapons of self-help" that the employer, employee or union may wish to utilize. *See Golden State I,* 475 U.S. at 614-15. It cannot be presumed that Congress intended the "weapons of self-help" to include the use of state subsidies. *Cf. Lyng v. Int'l Union, UAW*, 485 U.S. 360, 371 (1988) ("[i]t was no part of the purposes of the Food Stamp Act to establish a program that would

serve as a weapon in labor disputes."). The fact that Congress itself has enacted similar prohibitions on the use of federal monies to assist or deter union organizing with respect to federal programs, such as the federal Head Start Programs Act (42 U.S.C. § 9839(e) (2008)), strongly suggests otherwise.

There is no dispute that the NLRA envisions free and robust speech by employees and employers on union issues. *Linn v. United Plant Guard Workers of Am.,* 383 U.S. 53, 62 (1966). However, nothing in the NLRA or its legislative history suggests that Congress intended to require states to further that goal by subsidizing the speech of employers who may wish to engage in that debate. Nor are state subsidies an economic weapon of self-help to which employers are entitled under the NLRA.

Finally, contrary to the assertion of the Chamber of Commerce and its amici, AB 1889 is not preempted by the *Machinists* doctrine on the ground that California is invoking its spending power in the manner rejected by the Court in *Gould*, 475 U.S. 282. *See* Petitioners' Br., 25-26. Consideration of the limitations of a state's spending power arises when a state is asserting an *exception* to engage in conduct that would otherwise be preempted by the NLRA. *See Gould*, 475 U.S. at 288-89. A state's statutory scheme does not "escape[ ] pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id.* at 287. But AB 1889 does not

intrude on an area that Congress left to be unregulated. AB 1889 only places restrictions on the use of the State's own funds, and therefore is not preempted by the NLRA under the *Machinists* doctrine. That AB 1889 is an exercise of California's spending power does not somehow transform the State's otherwise legitimate restriction on the use of its own funds into conduct that is preempted by the NLRA. To conclude otherwise would constitute an unprecedented intrusion on a state's legitimate exercise of its spending power.

B. AB 1889 Restricts The Use of Funds Over Which California Maintains a Sovereign Interest

Even though AB 1889 restricts only the use of "*state*" funds, the United States asserts that "employers are not free under A.B. 1889 to spend their 'own funds' as they wish. . . ." United States' Br., 17. Contending that "A.B. 1889's limitations on employer speech are not limited to state grants, but continue to apply to 'state' funds even after those funds have been paid by the State to program participants in exchange for services rendered," the United States reasons that AB 1889's restrictions on the use of state program funds therefore "extend beyond any arguably legitimate proprietary interest." *Id*. Therefore, in the United States' view, AB 1889 regulates an employer's own funds, an activity that is preempted by the *Machinists* doctrine. *Id*. Similar reasoning is offered by the Chamber of Commerce. *See* Petitioners' Br., 41

(referring to restrictions on "state-derived" funds). The position advanced by the Chamber of Commerce and the United States is incorrect.

First, the district court addressed the limited issue of whether, *as a facial matter*, AB 1889's grant and program provisions are preempted by the NLRA. *See* J.A. 349 (district court's partial judgment declaring California Government Code sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoining respondents from enforcing those provisions). The district court did not evaluate AB 1889's grant or program provisions as applied to any particular state grant or program, nor did it make any factual findings as to how any grant or program operates.

Facial invalidation of a statute is "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (*quoting Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973)). Accordingly, a party mounting a facial challenge "must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577, 580 (1987) (to succeed in a facial preemption challenge, plaintiffs must show "there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law. . . . ").

Accordingly, so long as AB 1889's grant and program provisions can validly be applied in some circumstances, a facial challenge must be rejected. And any "as applied" challenges must be raised first in the trial court, to allow the State the opportunity to respond to them.[4]

Second, the Chamber of Commerce and the United States misinterpret the AB 1889 provisions at issue. As explained below, both the grant and program fund provisions would be applied only to funds in which the State has a legitimate interest, not to excess funds and profits.

1. The State Maintains a Sovereign Interest In Grant Funds

California disburses grant funds to advance a vast array of public interest goals. *See, e.g.*, Cal. Health & Safety Code § 125290.10-125292.10 (West 2008) (the California Stem Cell Research and Cures Act, providing grant and loan money for, inter alia, stem cell research); Cal. Gov't Code § 15438.6 (West 2008) (grants for primary health care clinics for capital improvements); and Cal. Penal Code § 13837 (West 2008) (grants for child sexual exploitation and

[4] Because AB 1889 contains an express severability clause, Cal. Gov't Code § 16649, even if a particular application of AB 1889 were held unconstitutional, only narrowly tailored injunctive and declaratory relief would be appropriate. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006).

child sexual abuse victim counseling centers). Like other government grants, California grant monies are subsidies disbursed from public funds. *See Rust v. Sullivan*, 500 U.S. 173, 199; *see also* Black's Law Dictionary, 1469 (8th ed. 2004), defining a subsidy as a "grant, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest."

When disbursing grant funds, 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 specific grant's purpose. This interest is substantial because the achievement of a grant goal is often difficult to measure. For example, with respect to California's stem cell research grants, to the extent that California allows those grant funds to be diverted from their intended purpose and, instead, used by the grant recipient to pay for activities to influence its employees about whether to join a union, less money would be available for the medical research that the State intends to fund. While the grant recipient might still be able to provide the State with some level of research to comply with the grant's terms, the State, in reality, would not receive the level of research services that it intended to fund and for which it paid.

Apparently recognizing the State's continuing interest in state grant funds, the Chamber of Commerce proffers the argument that the State's fiscal interest in those funds "is more than served by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses" or by either generically agreeing to fund "all employee relations" expenditures or none at all. Petitioners' Br., 35.

The Chamber of Commerce's suggestion is unworkable and would unnecessarily restrict the State's ability to ensure that grant funds are in fact applied only to the specific purposes for which they were awarded. It is difficult to imagine a scenario in which it would be practical to exclude all employee-related administrative costs from the grant program. Some such costs may be deemed necessary to the achievement of a grant's purpose and would be considered appropriate overhead, and other costs might not. For example, overhead costs associated with determining employee salaries may be deemed unavoidable expenses the grant recipient will incur in order to operate its business and to carry out the work funded by the grant. On the other hand, costs associated with planning an employee retreat may not. Because the parties involved in the specific grant may disagree on the efficacy of a specific overhead expense, clarity as to which specific overhead costs are allowable is often necessary.

It is thus not uncommon for the government to closely regulate grant-funded projects and to

explicitly restrict expenditures of certain overhead and administrative costs to which grant monies may be applied. *See e.g.,* J.A. 290-97 (Federal OMB Circular No. A-122 (Revised), establishing "principles for determining costs of grants, contracts and other agreements with non-profit organizations" and listing, at J.A. 293-95, fifty-six "Selected Items of Cost," including costs for public relations, communications, labor relations and lobbying); *see also* California Institute for Regenerative Medicine's ("CIRM") Grants Administration Policy for Academic and Non-Profit Institutions, pp. 27-36 ["Payment and Use of Funds" relating to stem cell research grants], *available at* http://www.cirm.ca.gov/reg/pdf/reg100500_policy.pdf (last visited February 6, 2008); *see* Cal. Code Regs. tit. 17, § 100500(b) (2008) (incorporating by reference CIRM policy).

That the government has a substantial interest in overseeing government grant funds is generally understood and is well accepted. *Cf. Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970) ("Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . . "). Moreover, the legitimate interest that the government retains in grant funds is implicitly recognized in this Court's First Amendment jurisprudence. *See, e.g.*, *Rust v. Sullivan,* 500 U.S. at 199, n. 5 ("The regulations are limited to Title X funds; the

recipient remains free to use private, non-Title X funds to finance abortion-related activities."). Indeed, recognizing the strong interest that states retain in grant funds they disburse, the Second Circuit, the only other court to evaluate a state law similar to AB 1889 as against a preemption challenge, correctly concluded that New York's law restricting the use of funds for union organizing-related purposes as applied to state grants is not preempted by the NLRA. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 102-03, 105, 107-08 (2d Cir. 2006) (*Healthcare Ass'n*); *see id.* at 102-03 (observing that "[to] the extent that [the New York law] applies to grant monies (which the employers cannot contend is their own), the associations do not argue that the State cannot specify in advance what a grant may and may not be used for.").

In short, because California maintains a sovereign interest in its grant funds, AB 1889's grant provision only regulates "state funds" and does not regulate an employer's use of its own funds in violation of *Machinists.* And, even if there may be instances in which that were not the case due to the specific requirements of a particular grant, such theoretical possibilities are insufficient to satisfy the Chamber of Commerce's burden in this facial challenge.

2. The State Maintains a Sovereign Interest In Program Funds

Nor can the Chamber of Commerce demonstrate that California lacks a continuing interest in state program funds after they are disbursed.

California disburses public funds in return for the delivery of social services to program beneficiaries in what California terms state "programs." The goals of state programs are similar to those of traditional grants and encompass a broad variety of public services, including child care and development (Cal. Educ. Code §§ 8240-8244 (West 2008); Cal. Code Regs. tit. 5, §§ 17906-18308 (2008)); job training to maintain high-performance workplaces in California (Cal. Unemp. Ins. Code §§ 10200-10217 (West 2008)); and delivery of medical care for the needy through California's Medicaid program, known as Medi-Cal (Cal. Welf. & Inst. Code §§ 14000-14199.3 (West 2008)).

As with grant funds, the State obviously has a strong interest in controlling program costs. And, as is the case with grants, the achievement of program goals, in particular as to ensuring the highest quality in the delivery of services, is often difficult to measure objectively. Furthermore, government programs, like grants, are substantially different from simple, straightforward commercial transactions between private parties seeking only commercial benefits. Rather, program participants are usually providing critical public services to California residents in the context of a comprehensive and detailed regulatory scheme and on a continuous basis over a long period of time. *See* Cal. Welf. & Inst. Code §§ 14000-14199.3 (West 2008); Cal. Code Regs. tit. 22, §§ 50000-59999 (2008). Because of these unique characteristics of state programs, the State maintains a legitimate

interest in program funds until such time as the program participant has provided the State with the service the State has funded in the manner required by the program.

The Chamber of Commerce, however, suggests that because program funds may in some instances be paid after program services are rendered, such funds are no longer state funds once they are disbursed. Thus, according to the Chamber of Commerce, AB 1889's program provisions regulate the program participant's *own funds,* and thus, in contravention of the *Machinists* doctrine, they intrude on an area Congress intended to leave unregulated.

This argument, particularly in the context of a facial challenge, is without merit. The Chamber of Commerce ignores the fact that not all programs are operated in the same manner. For example, in an effort to provide cash flow to program participants, California operates certain programs by paying *advances* or *interim* payments to program participants based on projected estimated allowable expenses. In those circumstances, the State calculates a cost settlement at the end of the fiscal year and recovers any overpayments that the State determines have been made.

One example is California's child care and child development program, in which California *advances* funds to program participants, or "contractors," before services are rendered. *See* Cal. Educ. Code § 8268 (West 2008); *see* Cal. Code Regs. tit. 5, §§ 18038,

18064(c) (2008). The program participants report expenditures on an accrual basis and must submit an annual financial and compliance audit. Cal. Code Regs. tit. 5, §§ 18063, 18071 (2008). The State reviews the audit to determine the contractor's "net reimbursement program costs." Cal. Code Regs. tit. 5, § 18072(a); *see* Cal. Code Regs. tit. 5, §§ 18013(p), 18034, 18035 (2008). After the State analyzes the audit, a final settlement is calculated and the California Department of Education recovers advanced funds to the extent the Department determines that an overpayment has been made. Cal. Code Regs. tit. 5, §§ 18072, 18038 (2008).

Because California makes advance payments to the child care provider based on *estimated* allowable expenses, it is unknown whether the State has made overpayments to the provider until settlement is calculated at the end of the year. The State thus retains a legitimate interest in the child care funds that have been disbursed until final payment for services rendered is actually determined. Indeed, until such final payment has been determined and any overpayments have been returned to the State, the funds remain "state funds." And, if the child care funds are used to pay for lobbying related to union organizing prior to a final reconciliation, those activities are, in fact, being financed and subsidized with "state funds."

The same is true with respect to one type of payment method that is used in California's Medi-Cal program. This method is used to reimburse hospitals

that have not negotiated contracts for inpatient services with the State ("non-contract" hospitals). In this reimbursement model, the State makes *interim* payments to each hospital based on the historical, allowable cost-to-charge ratio of the hospital, in order to furnish non-contract hospitals with cash flow sufficient to provide services to Medi-Cal patients throughout each hospital's fiscal year. Cal. Code Regs. tit. 22, § 51536(c)(2) (2008). These interim payments are paid as services are rendered and bills are submitted throughout the fiscal year. *See Redding Medical Center v. Bonta*, 89 Cal. Rptr. 2d 348, 349-50 (Cal. Ct. App. 1999).

At the end of a hospital's fiscal year, the hospital submits a Medi-Cal cost report that is then audited by the State. Cal. Welf. & Inst. Code § 14170 (West 2008); 42 C.F.R. §§ 413.20(b), 413.24(f) (2008). The State calculates a final settlement based on the audited cost report, and the final settlement is reconciled with the interim payments to determine whether there have been any underpayments or overpayments made to the provider. Cal. Code Regs. tit. 22, § 51536 (2008). If an overpayment has been made, it can be recovered by the State. Cal. Code Regs. tit. 22, § 51536(d) (2008). If a non-contract hospital is dissatisfied with the final settlement determination, it may file an administrative appeal. *See* Cal. Welf. & Inst. Code § 14171 (West 2008).

As is the case with the child care program discussed above, there is no question that California retains a substantial interest in state program funds that are disbursed to non-contract hospitals until

final payment for services rendered is actually determined. The existence of some circumstances in which California unquestionably has an interest in the use of its program funds requires that the Chamber of Commerce's facial challenge be rejected. *See United States v. Salerno,* 481 U.S. at 745.

While the application of AB 1889 to specific state programs is not before the Court, the State also notes its disagreement with any claim the Chamber of Commerce may make that California has no interest in funds disbursed through state programs when payment in such a program is made after services are rendered and no interim payments are made. Such a contention would be incorrect. The State has an interest in these disbursed funds until the program participants that are paid after services are rendered, such as skilled nursing facilities participating in Medi-Cal, have complied with all program requirements in rendering services for which the program participant has billed the State.

For example, when a provider renders services to an eligible beneficiary under California's Medi-Cal program, the provider is required to comply with the various program requirements as a condition of being entitled to reimbursement received from the program. Among other requirements, Medi-Cal providers are prohibited from rendering services which are "below or less than the standard of acceptable quality." Cal. Code Regs. tit. 22, § 51472 (2008). And the providers are prohibited from submitting a claim for reimbursement for, among other items, services "clearly in excess of accepted standards of practice," "in any

amount greater or higher than the usual fee charged by the provider to the general public for the same service," or "for which the provider has received and retained payment." Cal. Code Regs. tit. 22, §§ 51470(d), 51473, 51480(a) (2008). In addition, Medi-Cal providers are required to maintain records "as are necessary to fully disclose the type and extent of services provided to a Medi-Cal beneficiary." Cal. Code Regs. tit. 22, § 51476(a) (2008). With respect to Medi-Cal providers providing institutional care, such records must include "records of receipts and disbursements of personal funds of beneficiaries being held in trust by the provider," "employment records including shifts, schedules and payroll records of employees," and "book records of receipts and disbursements by the provider." Cal. Code Regs. tit. 22, § 51476(b) (2008).

California retains the right to audit Medi-Cal health care providers to assure that these and other program requirements are met, and may recover overpayments resulting from such audits. Cal. Welf. & Inst. Code §§ 14170; 14171.6-14177 (West 2008). Because the State has the right to recover overpayments, it retains a governmental interest in the funds it has disbursed.

If a program participant has not fully met the program's requirements because the participant has instead used program funds for other purposes, the integrity of the program is undermined. This is true even when the State tenders payment to the program participant based on a per diem rate. Accordingly, the

State retains a legitimate interest in funds delivered to program providers for services rendered. And since the participant is being reimbursed based on its satisfaction of all program requirements, the participant can have no complaint when it is asked to keep records showing that any funds used to assist or deter union organizing are not state funds that have been diverted from their intended purposes.

3. AB 1889 Does Not Apply to Excess Funds Over Which the State Has No Legitimate Interest

Next, the Chamber of Commerce argues that AB 1889 is preempted because it regulates funds that have been "fairly received in exchange for providing [a] public service." Petitioners' Br., 36. Because program participants incur costs to provide the services the State funds, the Chamber of Commerce must not be referring to that portion of payments which merely covers those costs. The Chamber of Commerce therefore appears to suggest that AB 1889 regulates the use of profits or, for that matter, any excess funds that a program participant may have earned after paying the allowable expenses incurred in satisfying the grant or program requirements.

The Chamber of Commerce's argument fails for two reasons. First, as discussed above, this writ proceeding presents a facial challenge only. The en banc court thus correctly recognized that AB 1889's purported application to profit was not before it. Pet.

App. 34a, 35a, n. 23. Moreover, the Chamber of Commerce has not established that all, or even most, grant recipients and program participants realize a profit from state grants and programs. In fact, amicus curiae American Hospital Association (AHA) suggests otherwise. Amicus Br. of AHA, 17. Nor has the State of California or the California state courts applied AB 1889's restrictions to any profit that a state grant or program may allow. Thus, this theoretical application of AB 1889 is not at issue here. As this Court has recognized, "[f]acial challenges are best when infrequent," and laws should not be invalidated by "'reference to hypothetical cases.'" *Sabri v. United States*, 541 U.S. 600, 608 (2004) (*quoting United States v. Raines,* 362 U.S. 17, 22 (1960)). Accordingly, in the event that AB 1889's grant or program provisions are actually applied to profit or excess funds, that issue should be litigated in an as-applied challenge, and not within the parameters of this facial challenge.

Second, if there are some grants or programs in which profits are realized, the Chamber of Commerce misinterprets AB 1889's grant and program provisions to restrict use of such profits. These provisions do *not* restrict the use of excess funds, including profit, provided that the grant or program does not require the return of such excess funds to the State. A contrary construction would place the constitutionality of AB 1889's grant and program provisions in doubt, contrary to the basic tenet of statutory construction that a statute should be interpreted to favor

constitutionality, if such an interpretation is reasonable and readily apparent. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (interpretation of local ordinance supported by representations of government's counsel adopted to avoid constitutional difficulties); *but see Stenberg v. Carhart*, 530 U.S. 914, 943-45 (2000) (state's interpretation of partial birth abortion statute not reasonable or readily apparent in view of statute's terms and underlying legislative history). Were the California courts given an opportunity to construe AB 1889, they too would follow the canon of statutory construction that statutes should be construed to avoid constitutional doubts. *See People v. Davenport,* 710 P.2d 861, 870 (Cal. 1985).

That excess funds are not within the purview of AB 1889 is consistent with a reasonable interpretation of that legislation and is consistent with the legislature's intent in enacting AB 1889. State funds are generally defined in AB 1889 as "any money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov't Code § 16645(d)(1). Neither this definition, nor the other provisions of AB 1889, expressly delineate when state program or grant funds lose their character as state funds. However, AB 1889's uncodified preamble makes it clear that in enacting AB 1889, the California legislature intended to prohibit "*subsidizing*" an employer's

efforts to assist or deter union organizing.[5] This reference to "subsidizing" necessarily restricts AB 1889's application to funds over which California retains a governmental interest. If an employer is using its own funds to assist or deter union organizing, then California is not subsidizing that conduct. And because the State has no governmental interest with respect to an employer's profit or excess funds that may be allowable under a particular program, an employer's use of such funds to assist or deter union organizing would not constitute a *state subsidy* for such activities. Because the stated goal of AB 1889 is to prohibit subsidizing employer conduct with state funds, excess funds would necessarily fall outside AB 1889's purview.[6]

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[5] AB 1889's preamble states:

> [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. 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 and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract. 2000 Cal. Stat. ch. 872, § 1 (emphasis added).

[6] Excess funds, of course, would not include overpayments that may be required to be returned to the State under the terms of the particular grant or program. *See* Cal. Code Regs. tit. 5, § 18072 (2008) (child care program).

The reasonableness of this interpretation of AB 1889 is evident when the interpretation applied to the federal Byrd Amendment, 31 U.S.C. § 1352, is considered. The Byrd Amendment restricts the use of government funds for certain lobbying activities and is structured very similarly to AB 1889. Specifically, the Byrd Amendment provides:

> *None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing* or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with . . . [t]he awarding of any Federal contract . . . [t]he making of any Federal grant. . . . [or] any Federal loan. . . . [t]he entering into of any cooperative agreement . . . [or] [t]he extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

31 U.S.C. § 1352(a)(1) & (a)(2) (emphasis added).

Significantly, in 1990, the federal Office of Management and Budget clarified its interim final guidelines regarding the Byrd Amendment by explaining that the Amendment did not govern profit. 55 Fed. Reg. 24540-01, 24542 (June 15, 1990) ("(2) Profits and fees earned under Federal contracts (see FAR subpart

15.9) are not considered appropriated funds. Profits, and fees that constitute profits, earned under Federal grants, loans, and cooperative agreements are not considered appropriated funds.").

As explained above, a similar interpretation of AB 1889 is reasonable and in accord with the California legislature's stated purpose for enacting AB 1889. Because this interpretation of AB 1889's grant and program provisions avoids any constitutional doubts concerning the state law, the interpretation should be adopted.

C. Because AB 1889's Grant and Program Provisions Further The State's Legitimate Policy of Not Subsidizing Employer Union Organizing-Related Activities, They Do Not Violate the *Machinists* Doctrine

The Chamber of Commerce and its amici, referencing only portions of AB 1889's uncodified preamble, describe AB 1889 as reflecting "California's explicit policy judgment that *employer* speech for or against unionization 'interfere[s] with an employee's choice about whether to join or be represented by a labor union." United States' Br., 14 (emphasis added) (*quoting* AB 1889's uncodified preamble, 2000 Cal. Stat. ch. 872, § 1). Based on a similar characterization of AB 1889, the Chamber of Commerce suggests that AB 1889's grant and programs provisions tilt the balance of power toward unions and thus effectively

regulate conduct that is preempted by the NLRA under *Machinists*. Petitioners' Br., 30-31. This characterization of AB 1889 is not correct.

AB 1889 does not reflect a legislative judgment that *employer* speech about union organizing is contrary to public policy or otherwise interferes with the rights of employees in labor matters. Rather, the plain and complete language of AB 1889's uncodified preamble makes clear that the California legislature found that state *subsidizing* of employer speech in this context, with state grant and program funds, is the conduct the legislature believed may interfere with an employee's choice about whether to join a union. The government's desire not to subsidize union-related expenditures is a recognized legitimate governmental concern. *See Lyng v. Int'l Union, UAW*, 485 U.S. 360, 371 ("[w]e have little trouble in concluding that [the federal Food Stamp Act, which declines initial and increased food stamp assistance to striking workers] is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes.").

Further, contrary to the Chamber of Commerce's assertion, AB 1889 does not favor unions over employers. AB 1889 does not provide an exemption for labor unions. Rather, the statute does apply to unions that seek to influence the decision of their employees or those of their subcontractors regarding whether to join a union. *See* Cal. Gov't Code § 16645(a) (defining "assist, promote, or deter union organizing"). More importantly, there is nothing in the record that

suggests, let alone demonstrates, that unions receive any state grant and program funds that they could use to assist or deter union organizing.

The Chamber of Commerce also incorrectly contends that the State's interest in enacting AB 1889 is not legitimate because it failed to restrict other potential improper uses of program funds. As has been recognized in the First Amendment and equal protection contexts, the government is well within its discretion to legislate in a narrow manner to remedy only the perceived problem before it. *See Davenport v. Washington*, 127 S. Ct. 2372, 2381 (2007); *FCC v. Beach Communications*, 508 U.S. 307, 316 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488-89 (1955).

Nor, as asserted by the Chamber of Commerce, does Government Code section 16647, which clarifies AB 1889's limited scope, undermine the statute's neutrality. Cal. Gov't Code § 16647.[7] First, AB 1889,

[7] Specifically, Section 16647 provides that:

> This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following: (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't Code § 16647.

by its plain terms, only restricts the use of state funds to "assist, promote, or deter union organizing." *See* Cal. Gov't Code § 16645.7(a). AB 1889 defines the phrase, "assist, promote, or deter union organizing" to mean: "any attempt by an employer to influence the decisions of its employees in this state or those of its subcontractors regarding either of the following: (1) Whether to support or oppose a labor organization that represents or seeks to represent those employees[, and] (2) Whether to become a member of any labor organization." Cal. Gov't Code § 16645(a). None of the activities enumerated in Government Code section 16647 fall within the above definition, and thus they would not be governed by AB 1889, even if they were not listed in Section 16647.

Second, several of the activities set forth in Government Code section 16647, specifically, "[a]ddressing a grievance," "negotiating or administering a collective bargaining agreement," and "[p]erforming an activity required by federal or state law or by a collective bargaining agreement" (Cal. Gov't Code § 16647(a), (c)), are activities that an employer may not be able to realistically and in some instances, legally, avoid when providing the services for which the State has contracted. As such, the California legislature's clarification that those activities are outside AB 1889's scope is reasonable.

In particular, the legitimacy of the exception for collective bargaining activities is underscored by the fact that the federal government has made similar distinctions in its Medicare program. For purposes of

that program, the federal government has determined that costs incurred for collective bargaining are reimbursable. J.A. 271 (Provider Reimbursement Manual, Part 1 § 2180.2 [¶ 5999Z-56]). Such costs are reimbursable because "[c]ontract negotiations and any procedures which flow from enforcement of contract terms, whether in a collective or individual setting, are necessary to maintain the continued operation of the provider, and, thus, are a precondition for the delivery of health services." *Id*. But significantly, the federal government, for purposes of Medicare, disallows costs that are "directly related to influencing employees with respect to unionization," because they "are not related to patient care." J.A. 266-67. Such distinctions are equally valid with respect to AB 1889.

Further, while AB 1889 permits the employer to use state funds when "[a]llowing a labor organization or its representatives access to the employer's facilities or property" (Cal. Gov't Code § 16647(b)), that provision neither requires nor encourages employers to agree to allow the labor union on its premises. Nothing in AB 1889 undermines an employer's right to refuse to allow a union to enter its premises. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538-41 (1992).

The same is true of AB 1889's provision that exempts, as outside the scope of AB 1889, activities involved in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." Cal. Gov't Code § 16647(d). AB 1889 neither requires nor encourages the employer to

negotiate such an agreement. The decision whether to engage in that activity is left entirely to the employer's discretion. Thus, contrary to the assertion of amici curiae The National Right to Work Legal Defense Foundation, Inc., et al., nothing in AB 1889 "induces employers to capitulate to union demands for neutrality card check agreements." Amici Br. of Nat'l Right to Work, 11 (citation omitted). Moreover, if the employer does wish to pursue a recognition agreement, AB 1889's restriction that it not use state funds to influence its employees about whether to join a union still applies. As such, the exception is consistent with the State's goal of not subsidizing union-lobbying activities, in order to preserve its neutrality.

Nor can the Chamber of Commerce demonstrate that AB 1889 is not neutral by asserting that employers would rarely use state funds to *assist* union organizing. Some employers do engage in activities to encourage their employees to join a union. For example, an employer may encourage employees to join a union that the employer prefers to another union. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993), *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).

And even were the Chamber of Commerce's contention accurate, as Judge Fisher aptly explained when this matter was before the Ninth Circuit on its first rehearing,

> The majority's extensive arguments as to the "real" purpose of AB 1889 are beside the point. Neutrality means not taking sides. Even if the majority is right that California is effectively preventing employers from using state funds to advocate *against* unionization only, California is still remaining neutral – and it is simply irrelevant whether the money would otherwise be spent to support unionization, oppose it, or in some combination.

Pet. App. 104a, n. 14 (Fisher, J., dissenting).

Finally, the Chamber of Commerce cannot successfully demonstrate that AB 1889 is preempted under *Machinists* based on the views of the sponsors of the legislation or of those who voted for it. The 12-member en banc court below properly rejected such an approach, observing that, "'[f]ederal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment.'" Pet. App. 34a, n. 21 (emphasis omitted) (*quoting Northern Ill. Chapter of Associated Builders & Contractors v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)).

Accordingly, because AB 1889's grant and program provisions set forth neutral restrictions on the use of state funds, they do not intrude upon an area that Congress intended to be left unregulated.

D. The Chamber of Commerce Has Not Demonstrated, As a Facial Matter, That AB 1889's Record-Keeping and Enforcement Provisions Are So Unduly Burdensome as to Render the Statute's Grant and Program Provisions Preempted Under *Machinists*

The Chamber of Commerce suggests that AB 1889's record-keeping and enforcement provisions are so onerous that they effectively chill or regulate the manner in which an employer can spend its own funds for union organizing activities. *See* Petitioners' Br., 44-51. The Chamber of Commerce's contention is not supported by either AB 1889's plain language or by the record that it established below in this facial challenge.

AB 1889 requires employers who receive grant funds or program funds in excess of $10,000 in a calendar year, and who make expenditures to assist or deter union organizing, to "maintain records sufficient to show that state funds have not been used" for those purposes, and to provide those records to the Attorney General upon request. Cal. Gov't Code §§ 16645.2(c); 16645.7(c). Though AB 1889 assumes state funds are spent on such expenditures, on a pro rata basis, if the employer commingles state and other funds, Cal. Gov't Code § 16646(b), AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

The record does not support the Chamber of Commerce's suggestion that meeting these requirements is unduly difficult and requires the adoption of separate accounting systems or the maintaining of voluminous records. In the summary judgment proceedings below, the burden allegedly caused by AB 1889's record-keeping provisions was a disputed fact. *See* J.A. 71, Docket Entry 103 (Statement of Genuine Issues by Defendants in Opposition to Plaintiffs' Motion for Summary Judgment). On the one hand, the Chamber of Commerce submitted declarations alleging that it would be burdensome to comply with AB 1889's record-keeping provisions. J.A. 129, 135-36, 155, 158-59, 160-61, 163, 165-68. Contrary evidence, however, was presented. Specifically, Respondents and Intervenors, American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation, submitted a declaration from a certified public accountant and partner in a national accounting firm that explained that AB 1889's record-keeping and accounting requirements "are similar to requirements imposed in other contexts, particularly for federal grant recipients" and that AB 1889's accounting and record-keeping requirements "appear to be significantly less burdensome" than complying with standard federal grant restrictions. J.A. 280-83, ¶¶ 6, 8. Significantly, the district court made no findings on this issue. Pet. App. 140a-149a.

Because the Chamber of Commerce is the party that sought and obtained summary judgment below,

all disputed facts must be resolved against it. *See Cantor v. Detroit Edison Co.,* 428 U.S. 579, 582 (1976). The existence of this disputed fact concerning AB 1889's record-keeping provisions renders it impossible for the Chamber of Commerce to establish, as a facial matter, that AB 1889's record-keeping provisions are so unduly burdensome as to effectively regulate the use of an employer's own funds. This is a classic example of a facial challenge "carr[ying] too much promise of premature interpretatio[n] of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (citations omitted).

The Chamber of Commerce nonetheless suggests that AB 1889's record-keeping requirements are overly burdensome as a matter of law. Petitioners' Br., 45. This contention is also without merit. This Court has recognized that record-keeping requirements applicable to government subsidies do not impermissibly burden expressive activity. For example, in *Regan v. Taxation With Representation,* 461 U.S. at 544-46, this Court upheld the constitutionality of a federal tax law requiring non-profits to establish a separate entity to conduct lobbying in order for contributions made to the non-profits to be tax deductible. As this Court observed, "[t]he IRS apparently requires only that the two groups 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." *Id*. at 544, n. 6.

Similarly, in *Rust v. Sullivan*, 500 U.S. 173, this Court upheld, against a facial challenge, a federal requirement that a recipient of federal family planning grant money keep any pro-abortion activities, for which the grant funds could not be used, "physically and financially separate" from activities for which the funds could be used. "Mere bookkeeping separation" was not sufficient. *Rust*, 500 U.S. at 180-81, 196. This Court recognized that "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Id*.

By their plain terms, AB 1889's record-keeping provisions are far less onerous than those upheld in *Regan* and *Rust. Regan,* 461 U.S. at 544; *Rust,* 500 U.S. at 180-81 and 197. Unlike the requirements in *Regan* and *Rust,* AB 1889 does not require employers to establish separate organizations to engage in activities the government does not wish to subsidize. In addition, there was strong evidence in the record that AB 1889's requirements are not burdensome and that government grants routinely require record-keeping to ensure the proper use of expenditures. *See* J.A. 280-83.

Notwithstanding, the Chamber of Commerce cites *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*Massachusetts Citizens*) (plurality opinion) for the proposition that AB 1889's accounting requirements are overly burdensome. *Massachusetts Citizens* is inapposite. *Massachusetts Citizens* involved an *as applied* challenge to a federal law that bars corporations from spending their own treasury funds to influence a federal election. *Massachusetts Citizens,* 479 U.S. at 241. The plaintiff was a modest nonprofit, nonstock corporation that did not engage in any business activities at all. *Id.* at 241-42. Its sole purpose was "to disseminate political ideas, not to amass capital." *Id.* at 259. It "did not accept contributions from business corporations or unions." *Id*. at 242. Rather, "[i]ts resources [came] from voluntary donations from 'members' and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics." *Id*.

While the challenged statute prohibited the plaintiff from using its own treasury funds to support political candidates, it did permit the organization to engage in limited independent campaign spending with other funds donated for that specific purpose, but only if it first established a segregated fund and complied with a multitude of bookkeeping, administrative and disclosure obligations. *Massachusetts Citizens*, 479 U.S. at 253-54. These requirements included the appointment of a treasurer and the filing of periodic reports with the Federal Election Commission containing specified, detailed information, including

"the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; [and] the total amount of all disbursements, detailed by 12 different categories; . . . . " *Id*. It was in this as-applied context that the plurality concluded that the "[d]etailed record-keeping and disclosure obligations, along with a duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *Id*. at 254-55 (footnote omitted).

The contrast between *Massachusetts Citizens* and this case is stark. First, this is a facial challenge only. Unlike the showing of burden made with respect to the particular plaintiff in *Massachusetts Citizens,* the Chamber of Commerce has failed to establish that all employers who are awarded state grants or participate in state programs (such as hospitals) lack the sophistication or wherewithal to comply with AB 1889's record-keeping provisions. Those provisions simply require employers who incur expenses to assist or deter union organizing to "maintain records sufficient to show that state funds have not been used" for those activities. *See* Cal. Gov't Code § 16645.2(c). And while those provisions prohibit

grant recipients and program participants from commingling state funds with other funds if the recipients choose to finance activities to assist or deter union organizing, Cal. Gov't Code § 16646(b), AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648. Given the regulatory schemes governing state grants and programs discussed above, and the expert testimony in the record indicating that AB 1889's accounting and record-keeping provisions "appear to be significantly less burdensome than the detailed requirements for federal grant recipients," the Chamber of Commerce cannot demonstrate, as a facial matter, that all employers covered by AB 1889 face the same sort of burden as did the entity at issue in *Massachusetts Citizens,* 479 U.S. at 241-42, 253-54. *See* J.A. 282-83, ¶ 8.

More important, *Massachusetts Citizens* involved limitations on the expenditures of an organization's *own* funds for political speech, an intrusion on First Amendment rights that can only be justified by a compelling state interest. *Massachusetts Citizens*, 479 U.S. at 256. Because AB 1889 simply declines to subsidize speech with state funds and does not restrict the use of an employer's own funds, it need not be justified by a compelling state interest. *See Regan v. Taxation With Representation,* 461 U.S. at 545; *Rust v. Sullivan,* 500 U.S. at 197. This Court expressly underscored that point in *Massachusetts Citizens* when it expressly distinguished *Regan* on the ground that

"there is no right to have speech subsidized by the Government." *Massachusetts Citizens*, 479 U.S. at 256, n. 9.[8]

Finally, AB 1889's penalty and attorney fee provisions do not unduly burden employers. AB 1889 provides that employers who violate AB 1889 are liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8(d). These civil penalties are directly tied to the amount of state funds used for prohibited activity. The potential penalties are thus measured and reasonable. Moreover, statutes commonly allow reasonable attorney fees only to a prevailing plaintiff. *See, e.g.,* Cal. Ins. Code §§ 785, 789(e) (West 2008) (insurance transactions in which insurer, broker, agent, and/or others violate their duty of honesty, good faith, and fair dealing to a prospective insured who is 65 years of

[8] The Chamber of Commerce's argument that AB 1889's record keeping provisions would effectively silence employers, as a matter of law, is also undercut by the fact that record-keeping requirements are mandated in other contexts as well. Indeed, the Supreme Court has imposed extensive record-keeping requirements on unions engaged in political speech, so as to ensure that no dues money received from workers who object to such expenditures are used for those purposes. *See Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 234, 237 (1977); *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 304-09 (1986). Such requirements, however, have not prevented such organizations from continuing to actively engage in such speech.

age or older); Cal. Bus. & Prof. Code § 6412.1(b) (West 2008) (unlawful acts of legal document assistants or unlawful detainer assistants); Cal. Bus. & Prof. Code §§ 6450, 6455(a) (West 2008) (violations of laws pertaining to paralegals); 15 U.S.C. § 2310(d)(2) (2008) (Magnuson-Moss Warranty Act); 15 U.S.C. § 26 (2008) (the Clayton Act), and 18 U.S.C. § 1964(c) (2008) (Racketeer Influenced and Corrupt Organizations Act (RICO)).

Similarly, that AB 1889 provides for taxpayer lawsuits does not render the legislation unduly burdensome as a matter of law. *See* Cal. Gov't Code § 16645.8(a). As the en banc court below correctly observed,

> In this respect, the statute is no different from any number of other federal and state laws or qui tam causes that enable private attorneys general to help detect, punish and deter wrongdoing. In contrast to some such statutes (e.g., § 4 of the Clayton Act, 15 U.S.C. § 15), which encourage private suits by permitting plaintiffs to be awarded treble damages, AB 1889 only allows private litigants to recover attorney's fees and costs – the damages go to the state. *See* § 16645.8(d).

Pet. App. 5a, n. 3.

For these reasons, the Chamber of Commerce is wrong when it contends that, as a facial matter, AB 1889 constitutes a cognizable burden on employers

that effectively chills them from using their own funds to assist or deter union organizing. To the contrary, AB 1889's record-keeping and enforcement provisions are reasonable and measured.

II.

AB 1889'S GRANT AND PROGRAM PROVISIONS ARE NOT PREEMPTED UNDER THE *GARMON* DOCTRINE

The *Garmon* preemption doctrine "safeguards the primary jurisdiction of the National Labor Relations Board [NLRB] to pass judgment on certain conduct." *Livadas v. Bradshaw*, 512 U.S. 107, 118 (1994); *see also Boston Harbor,* 507 U.S. 218, 224-25. To preserve the NLRB's jurisdiction, the *Garmon* doctrine prohibits state and local regulation of conduct that is actually or arguably protected by Section 7 of the NLRA, as well as conduct that is actually or arguably prohibited by Section 8 of the Act. *Boston Harbor*, 507 U.S. at 224-25; *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187-88 (1978). Because AB 1889 neither regulates conduct that is actually or arguably protected by Section 7 or actually or arguably prohibited by Section 8, AB 1889 is not preempted under *Garmon*.

A. AB 1889 Does Not Regulate Speech That is Actually or Arguably Protected Under *Garmon*

The Chamber of Commerce argues that AB 1889 is preempted under *Garmon* based on its interpretation of Section 8(c) of the NLRA, which is codified at 29 U.S.C. § 158(c). *See* Petitioners' Br., 23-24. Subdivisions (a) and (b) of Section 8 set forth the activities deemed "unfair labor practices" by employers and labor organizations, respectively. Subdivision (c), upon which the Chamber of Commerce relies for its *Garmon* preemption analysis, provides: "[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 under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (2008). Arguing that Section 8(c) is an appropriate basis to support *Garmon* preemption, the Chamber of Commerce reasons that, "employer freedoms, such as the freedom to engage in noncoercive speech, are 'protected' by the NLRA by preventing government interference with that freedom, just as the First Amendment 'protects' citizens' speech by preventing 'Congress' from interfering with it." Petitioners' Br., 24, n. 2 (*quoting Healthcare Ass'n,* 471 F.3d at 99).

As the United States implicitly acknowledges, however, using Section 8(c) as a basis to establish preemption under *Garmon* is unsound. United States' Br., 26 (stating that the en banc court, when evaluating *Garmon,* "incorrectly focused its attention on the question whether A.B. 1889 regulates employer speech that is protected or affirmatively authorized by the NLRA.").

Indeed, Section 8(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. at 617. That is, Section 8(c) makes it clear that an employer does not commit an unfair labor practice by expressing its views regarding union organizing. Section 8(c) thus operates similarly to a savings clause, clarifying that the provisions of section 8(a), defining unfair labor practices by the employer, should not be interpreted to extend to noncoercive speech, which is protected by the First Amendment. Any protections on free speech are found in the First Amendment, and not the NLRA. As discussed above, government limitations on the use of its funds to subsidize speech, similar to the limitation in AB 1889, do not constitute regulation of speech and have been consistently upheld by this Court when challenged under the First Amendment. *See, e.g., Rust v. Sullivan*, 500 U.S. at 192-93 and *Regan v. Taxation With Representation*, 461 U.S. at 544-46.

The Chamber of Commerce interprets these First Amendment cases far too narrowly when it suggests

that they are limited to situations in which the government is funding a programmatic message. Petitioners' Br., 54. *Regan*, for example, has nothing to do with the government funding a programmatic message. Congress simply did not wish to subsidize private lobbying activity. *Regan*, 461 U.S. at 544.

Moreover, the question whether the government is funding a programmatic message is relevant when the government's funding decisions constitute viewpoint discrimination. *See United States v. American Library Association,* 539 U.S. 194, 213, n. 7 (plurality opinion) ("[*Legal Services Corp. v. Velazquez,* 531 U.S. 533, 542 (2001)] held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" (citations and emphasis omitted)). AB 1889 cannot properly be characterized as discriminating on the basis of viewpoint. AB 1889 does not prohibit employer speech on the topic of union organizing. Rather, AB 1889, in a viewpoint neutral manner, prohibits the use of state grant and program funds for activities related to assisting, promoting, *or* deterring union organizing. *See Davenport v. Washington* 127 S. Ct. 2372, 2382 ("[q]uite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission. *Cf. Regan, supra*, at 549-550[ ] (*First Amendment* does

not require the government to enhance a person's ability to speak)."). Accordingly, AB 1889's restrictions on the use of state funds for an activity that the State declines to subsidize do not violate the First Amendment.

Yet, by asserting that Section 8(c) creates affirmative free speech rights *independent* of the First Amendment, the Chamber of Commerce requests that this Court grant employers broader speech rights than they would otherwise enjoy under the First Amendment. There is no reason to conclude that, through Section 8(c), Congress provided such an expansive right that would invalidate legitimate state action. Accordingly, even if Section 8(c) provides an employer with a free speech protection, that NLRA-created right should be no broader than the free speech right protected by the First Amendment. Because the State's decision to decline to subsidize protected speech does not offend the First Amendment, the Chamber of Commerce's *Garmon* challenge predicated on Section 8(c) fails.

B. AB 1889 Does Not Regulate Speech That is Actually or Arguably Prohibited Under *Garmon*

The United States contends that AB 1889 regulates "coercive" employer speech, the same speech that is *prohibited* by Section 8 of the NLRA and, therefore, it is preempted under the *Garmon* doctrine. United States' Br., 24-25. This contention is incorrect.

Under Section 8 of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed in section 7 of the NLRA. 29 U.S.C. § 158(a)(1) (2008). Employer speech is not considered "coercive," for purposes of Section 8, if the speech "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Contrary to the United States' contention, AB 1889 does not impose penalties for the same conduct that is prohibited under Section 8. Penalties are not available under AB 1889 on the basis that an employer has engaged in "threats of reprisal, force or promise of benefit," an issue that would be exclusively within the NLRB's jurisdiction. Rather, AB 1889 penalties are only available if the employer engages in a different activity, using state funds to pay for an employer's activities to assist or deter union organizing. This is true regardless of whether or not the speech is coercive.

For this reason, AB 1889 is not similar to *Gould*, in which a Wisconsin statute that prohibited employers who had engaged in repeated violations of the NLRA from doing business with the State was held to be preempted under the *Garmon* doctrine. *Gould*, 475 U.S. 282, 283-84. Unlike the statute at issue in *Gould,* AB 1889 does not function "as a supplemental sanction for violations of the NLRA." *Id*. at 288.

Moreover, the prosecution of an AB 1889 enforcement action would not require a state court to decide whether an employer engaged in speech that was coercive. The en banc court correctly concluded that under the primary jurisdiction test set forth in *Sears,* 436 U.S. at 188, there is an insufficient identity of claims between AB 1889 and the NLRA to warrant *Garmon* preemption. Pet. App. 26a-28a. The United States implicitly recognizes this. Its *Garmon* preemption argument is premised, in part, on the assumption that AB 1889 is preempted under the *Machinists* doctrine to the extent that AB 1889 applies to state funds spent on an employer's non-coercive speech. United States' Br., 25 ("But because much of A.B. 1889 is preempted under *Machinists* principles, a state court considering an A.B. 1889 claim would have to attempt to discern whether employers engaged in coercive or prejudicial speech . . . as part of the preemption analysis – the same analysis undertaken by the Board."). But, as no part of AB 1889 is preempted under the *Machinists* doctrine, the United States' *Garmon* argument necessarily fails.

C. AB 1889 Falls Within The Exception to *Garmon* Preemption for Matters "Deeply Rooted in Local Feeling and Responsibility"

Even if AB 1889 were found to be intruding on an area that is actually or arguably protected or prohibited by the NLRA for purposes of *Garmon*

preemption, the en banc court below correctly determined that the recognized exception to *Garmon* preemption for matters "deeply rooted in local feeling and responsibility" would apply to AB 1889. Pet. App. 31a.

AB 1889 falls squarely within this exception. Indeed, this Court has recognized that state matters such as libel and tort claims are so deeply rooted in local feeling and responsibility as to fall within the purview of this exception. *See Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966) (state malicious libel action); *Int'l Union, United Auto Workers of America (UAW CIO) v. Russell*, 356 U.S. 634, 644-46 (1958) (state action for malicious interference with an employee's rights).

Here the state interest at issue should be granted even more deference. At their core, AB 1889's grant and program provisions further the exercise of California's sovereign right to manage and control its own financial affairs. This is an issue of exceptional importance to the State.

This Court has long recognized that managing a state's own fiscal affairs is a state's sovereign right. Indeed, the importance of protecting states from "judicial interference in the vital field of financial administration," underlies the protection, afforded by the Eleventh Amendment, of the state treasury from damage awards even where injunctive relief would be

allowed. *See Great Northern Life Ins. v. Read,* 322 U.S. 47, 53-54 (1947).

The significance of a state's sovereign interest in decisions regarding the use of its funds was similarly recognized in *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). There, the Court rejected, on equal protection grounds, a class action challenging a school-financing system that was based on local property taxation and refused to order the State of Texas to redistribute funds between school districts. *Id*. at 4-6. In reaching its decision, the Court noted that the plaintiffs had brought "nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues." *Id*. at 40. The Court recognized that it was thus being asked to "intrude in an area in which it has traditionally deferred to state legislatures." *Id.* (footnote omitted). It refused to do so. Indeed, with respect to the Equal Protection Clause, "[t]his Court has often admonished against such interferences with the State's fiscal policies. . . . " *Id*. It is submitted that the exercise of such restraint is also appropriate in the context presented here.

California has a sovereign right to control its fisc. California's decision to enact AB 1889's grant and program provisions falls squarely within the exception to *Garmon* preemption for matters deeply rooted in local feeling and responsibility.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

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Respectfully submitted,

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