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WISCONSIN STATE LEGISLATURE ...
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2009-10

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Labor, Elections, and Urban Affairs (SC-LEUA)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Gigi Godwin (LRB) (September/2011)

LEXSEE 471 F.3D 87

Healthcare Association of New York State, Inc., New York Association of Homes and Services for the Aging, Inc., New York State Health Facilities Association, Inc., NYSARC, Inc. and United Cerebral Palsy Associations of New York State, Inc., Plaintiffs-Appellees, v. George E. Pataki, Governor of the State of New York, Eliot Spitzer, Attorney General of the State of New York and Linda Angello, Commissioner of Labor of the State of New York, Defendants-Appellants,

Docket No. 05-2570-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

471 F.3d 87; 2006 U.S. App. LEXIS 29857; 180 L.R.R.M. 3265; 153 Lab. Cas. (CCH) P10,764

February 10, 2006, Argued
December 5, 2006, Decided

PRIOR HISTORY: **[**1]** Appeal from an entry of summary judgment in favor of the plaintiffs by the United States District Court for the Northern District of New York (The Honorable Neal P. McCurn, District Judge, presiding).
Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 388 F. Supp. 2d 6, 2005 U.S. Dist. LEXIS 9186 (N.D.N.Y. 2005)

DISPOSITION: We reverse and remand.

COUNSEL: JEFFREY J. SHERRIN, CORNELIUS D. MURRAY, JAMES A. SHANNON, O'Connell and Aronowitz, P.C., for Plaintiffs-Appellees.

ELIOT SPITZER, Attorney General of the State of New York, MICHELLE ARONOWITZ, Deputy Solicitor General, M. PATRICIA SMITH, Assistant Attorney General in Charge of Labor Bureau, with SETH KUPFERBERG, Assistant Attorney General, of Counsel, for Defendants-Appellants.

JUDGES: Before: JACOBS, Chief Judge, WESLEY, and JOHN R. GIBSON, * Circuit Judges. Judge Wesley concurs in a separate opinion.

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION BY: JOHN R. GIBSON

OPINION

[*89] JOHN R. GIBSON, Circuit Judge.

George E. Pataki, Eliot Spitzer, and Linda Angello, respectively the Governor, Attorney General, and Labor Commissioner of the State of New York, appeal from the district court's grant of summary judgment **[*90]** to the plaintiff associations [1] in this suit for declaratory **[**2]** and injunctive relief from enforcement of *New York Labor Law § 211-a*. *Section 211-a* restricts employers from spending monies derived from the State to hire employees or contractors to attempt to influence union organizing campaigns. The district court held that enforcement of *section 211-a* is preempted by the National Labor Relations Act, commonly known as the NLRA. We reverse the grant of summary judgment because we conclude that there are disputed issues of fact.

1 Healthcare Association of New York State, Inc., New York Association of Homes and Services for the Aging, Inc., New York State Health Facilities Association, Inc., NYSARC, Inc., and United Cerebral Palsy Associations of New York State, Inc.

New York Labor Law § 211-a(2) [2] provides: "[N]o monies appropriated by the **[*91]** state for any purpose shall be used or made available to employers" to use for three forbidden purposes:

(a) training managers, supervisors or other administrative personnel [**3] regarding methods to encourage or discourage union organization or participation in a union organizing drive;

(b) hiring attorneys, consultants or other contractors to encourage or discourage such organization or participation; and

(c) paying employees whose principal job duties are to encourage or discourage such organization or participation.

2 *Section 211-a* (2002)(as amended 2002 N.Y. Laws c. 601) provides in full:

> 1. The legislature hereby finds and declares that sound fiscal management requires vigilance to ensure that funds appropriated by the legislature for the purchase of goods and provision of needed services are ultimately expended solely for the purpose for which they were appropriated. The legislature finds and declares that when public funds are appropriated for the purchase of specific goods and/or the provision of needed services, and those funds are instead used to encourage or discourage union organization, the proprietary interests of this state are adversely affected. As a result, the legislature declares that the use of state funds and property to encourage or discourage employees from union organization constitutes a misuse of the public funds and a misapplication of scarce public resources, which should be utilized solely for the public purpose for which they were appropriated.
>
> 2. Notwithstanding any other provision of law, no monies appropriated by the state for any purpose shall be used or made available to employers to: (a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.
>
> 3. Any employer that utilizes funds appropriated by the state and engages in such activities shall maintain, for a period of not less than three years from the date of such activities, financial records, audited as to their validity and accuracy, sufficient to show that state funds were not used to pay for such activities. An employer shall make such financial records available to the state entity that provided such funds and the attorney general within ten business days of receipt of a request from such entity or the attorney general for such records.
>
> 4. The attorney general may apply in the name of the people of the state of New York for an order enjoining or restraining the commission or continuance of the alleged violation of this section. In any such proceeding, the court may order the return to the state of the unlawfully expended funds. Further, the court may impose a civil penalty not to exceed one thousand dollars where it has been shown that an employer engaged in a violation of subdivision two of this section; provided, however, that a court may impose a civil penalty not to exceed one thousand dollars or three times the

> amount of money unlawfully expended, whichever is greater, where it is shown that the employer knowingly engaged in a violation of subdivision two of this section or where the employer previously had been found to have violated subdivision two within the preceding two years. All monies collected pursuant to this section shall be deposited in the state general fund.
>
> 5. The commissioner shall promulgate regulations describing the form and content of the financial records required pursuant to this section, and the commissioner shall provide advice and guidance to state entities subject to the provisions of this section as to the implementation of contractual and administrative measures to enforce the purposes of this section.

[4]** *Subsection 1 of section 211-a* memorializes the legislative finding that sound fiscal management requires the state to assure that funds appropriated for the purchase of goods and services are actually expended solely for those goods and services, rather than for the purpose of encouraging or discouraging union organization.

The accounting provision, *section 211-a(3)*, requires "[a]ny employer that utilizes funds appropriated by the state" to maintain for three years financial records sufficient to show that the employer did not spend "state funds" for any of the three restricted purposes.

The enforcement provision, *section 211-a(4)*, empowers the Attorney General of New York to sue for both injunctive relief and the return to the State of monies spent for the three restricted purposes. The Attorney General may also seek a civil penalty of up to $ 1000 for a first violation or, for a knowing violation or a second violation within two years, the greater of $ 1000 or three times the money spent in violation of *subsection 2*. [3] *New York Labor Law § 213* provides that any person who violates any provision of the labor law is guilty of a misdemeanor; however, **[**5]** the State points out that because *section 211-a* itself prescribes only fines and no jail time, the offense is actually a non-criminal "violation," rather than a misdemeanor, notwithstanding this language in *section 213*. See NY Penal Law *§ 55.10.3* ("Any offense defined outside this chapter which is not expressly designated a violation shall be deemed a violation if: (a) Notwithstanding any other designation specified in the law or ordinance defining it, a sentence to a term of imprisonment which is not in excess of fifteen days is provided therein, or the only sentence provided therein is a fine."); see *People v. Star Supermarkets, Inc., 67 Misc. 2d 483, 324 N.Y.S.2d 514, 516-17 (N.Y. Monroe County Ct. 1971)* (sabbath-breaking was a "violation," despite specific language in statute terming offense a misdemeanor), aff'd, *40 A.D.2d 946, 339 N.Y.S.2d 262 (N.Y. App. Div. 1972)*.

> 3 The associations argue that the penalties are worse than they appear; they point to Labor Law *§ 213*, which provides that any person who violates any provision of the labor law shall be punished, "except as in this chapter or in the penal law otherwise provided," by fines or imprisonment of up to thirty days or sixty days, respectively, for second and third violations. Since *section 213* especially defers to statutes for which the punishment is otherwise provided and since *section 211-a(4)* specifies only civil penalties, the provisions of *section 213* do not appear to authorize further punishment.

[6]** *Section 211-a(5)* instructs the Commissioner of Labor to promulgate regulations describing the form and content of the financial records required, but the Commissioner has not yet done so.

The plaintiffs are various not-for-profit corporations or trade associations involved in providing healthcare or representing **[*92]** providers of healthcare. They allege that they or their members receive funds to pay for services rendered, including Medicaid payments, that have at one time been appropriated by New York. In addition to sales of services, they allege that they receive funds from New York to support services they provide, such as training residents and interns and charity health care. Medicaid and other governmental funds represent the great majority of the associations' or their members' income, in some cases making up 90 to 95% of their income.

They further allege that some of the associations are currently undergoing unionization drives or expect to undergo such campaigns in the near future. They allege that "Labor Law *§ 211-a* will encourage union organizing campaigns against Plaintiff Associations because the statute impairs the ability of these employers to communicate with their **[**7]** own employees regarding the benefits and disadvantages of unionization."

The complaint alleges, "The prohibitions of *New York Labor Law § 211-a* apply to monies the ownership and control of which have already been transferred to the

recipient." The associations contend that even after they or their members have provided a service and have been paid for it, the strictures of *section 211-a* follow the money and prevent the associations and their members from using their own money to communicate with their employees regarding whether it is desirable to unionize. They further allege that monies that they receive from local governments may be considered covered by *section 211-a* because the local governments received the money from the State: "[T]here is no limitation in the statute as to when in the funding 'chain,' the funds cease to retain and lose their character as state-appropriated monies." They also allege that federal monies are disbursed through the State, so that federal monies are also covered by *section 211-a*. "It is, therefore, impossible to determine what funds, no matter how tenuously connected to state appropriations, are subject to the prohibitions **[**8]** of *section 211-a*."

They further allege that the State Attorney General has interpreted *section 211-a* to restrict their use of Medicaid funds, including the portion of such funds contributed by the federal government. According to the Amended Complaint, the State Attorney General has investigated one or more members of the plaintiff associations for their use of Medicaid funds to oppose unionization.

The associations allege that but for the prohibitions of *section 211-a*, they would spend proceeds derived from their dealings with the State to pay for the three kinds of expenses restricted by *section 211-a*.

The associations sought a declaration that *section 211-a* is preempted by the National Labor Relations Act (the "NLRA") and the Labor Management Relations Disclosure Act and that it violates their *First Amendment* and Due Process rights.

The three State officials (whom we will call collectively "the State") filed a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss the complaint, and the associations filed a cross-motion for summary judgment. The State sought to convert its *Rule 12(b)(6)* motion to a motion for summary judgment, but because the **[**9]** district court viewed the issue as "predominately legal," the court treated both the associations' and the State's motions as motions for judgment on the pleadings, taking into account only those documents that would be considered on a *Rule 12(b)(6)* motion. *Healthcare Ass'n of New York State, Inc. v. Pataki, 388 F. Supp. 2d 6, 9 (N.D.N.Y. 2005)*.

[*93] The district court quite reasonably relied extensively on the Ninth Circuit's decision of a very similar case in *Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004)*. After the district court's decision, the panel in Lockyer granted rehearing and issued a superseding opinion, *422 F.3d 973 (9th Cir. 2005)*. The Ninth Circuit then vacated the panel opinion and granted rehearing en banc, *437 F.3d 890 (9th Cir. 2006)*, and has just recently decided that the California statute at issue is not preempted by federal labor law. *Chamber of Commerce v. Lockyer, 463 F.3d 1076 (9th Cir. 2006)* (en banc).

The district court held that *section 211-a* is preempted by the NLRA under the Machinists [4] doctrine, under which state laws are preempted if they unsettle **[**10]** the balance of interests between employers, employees and unions established by the NLRA. *388 F. Supp. 2d at 12*. The district court held that the restrictions *section 211-a* places on an employer's ability to communicate distort the union organizing process instituted by the NLRA. *Id. at 23*. The court held that the threat of an enforcement proceeding by the Attorney General and of the penalties, including a fine of treble the amount wrongfully spent, would tie employers' hands during union-organizing campaigns, thus depriving employers of an economic weapon the NLRA reserved to them. *Id. at 24*. The record-keeping requirement was also sufficiently onerous to affect employers' ability to communicate as allowed by the NLRA. Id. The district court therefore held that *section 211-a* interferes with the campaign process provided by the NLRA and is preempted under the Machinists doctrine. *Id. at 24-25*.

4 *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)*.

[11]** The district court also determined that *section 211-a* should not be exempt from Machinists preemption on the ground that the State is acting as a market participant rather than as regulator. The court held that the broad application of *section 211-a*, which reaches all employers who receive monies appropriated by the State for any purpose, is not typical of a market participant's efforts to address a specific proprietary problem or project. *Id. at 17-19*. Moreover, notwithstanding the legislative findings announcing that the purpose of *section 211-a* is to make sure the State gets its money's worth when it pays for goods and services, the district court held that the most prominent effect of the statute is to distort the balance of power in unionization campaigns, rather than to protect the State's spending power. *Id. at 20*.

Because the district court determined that *section 211-a* is preempted under the Machinists doctrine, it did not go on to decide whether it is also preempted or unconstitutional under the other theories raised. *Id. at 25*.

Accordingly, the district court granted the associations' motion, declared *section 211-a* preempted by the

NLRA, and permanently **[**12]** enjoined the State from implementing or enforcing the statute. Id.

The State appeals, arguing that *section 211-a* does not interfere with employers' rights under the NLRA, nor does it deprive employers of economic weapons meant to be left available to them. The State argues that it is entitled to make sure that it gets what it pays for, and because of the complexities of the health-care system, the substantive and accounting requirements of *section 211-a* are a **[*94]** reasonable method of making sure that State monies are not misused.

I.

We begin by addressing the procedural issue of what kind of order we are reviewing. The State initially moved the district court to dismiss the amended complaint under *Rule 12(b)(6)*, and the associations sought summary judgment. The State later asked to convert its motion to one for summary judgment because it had filed a number of evidentiary exhibits that would not properly be before the court on a motion to dismiss, and in particular, the State sought permission to file a number of exhibits after the hearing. The associations opposed the filing of the post-hearing exhibits and opposed the conversion of the motion to dismiss, arguing that they would **[**13]** need discovery in order to respond to a motion for summary judgment. The district court ruled that, because the issues before it were "predominately legal," the court would decide the motions on the pleadings, taking into account only those documents which would be considered in a motion on the pleadings. *Healthcare Ass'n of New York State, Inc. v. Pataki, 388 F. Supp. 2d 6, 9 (N.D.N.Y. 2005)*.

On appeal, the State contends that there are issues of fact that preclude the grant of summary judgment for the associations, and in fact both sides have filed relevant affidavits, which, of course, would not be cognizable on a *Rule 12(b)(6)* motion. The associations' only motion was for summary judgment and indeed, it would be impossible to treat their motion as one for judgment on the pleadings, since the State has not filed an answer and the pleadings therefore are not closed. See *Fed. R. Civ. P. 12(c)* (motion for judgment on pleadings may be made after pleadings closed). Accordingly, we review the district court's order as the entry of summary judgment for the associations.

We review the district court's grant of summary **[**14]** judgment de novo. *Rondout Elec., Inc. v. NYS Dep't of Labor, 335 F.3d 162, 165 (2d Cir. 2003)*. Summary judgment is only appropriate if there are no genuine issues of material fact and the associations are entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

II.

The associations contend that enforcement of *section 211-a* should be enjoined because the statute is preempted by each of two discrete and complementary theories of preemption under the NLRA. The first, and the older, theory is known as Garmon preemption, after *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*. Garmon preemption addresses actual or arguable conflicts between state law and *sections 7* or *8* of the NLRA. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Builders & Contractors, 507 U.S. 218, 225, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* ("Boston Harbor"). The second type of preemption, Machinists preemption, preempts regulations that do not impinge on the protections and prohibitions of *sections 7* and *8*, but rather interfere with the NLRA's plan to **[**15]** leave certain areas unregulated, whether by the states or even by the NLRB. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 146, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)*.

In Garmon, Justice Frankfurter crafted one broad rule of preemption to serve several kinds of state intrusions on federal labor law, which he enumerated as "potential conflict of rules of law, of remedy, and of administration." *359 U.S. at 242*. The danger from the first kind of conflict is that the State will require **[*95]** different behavior than that prescribed by the NLRA (the substantive concern); the danger from the second is that the State will provide different consequences for the behavior (the remedial concern); and the danger from the third is that Congress's design to entrust labor questions to an expert tribunal -- the NLRB -- would be defeated by state tribunals exercising jurisdiction over labor questions (the primary jurisdiction concern). To protect against such conflicts, preemption would obviously be required "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by *§ 7* of the National **[**16]** Labor Relations Act, or constitute an unfair labor practice under *§ 8*." *Id. at 244*. But Garmon extended preemption further: "When an activity is arguably subject to *§ 7* or *§ 8* of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id. at 245* (emphasis added).

Thus, the Garmon rule can be stated quite elegantly: "States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)*. However, this simple fiat masks the wide variety of cases covered by the Garmon rule: cases where the state courts exercised jurisdiction over a state claim involving actions

arguably prohibited by the NLRA, see *Garmon, 359 U.S. at 238-39* (state tort claim preempted even though the NLRB declined jurisdiction over unfair labor practice proceeding); cases in which there were never state court proceedings, but in which a state has **[**17]** adopted a policy that conflicts with federal labor law, see *Livadas v. Bradshaw, 512 U.S. 107, 116-117, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)* (state benefit effectively conditioned on employee not being covered by collective bargaining agreement); and cases in which the state regulation does not conflict with, but augments the remedies provided by federal labor law, *Gould, 475 U.S. at 287-88* (requiring preemption of state law declining to do business with repeat violators of NLRA because state may not augment sanctions imposed by NLRB).

Garmon recognized that the principles it announced were so broad that they would sometimes yield, as where, for instance, the activity regulated was merely peripheral to the federal concerns, or where the states' need to regulate certain conduct was so obvious that one would not infer that Congress meant to displace the states' power. *359 U.S. at 243-44.*

Because Garmon covers so many different concerns and situations, the one-size fits all remedy can be difficult to administer. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978),* **[**18]** Justice Stevens separated out what Justice Frankfurter had joined, distinguishing the substantive and remedial concerns from the primary jurisdiction concern and prescribing different treatments for each. "The primary-jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so." *Id. at 201*; accord *Belknap, Inc. v. Hale, 463 U.S. 491, 510-11, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983).* Because the opportunity to invoke the NLRB's jurisdiction depends on bringing an unfair labor practice proceeding, the primary jurisdiction interest will ordinarily be invoked in **[*96]** cases where the conduct at issue was arguably prohibited by the NLRA. See *Sears, Roebuck, 436 U.S. at 197*; see generally 2 The Developing Labor Law 2200-2204 (Hardin et al. eds. 4th ed. 2001). Justice Stevens wrote that where the state regulation affects conduct arguably protected by the NLRA, it may be impossible for the party seeking an adjudication to bring the dispute before the NLRB in the form of an unfair labor practice proceeding. **[**19]** *Sears, Roebuck, 436 U.S. at 201-03.* In such cases, the NLRB's primary jurisdiction will not be in danger. However, where the conduct in issue is arguably protected by the NLRA, there is a substantive *Supremacy Clause* concern that the state tribunal could restrict or hamper federally protected rights; therefore, the state proceeding or regulation could be preempted even if the controversy is not one which the parties could bring before the NLRB. See *436 U.S. at 199-200.* But where there is no threat to the NLRB's primary jurisdiction, the propriety of preemption depends on "the strength of the argument that *§ 7* [or here, *§ 8(c)*] does in fact protect the disputed conduct," *436 U.S. at 203*, in other words, whether there is a real danger that state rules will conflict with federal ones. Thus, in Sears, Roebuck there was no preemption even though the state court action concerned conduct that was "arguably" protected by *section 7*, because the argument was not strong enough. *436 U.S. at 207.*

We must therefore begin by identifying whether any specific provision of *sections 7* or *8* of the NLRA actually or arguably prohibits **[**20]** or protects the conduct that is the subject of state regulation. Next, we must decide whether the controversy is identical to one that the aggrieved party could bring (or induce its adversary to bring) before the NLRB. If not, the State's action could still be preempted, but only if there is a strong showing that the State has interfered with the protections offered by *section 7* or *8* of the NLRA. Finally, we consider whether the regulated conduct touches interests "deeply rooted in local feeling and responsibility," *359 U.S. at 244*, so that the State's action should not be preempted despite affecting conduct "arguably" protected by the NLRA.

A.

The first step in establishing Garmon preemption is to identify which provision of *sections 7* or *8* is alleged to protect or prohibit the conduct regulated. *UAW-Labor Employment & Training Corp. v. Chao, 355 U.S. App. D.C. 460, 325 F.3d 360, 364 (D.C. Cir. 2003).* The associations have no valid claim that *section 211-a* affects their rights under *section 7*, since *section 7* only confers rights on employees, not on employers. See *29 U.S.C. § 157* (codifying *section 7 of NLRA*).

The **[**21]** associations' stronger argument is that *section 8(c) of the NLRA* protects their right to direct non-coercive speech to their employees during the course of a unionization campaign. Section 8(c)(codified at *29 U.S.C. § 158(c)*) provides:

> The 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.

The State contends that *section 8(c)* does not protect speech because the *First Amendment* -- not the NLRA -- is the source of any employer free speech protections in the union organizing context. This view is supported by the Ninth Circuit's **[*97]** opinion in *Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1091-92 (9th Cir. 2006)* (en banc). While we agree that the history of *section 8(c)* confirms that Congress meant the section to coincide with the *First Amendment*, this does not mean that *section 8(c)* is a mere place-holder with no labor law function of its own. The history of **[**22]** the section shows that the contours of the *First Amendment* in a labor context are intertwined with and shaped by the NLRA rights and restrictions governing the same conduct, and by *section 8(c)* in particular. The legislative history and subsequent interpretation of *section 8(c)* demonstrate that the provision was meant to expand speech rights in the labor context; we therefore conclude that *section 8(c)* itself protects employer speech and that state action impinging on this protection may be preempted under Garmon.

The earliest interpretation of the NLRA was that it imposed significant limitations on employer speech. For example, in *International Association of Machinists v. NLRB, 311 U.S. 72, 78, 61 S. Ct. 83, 85 L. Ed. 50 (1940)*, the Supreme Court upheld an NLRB decision requiring employers to refrain from making even "[s]light suggestions" of preference for one union over another. The first sign of a change in thinking came in *NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 479, 62 S. Ct. 344, 86 L. Ed. 348 (1941)*, where the Supreme Court reversed an NLRB finding of an unfair labor practice predicated on an employer's speech alone. The Court remanded for the NLRB **[**23]** to take into account surrounding facts that could have made that speech "coercive," which is the standard for an unfair labor practice under *section 8(a)(1)*. See *29 U.S.C. §§ 157 & 158(a)(1)* (making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their *section 7* rights). Virginia Electric did not mention the *First Amendment* and appeared to be a pure labor law case. But later, in *Thomas v. Collins, 323 U.S. 516, 536-37, 65 S. Ct. 315, 89 L. Ed. 430 (1945)*, the Supreme Court held that the *First Amendment* protected union speech not protected by the NLRA, and in dicta, stated that Virginia Electric had decided

> that employers' attempts to persuade to action with respect to joining or not joining unions are within the *First Amendment's* guaranty. . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. . . . But short of that limit the employer's freedom cannot be impaired.

Id. at 537-38. Thus, the Supreme Court crafted a *First Amendment* standard **[**24]** for labor cases hinging on "coercion," an unfair labor practice concept, rather than using a familiar *First Amendment* standard from outside the labor context.

In 1947, Congress passed the Taft-Hartley Act, a wide-ranging recalibration of the NLRA, which included free speech protections for both employers and employees. *Section 8(c)* added the speech clause, which gave a more specific gloss to the concept of "coercive" speech by stating that speech would not be an unfair labor practice unless it contained a threat of reprisal or force or a promise of benefit. See generally *Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967)*. The House Conference Report stated that the provision was meant to correct the NLRB's rulings, which were unduly restrictive of employers' speech:

> The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements **[*98]** as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech **[**25]** when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.

H.R. Rep. No. 80-510, at 45 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947 at 549 (1948). The Supreme Court later acknowledged that "the enactment of *§ 8(c)* manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1965)*. Linn held that state defamation laws would be preempted by federal labor law if the defamation laws did not require malice and injury; otherwise, the defamation laws might allow "unwarranted intrusion upon free discussion envisioned by the [NLRA]." *Id. at 65*. Linn may thus be read to af-

firm that speech rights of both employer and employees play a cognizable role in the NLRA process. [5]

> 5 Chao considered it unclear whether Linn had held that the speech in question was protected by *section 8(c)* or was prohibited by the NLRA; nevertheless, the D.C. Circuit assumed arguendo that *section 8(c)* protects the employer's right to speak. *325 F.3d at 364-65*. The dissent concluded *section 8(c)* does protect speech and should therefore provide a basis for Garmon preemption. *Id. at 368-69*.

[26]** The State and amici argue that *section 8(c)* added no content to the NLRA, but merely codified the earlier *First Amendment* cases. As support for this assertion, they quote *NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)*, in which the Supreme Court decided that certain employer statements could be treated as unfair labor practices notwithstanding *section 8(c)*. Gissel stated that *section 8(c)* "merely implements the *First Amendment*." Id. Cf. 93 Cong. Rec. 3953 (daily ed. Apr. 23, 1947), reprinted in Legislative History of the Labor-Management Relations Act at 1011 (remarks of Senator Taft that *section 8(c)* carried out "approximately" the same rule found in Supreme Court cases). This remark should not be taken out of context, for the Court immediately continued by saying,

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in *§ 7* and protected by *§ 8(a)(1)* and the proviso to *§ 8(c)*.

395 U.S. at 617. **[**27]** In other words, the employer's entitlement to free speech is not categorical, but limited by the NLRA concept of coercion; to avoid coercion as defined in *section 8(c)*, the NLRB can limit the content of employer speech more severely than would be permissible if the NLRA rights of the employees were not simultaneously affected. See id. The interdependence of the *First Amendment* and the labor laws described in Gissel surely refutes the notion that speech rights are not the business of the NLRA and should not be the basis for Garmon preemption.

Many courts, including this one, have affirmed that *section 8(c)* not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present. "Granting an employer the opportunity **[*99]** to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance." *NLRB v. Pratt & Whitney Air Craft Div., 789 F.2d 121, 134 (2d Cir. 1986)*. Accord *Steam Press Holdings, Inc. v. Hawaii Teamsters, 302 F.3d 998, 1009 (9th Cir. 2002)* **[**28]** ("Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate.") (citation omitted); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB, 164 F.3d 867, 875 (4th Cir. 1999)* ("As the Board has recognized, 'permitting the fullest freedom of expression by each party' nurtures a healthy and stable bargaining process.") (citation omitted). In particular, the employer's speech rights are said to play a role in the unionization campaign context. *NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1108 (9th Cir. 1971)* ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right."); *McGraw-Edison Co. v. NLRB, 419 F.2d 67, 70 (8th Cir. 1969)* (Blackmun, J.) ("recognizing that labor and management, particularly during organizational campaigns, ordinarily 'are allowed great latitude in freedom of expression,'" but holding that employer exceeded even that latitude) **[**29]** (citation omitted); *Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967)* ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available."); see also *Beverly Enters., Inc. v. NLRB, 139 F.3d 135, 140 (2d Cir. 1998)* (referring to protection under *§ 8(c)* in campaign context); *Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419, 1428 (2d Cir. 1996)* (quoting the language from *Pratt & Whitney, supra*, in a campaign context).

The State and amici also argue that *section 8(c)* does not protect speech because, rather than stating that there is a right to free speech, the section merely states that such speech will not be sanctionable as an unfair labor practice or evidence of one. It is surely a familiar concept that one way of granting rights is to state that the government cannot punish certain conduct. For instance, the *First Amendment* does not explicitly grant freedom of speech, but instead says **[**30]** that "Congress shall make no law . . . abridging the freedom of speech." *U.S. Const. amend. I*. Obviously, we interpret the *First Amendment* as protecting free speech. By the same to-

ken, *section 8(c)* protects employer speech from infringement by the NLRB.

While we have no trouble concluding that *section 8(c)* protects some speech from restrictions imposed by the NLRB, the question remains whether *section 8(c)* "protects" the same speech from restrictions imposed by the states. See *Sears, Roebuck, 436 U.S. at 199-200 n. 30* (referring to the meaning of "protected conduct" within the Garmon doctrine as "conduct which the State may not prohibit"). We may rely on Linn in part to answer that question, for in Linn a state's libel law was held to be preempted to the extent that it made the union liable for conduct that was protected by *section 8(c). 383 U.S. at 65.* Moreover, the labor law cases cited above at pages 23-24, affirm the idea that *section 8(c)* embodies a policy of encouraging free speech in the labor context; such a policy **[*100]** necessarily entails freedom from state meddling as well as freedom from restriction by the NLRB.

The Atelson amici **[**31]** argue that *section 8(c)* does not confer rights because it only applies in unfair labor practice proceedings, not in representation proceedings, which are governed by the "laboratory conditions" doctrine, [6] see *Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 & n. 11 (1962).* It is true that "*§ 8(c)* was not designed to serve this interest [of encouraging free debate] by immunizing all statements made in the course of a labor controversy." *Linn, 383 U.S. at 62 n. 5.* Employer speech can still be "protected" from designation as an unfair labor practice, even if the speech has other legal consequences -- such as upsetting laboratory conditions. The fact that *section 8(c)* grants only limited protection for campaign speech does not mean that it gives no protection at all, and the State and amici point to nothing in the Garmon line of authority that suggests that an activity has to be absolutely immunized from all legal effect in order to be "protected" under the NLRA. The legislative history shows Congress amended the NLRA to give the parties freer rein to speak on labor issues, including organizing campaign issues, than they had previously been **[**32]** afforded, though not absolutely free rein. Since this clearly reveals a policy choice by Congress, we must give that choice effect, even if the reform effected was somewhat modest. We therefore conclude that *section 8(c)* does protect employer speech in the unionization campaign context and can provide a basis for Garmon preemption.

6 Under the "laboratory conditions" doctrine, "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).* See generally 1 The Developing Labor Law 445-47 (Hardin, et al., eds. 4th ed. 2001).

B.

Next, we must determine whether *section 211-a* threatens the NLRB's primary jurisdiction. Sears, Roebuck declared that the primary jurisdiction rationale "does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union **[**33]** to invoke, the jurisdiction of the Board." *436 U.S. at 202.* See *Bldg. Trades Emplrs. Educ. Ass'n v. McGowan, 311 F.3d 501, 512-13 (2d Cir. 2002)* (state agency not required to refrain from deciding a labor question in deference to NLRB's primary jurisdiction where such inaction would create an incentive for union not to bring unfair labor practice claim and thus would deprive employer of opportunity to obtain Board determination of question). Here, there is no proceeding pending in a state tribunal, and the associations point to no possible dispute arising under *section 211-a* that would be identical with an NLRA dispute or over which the State would usurp NLRB jurisdiction. See Stephen F. Befort and Bryan N. Smith, "At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyer," *20 Lab. Law. 107, 133 (2004)* (California statute similar to *§ 211-a* "neither provides an alternative forum for deciding unfair labor practice issues nor imposes an additional remedial scheme in a way that undermines the Board's authority to administer the NLRA."). Indeed, the NLRB "has no authority to address conduct **[**34]** protected by the NLRA against governmental interference." *Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 108, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989).*

[*101] The point of extending preemption to conduct only arguably prohibited or protected by the NLRA is a kind of uncertainty principle. When conduct falls generally within the scope of *sections 7* or *8*, but it would require "precise and closely limited demarcations," *Garmon, 359 U.S. at 242*, to determine on which side of the line the conduct actually falls, then by deciding the question we would move the line itself. It is for the NLRB, not the courts, to draw the close lines, while "[o]ur task is confined to dealing with classes of situations." *Garmon, 359 U.S. at 242*; see *id. at 244-45.* In this case, there is no need for such precision of demarcation, because *section 211-a* only applies to speech that "encourages or discourages" unionization, and that is clearly the kind of speech addressed by *section 8(c).* If, for instance, *section 211(a)* burdened speech only if the speech entailed a "threat of retaliation or force," enforcing the law would require a court **[**35]** to interpret *section 8(c)* and thus to define the contours of the NLRA. See *Sears, Roebuck, 436 U.S. at 197-98.* The instant case does not require us to define the contours of *section 8(c)*, and

there is thus no basis for preemption to protect the primary jurisdiction of the NLRB.

C.

Because there is no threat to the NLRB's primary jurisdiction, we turn to the question of whether *section 211-a* interferes with the substantive provisions of *section 8(c) of the NLRA*. See *Sears, Roebuck, 436 U.S. at 203* ("The danger of state interference with federally protected conduct is the principal concern of the second branch of the Garmon doctrine."). The State contends that *section 211-a* does not infringe on employers' speech rights because a government's refusal to fund speech does not, as a matter of law, constitute interference with that speech.

The State cites *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*, and *Regan v. Taxation with Representation, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)*, cases in which the Supreme Court held that "a legislature's decision not to subsidize the exercise of a fundamental **[**36]** right does not infringe the right." *Regan, 461 U.S. at 549*. See *United States v. Am. Library Ass'n, 539 U.S. 194, 212, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)* (plurality opinion) (contrasting a penalty based on exercise of a protected right, which would infringe the right, with a refusal to grant a subsidy to exercise the right, which does not). These cases from outside the labor law context are relevant only by analogy and only to the extent they can be reconciled with *Wisconsin Department of Industry, Labor, and Human Relations v. Gould Inc., 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)*. There, a Wisconsin statute forbad the State's procurement agents to purchase any product manufactured or sold by a firm that was a repeat violator of the NLRA. The statute fell within Garmon preemption because it penalized conduct prohibited by the NLRA. However, Wisconsin contended that the statute should not be preempted because it was "an exercise of the State's spending power rather than its regulatory power." *Id. at 287*. The Supreme Court dismissed that argument as "a distinction without a difference," because the purpose of the statute **[**37]** was "to deter labor law violations and to reward 'fidelity to the law.'" Id. (citation omitted).

The difference between Rust and Gould is that whereas a government can "make a value judgment favoring" conduct other than exercise of the protected right and **[*102]** can implement that judgment by allocating public funds in a way that excludes the protected conduct, *Rust, 500 U.S. at 192-93* (quoting *Maher v. Roe, 432 U.S. 464, 474, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977)*), a State cannot leverage its money to affect the contractor's protected activity beyond the contractor's dealings with the State. See *Northern Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005)* ("Conditions on spending may become regulation if they affect conduct other than the financed project."), cert. denied, *127 S. Ct. 347, 166 L. Ed. 2d 23 (2006)*; *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277, 279 (7th Cir. 2005)* (In Gould the "state was penalizing contractors for conduct outside the scope of the state's contracts."). The purpose of the statute preempted in *Gould* **[**38]** was to affect the contractors' behavior at all times, lest it come back to haunt them when they bid for a State contract. Our inquiry, then, is whether *section 211-a* is aimed at making sure that State funds are only spent on the purposes the State has chosen, or whether, instead, the State has used its spending power to restrict the associations' protected speech beyond their dealings with the State.

1.

The associations contend that *section 211-a* does restrict more than the use of money that belongs to the State, because it also restricts the associations' and their members' use of their own money. In other words, the State is not merely refusing to subsidize, but is restricting the associations' and their members' enjoyment of money they earned by performing contracts that have nothing to do with union campaign costs. Whether the money belongs to the State or to the associations would apparently depend in part on whether the money was given pursuant to a grant, or earned pursuant to a contract. [7] There is evidence in the record of each type of transaction. Compare Affidavit of Marc N. Brandt at 6 (referring to application of *section 211-a* to proceeds for contracts for sale **[**39]** of soap); with Amended Complaint at 8 (referring to the associations' receipt of "special funds" to train interns and residents and to offset losses from charity care and bad debts). To the **[*103]** extent that *section 211-a* 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. The dispute thus narrows to whether, when the State agrees to pay a price for goods and services, it may specify how the vendor will use the proceeds of the transaction.

7 In distinguishing between money that can be said to belong to the State and money that belongs to the employers, our analysis differs from that of both majority and dissent in *Lockyer, 463 F.3d 1076 (9th Cir. 2006)* (en banc). The California statutes at issue in Lockyer restricted only the use of state grants or funds received through participation in a state "program," an undefined term. *Cal. Govt. Code §§ 16645.2 & 16645.7*. A claim involving another statutory section, *Cal. Govt. Code § 16645.4*, which restricted employ-

ers' use of proceeds from contracts with the State, was apparently dismissed by the district court pursuant to stipulation and was therefore not before the Ninth Circuit. See *463 F.3d at 1080 n. 1 & 1097 n. 22* ; see also *Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199, 1202 (C.D. Cal. 2002)* (plaintiffs lacked standing to pursue claim), rev'd on other grounds, *463 F.3d 1076 (9th Cir. 2006)* (en banc). The majority of the Ninth Circuit en banc treated both the grant and "program fund" statutes as covering only funds "given" by the State to the employers, which the State had the right to withhold. See, e.g., *463 F.3d at 1097.* In contrast, the dissent argued throughout that the statutes (or at least the program fund statute) applied to funds that belonged to the employers. *Id. at 1098* (the program fund statute "co-opt[ed] the payment for goods and services and profit realized under a contract (undoubtedly not state funds)"). We hold that the New York statute appears to apply both to funds that are gifts of the State and funds that have been earned, that the preemption issue depends on the State's and the employers' respective rights in the funds at issue, and that those rights are determined by the nature of the transaction by which the money changed hands.

[40]** *Section 211-a(2)* provides that "no monies appropriated by the state for any purpose shall be used or made available to employers" for any of the three forbidden purposes (encouraging or discouraging unionization by training managers, hiring attorneys or consultants, or hiring special employees).

The associations contend that the broad term "monies appropriated by the state for any purpose," *section 211-a(2)*, creates restrictions and obligations when the associations and their members receive payment by the State for goods and services. The Affidavit of Daniel Sisto, president of one plaintiff, Healthcare Association of New York, states: "Medicaid pays for a service rendered." He contends that for the State to dictate what the hospitals can do with the money so earned is analogous to passing a State law that says that State employees may not spend any of their salaries for the advocacy of environmental causes. Similarly, Marc N. Brandt, Executive Director of plaintiff NYSARC, Inc., testified that his organization runs sheltered workshops, in which disabled persons produce goods such as soap that are sold to the State or others. Brandt testified that the "question . . . exists" whether **[**41]** the monies paid for the soap are considered "state-appropriated funds" that cannot be used by NYSARC for the purposes prohibited by *section 211-a*. If so, the State's asserted rationale of assuring that it gets the services it pays for does not extend so far -- preventing the associations and their members from using their proceeds in a particular way would not save the State any money or guarantee that the State received the goods or services for which it contracted.

The State does not deny the existence of some straightforward fixed-price contracts, but it responds that the Medicare and Medicaid systems are to some extent cost-based, so that if an employer incurs labor costs for opposing unionization, those costs would be included in figuring the rate at which the hospital was paid for services in the future. Consequently, how the associations and their members spend their money affects how much the State will have to pay for subsequent transactions. The associations dispute the assertion that their unionization campaign costs will affect the State's expenses. Sisto testified:

> Defendants suggest that the restrictions on spending in *section 211-a* are consistent with Medicare **[**42]** or Medicaid's not allowing such costs. That is an analogy that is legally and factually false. First, neither Medicare nor Medicaid reimbursement rates for hospitals are cost-based. Hospitals are reimbursed under a case-based prospective payment system. Under this system, a hospital gets paid a set fee based upon the diagnosis and severity of the condition of the patient. Labor-related expenditures are irrelevant to how much reimbursement is received for the patient's care.
>
> Even to the extent that the amount of the case-based rate has any relationship to costs, current hospital Medicaid payment calculations use 1983 costs as the 'base' for determining the payment rate. Thus, the only costs that figure into today's Medicaid payments to hospitals are those incurred 20 years ago.

The State responds that current labor costs can affect the price the State **[*104]** pays, and it cites *New York Comp. Codes, Rules, & Regs. tit 10, § 86-1.46(a)*, under which the most recent two years are the baseline for computing the rates which the State will pay for care provided by community-based home health care agencies. We take it from this patently partial response that the State does not dispute that **[**43]** its obligations to pay under at least some cost-based provisions would not be reduced by prospectively reducing an employer's anti-union campaign costs. At any rate, these conflicting

views of the facts may not be resolved on appeal or, indeed, on summary judgment.

Moreover, there would seem to be a vastly simpler and more effective way to make sure that the State does not end up paying labor costs for such activities: the State could simply require such costs to be excluded when setting the price base. Cf. *Milwaukee County, 431 F.3d at 280-81* (existence of more effective way of addressing problem creates inference that County's actual purpose was to engage in labor regulation). This is the method used in *42 U.S.C. § 1395x(v)(1)(N)*, which the State contends is equivalent to *section 211-a*; but *§ 1395x(v)(1)(N)* simply says that such costs will not be reimbursable or will be excluded from the costs on which the price of services is calculated. [8] The associations do not dispute that the State can determine which costs are allowable in a cost-based system. Sisto emphasizes the difference between restrictions on reimbursable costs and restrictions **[**44]** on what can be done with money once it has changed hands:

> This case has absolutely nothing to do with reimbursement rates; it has to do with restrictions on spending. . . . Expenditures on research are not "allowable" costs for Medicaid reimbursement purposes. That hardly means that the provider is prohibited from spending Medicaid reimbursement on research; rather, such expenditures are encouraged.

App. 463-64. We take this as a concession by the associations that it is not reimbursement restrictions that they object to, but restrictions on use of earned proceeds.

> 8 The State cites a number of federal statutes which appear to apply primarily to grant recipients or to limit reimbursable costs. Since the validity of these statutes is not in issue, we will not discuss them individually.

The Brennan Center for Justice and associated amici argue that the complexity of government programs such as Medicare makes it impossible to protect the State's interests by contractual limitations on **[**45]** what the government will pay for:

> The complexity of many government-funded services and the difficulty of measuring concrete outcomes in areas like health care make it difficult to specify (in a contract or grant agreement) performance criteria sufficient to ensure delivery of high quality services and to anticipate all potential abuses. Therefore, a simple contract in which the contractor agrees to deliver certain services for a specific sum of money with "no strings attached" has not proven an effective means of delivering public services.

Brennan Center, et al., Br. at 8. This argument may well be correct, but it poses a question of fact -- perhaps a question of expert opinion -- that we may not resolve at this procedural stage. Moreover, even if some State expenditures are too complex to monitor performance without something akin to *section 211-a*, the amici do not deny that *section 211-a* does cover other staightforward contracts such as contracts for soap, under which the State cannot save money or improve the quality **[*105]** of the merchandise by restricting what the vendor does with its proceeds.

We conclude that, to the extent that *section 211-a* functions as a **[**46]** restriction on what use may be made of State grants, it is not preempted by Garmon. To the extent that *section 211-a* imposes restrictions on the associations' and their members' use of proceeds earned from state contracts and statutory reimbursement obligations in which the contractor's labor costs cannot affect the amount of expense to the State, it attempts to impose limitations on the use of the associations' money rather than the State's; it therefore deters employers from the exercise of their rights under *section 8(c)* and satisfies the threshold conditions for *Garmon* preemption. To the extent that the State has assumed cost-based obligations that allow contractors to be reimbursed for unionization campaign expenses, the State must demonstrate why it is not feasible for the State to avoid such expenses by designating such costs as non-reimbursable.

2.

The associations also contend that in the context of Medicare benefits, *section 211-a*'s language allows the State to restrict employers' *section 8(c)* activities based on funds originally provided by federal and local governments, but which have merely passed through the State treasury.

Numerous affidavits describe **[**47]** the Medicare system in which every service is paid for by a percentage of federally appropriated money and a percentage of State-appropriated money. Sisto testified:

> Federally-appropriated dollars are deposited in special state accounts to be used exclusively for the Medicaid program. These federal dollars are then re-appropriated by the state, along with the

> state dollars, to be paid to the localities in order to support the localities' provision of medical assistance.

He contends that the State operates a claims payment system that processes the payments to providers, so that even local funds are disbursed to the provider by the State. Sisto contends that the State claims *section 211-a* reaches and regulates an employer's use of monies paid for Medicare services, even the portion actually funded by the federal government and local governments.

The affidavit of M. Patricia Smith, the Assistant Attorney General in Charge of the Labor Bureau, indicates that "medicaid funds are subject to the statute." To the extent that *section 211-a* is interpreted to apply to funds that were originally appropriated by the federal government and only pass through the State en route **[**48]** to the contractors who have earned the funds, it would exceed the State's legitimate interest in controlling the use of its own money. Whether, in the context of providing Medicare and Medicaid services and in the other transactions between the State and the associations and their members, the federal monies truly "pass through" the State or whether they instead are subsidies of State spending decisions, is a question of fact that was not resolved in the district court and which the parties have not addressed in the kind of detail or comprehensiveness that would allow us to render a decision.

Similarly, the application of *section 211-a* to all Medicaid money would restrict use of monies that were appropriated by local "social services districts." Application of *section 211-a* to monies appropriated by "social services districts" may or may not be preempted, according to whether that money could be described as State appropriations "passing through" the local districts, which is, again, a question of fact.

Even if the State did not apply *section 211-a* to funds that originated with federal **[*106]** and local governments, Sisto contends that it would be impossible for an employer to distinguish **[**49]** between such funds and funds appropriated by the State, since the hospitals receive lump sum payments indicating only the amount for each patient: "Each of these figures represents an amalgam of funds that had originated with the federal, state and local governments. The relative share of federal, state and local percentages are neither known nor disclosed to the provider-recipient." In such a system, putting the burden on the recipient of funds to identify and restrict the use of the State portion of the funds for certain expenses, at peril of ruinous fines, is different and more burdensome than simply refusing to fund certain activities in the first place.

Thus, to the extent that *section 211-a* burdens the associations' use of federal and local monies that only pass through the State, it would constitute an attempt to regulate labor practices rather than a refusal to subsidize campaign costs. Moreover, even if *section 211-a* does not apply to federal and local monies, if it places a significant burden on the associations and their members to ascertain what portion of mixed payments are subject to State restrictions, it would burden the associations' and their members' exercise of **[**50]** their NLRA speech rights and would be preempted under *Garmon*.

3.

We conclude that there are vital fact issues that must be determined before we can decide whether *section 211-a* is limited to a restriction on the use of State funds or whether it overreaches in an attempt to regulate the employers' speech regardless of whether State funds are at issue. First, we must know whether the State contends that *section 211-a* restricts employers' use of funds earned from fixed-price contracts with the State. If so, then *section 211-a* is broader than necessary to serve the efficiency purpose claimed by the State. Second, if the State maintains cost-based measures that allow reimbursement for unionization campaign expenses, the State must demonstrate why it is not feasible for the State to avoid such expenses by designating such costs as non-reimbursable. Finally, we must know whether *section 211-a* as applied does indeed create obligations upon receipt of monies that originated with federal and local governments. To the extent that the State applies *section 211-a* to burden the use of money that cannot be considered State funds, it burdens NLRA speech and satisfies the threshold conditions **[**51]** for *Garmon* preemtion.

D.

Finally, even after concluding that some applications of *section 211-a* supported by the record would satisfy the threshold for Garmon preemption, we must consider whether "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility," *Garmon, 359 U.S. at 244*, that the State's action should not be preempted absent a clear indication of Congressional intent to do so.

The State contends that *section 211-a* "embodies a core state function" of "[e]nsuring state funds are used only for the purpose for which they were appropriated." The associations make three points in response: (1) that *section 211-a* is overbroad because it attaches restrictions upon money paid for goods and services having nothing to do with unionization campaign expenses; (2) that it is ineffective because even the State's cost-based obligations are based on historic costs rather than current ones and so reducing the employer's costs would not reduce the State's expense; and (3) that it is overbroad because it

reaches **[*107]** not only the State's share of welfare expenditures, but also federal and local governments' shares. These are **[**52]** the same questions that must be resolved in order to determine whether *section 211-a* restricts the associations' and their member's exercise of their NLRA speech rights, rather than merely refusing to subsidize that exercise. Accordingly, we cannot determine whether the local interest exception should apply without resolution of disputed facts.

III.

The associations contend that *section 211-a* is also preempted by Machinists preemption. Under that doctrine, even regulation that does not actually or arguably conflict with the provisions of *sections 7* or *8* of the NLRA may interfere with the open space created by the NLRA for "the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)* (quoting *NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)*); *Rondout Elec., Inc. v. NYS Dep't of Labor, 335 F.3d 162, 167 (2d Cir. 2003)*. In crafting the NLRA, Congress "struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Machinists, 427 U.S. at 140 n. 4* **[**53]** (quoting Archibald Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)). While Garmon protects NLRB jurisdiction over the conduct expressly protected and prohibited, Machinists preemption concerns conduct that Congress has left to laissez-faire, and it protects it not only against state interference, but even against interference by the NLRB, an important distinction from Garmon. See *id. at 142-43, 150.*

The question in Machinists preemption is "whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Id. at 147-48* (internal quotation marks omitted). The associations contend that the NLRA allows employers free speech as a "weapon" to respond to union organizing campaigns and to deprive employers of this "weapon" would alter the balance of power created by Congress.

Because Garmon preemption applies to conduct that is regulated by the NLRA and Machinists preemption applies to conduct the NLRA left unregulated, the two doctrines are conceptually complementary. See *Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)* **[**54]** (Machinists preemption was designed to govern cases that fell outside the reach of Garmon). However, because the protection afforded by *section 8(c)* is to leave employer speech largely unregulated, in a case involving *section 8(c)*, the Garmon doctrine and the Machinists doctrine actually tend toward the same point: requiring New York to respect Congress's intent to "leave some activities unregulated," *Machinists, 427 U.S. at 144*, so that the parties may resolve their disputes by use of the economic weapons left to them. Cf. *Livadas v. Bradshaw, 512 U.S. 107, 117 n. 11, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)* (difference between conflict preemption and Machinists preemption is "entirely semantic"). As we have already discussed, it is well-established that an employer's speech rights do play a role in Congress's design for how employees decide whether a union will represent them. See pages 23-24, supra. Though we conclude that the Machinists doctrine may well require preemption of *section 211-a*, the ultimate question depends on the same factors we **[*108]** considered relevant in our Garmon discussion: whether *section 211-a* burdens moneys **[**55]** that cannot properly be said to belong to the State (because they either belong to the contractors or to federal or local governments) and whether the State can accomplish its goal of saving money by limiting the kind of costs for which it will reimburse program participants. These questions in turn depend on disputed facts, which cannot be decided on summary judgment.

The associations also raise an additional Machinists argument; they contend that the NLRA allows employers free speech as a "weapon" to respond to union organizing campaigns and to deprive employers of this "weapon" would alter the balance of power created by Congress. The associations contend that by forbidding employers to use "monies appropriated by the state" to train supervisors to speak against unionization, to hire attorneys or consultants in connection with opposing an organizing drive, and to hire employees whose job is to oppose an organizing drive, the State has curtailed the employers' effective use of their right to speak to their employees about unionization. The State contends: "Employers can and do oppose unionization vigorously notwithstanding *§ 211-a*." The State therefore contends that whether **[**56]** *section 211-a* affects employers' "ability to engage in any activity as a practical matter is disputed" and summary judgment should therefore not have been granted against the State.

We cannot agree that the degree to which the associations are actually able to mount effective campaigns should be determinative of Machinists preemption, for this will depend on how each plaintiff has chosen to earn its living. In light of our reasoning in Part II, employers who are entirely dependent on State grants would find themselves with no money to spend on the three prohibited activities, but this would not mean that the State had run afoul of the NLRA. See *Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1088 (9th Cir. 2006)* (en banc)("[E]ven if an employer made a business decision to fund its operations entirely through the receipt of state

grants, such that the statute effectively prevented that employer from spending any portion of its revenues to advocate during an organization election, that effect would be incidental and solely the consequence of an employer's free-market choice.") Likewise, employers who received a significant amount of money from private **[**57]** sources might be able to wage effective campaigns, but the State might still be improperly restricting their use of monies they have earned from State soap contracts.

We conclude that the answer to the Machinists question will depend on the same factors we have identified as determinative in our Garmon discussion, Part II.

IV.

A major limitation on the labor law preemption doctrines is the principle that state conduct will not be preempted if the state's actions are proprietary, rather than regulatory. *Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 226-230, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* ("Boston Harbor"). "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id. at 231-32.*

The State contends that *section 211-a* comes within this "market participant" exception to the preemption doctrines. In Boston Harbor, a Massachusetts agency **[*109]** entered a contract requiring all contractors who bid on contracts **[**58]** for the project to abide by certain labor conditions. The Supreme Court held that the agency's action could be characterized as proprietary rather than regulatory because the purpose of the contract was to ensure the timely and economical performance of a cleanup project for which the agency was proprietor, and the challenged action was limited to one particular job. *507 U.S. at 232.*

This reasoning has been reformulated by the Fifth Circuit:

> In distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power, the key under Boston Harbor is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999), **[**59]** cited in *Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 420 (2d Cir. 2002).*

The State's articulated concern, getting what it paid for, is a quintessentially proprietary concern and one that any private party would care about as well. See *Bldg. & Constr. Trades Dep't v. Allbaugh, 353 U.S. App. D.C. 28, 295 F.3d 28, 35 (D.C. Cir. 2002)* ("[T]hat the Government is a lender to or a benefactor of, rather than the owner of, a project is not inconsistent with its acting just as would a private entity; a private lender or benefactor also would be concerned that its financial backing be used efficiently."). But see *Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1084 (9th Cir. 2006)* (en banc) (holding that California statute similar to *section 211-a* had no proprietary purpose). However, to the extent that *section 211-a* protects the State's proprietary interests, we have already held in Part II that it would not be subject to Garmon preemption. We have held that the statute will only be preempted to the extent that it burdens an employer's use of monies earned from contracts or reimbursement obligations that do not include **[**60]** any costs associated with the three prohibited activities. With regard to such contracts or reimbursement obligations, the State's asserted proprietary interest in saving money is inapplicable. The State cannot save money by burdening the employer's use of contract proceeds, at least not if the State's future obligations cannot be shown to vary according to how the employers spend their money. Similarly, the State cannot save money by burdening the employer's use of monies belonging to federal and local governments, but merely passing through the State as paying agent. The market-participant analysis therefore does not add any element not already taken into account in Part II.

V.

We hold that material issues of fact made the entry of summary judgment inappropriate on the issues of Garmon and Machinists preemption. We reverse and remand for further proceedings consistent with this opinion.

CONCUR BY: Wesley

CONCUR

Wesley, *Circuit Judge*:

I agree with the majority's decision to remand for reconsideration under *Machinists* preemption. I write separately to express my disagreement with the majority's conclusion that *Garmon* applies.

[*110] The majority opinion begins its **[**61]** *Garmon* analysis with the proposition that "*section 8(c) of the NLRA* protects [an employer's] right to direct noncoercive speech to their employees during the course of a unionization campaign." From this proposition, the opinion extrapolates a *section 8(c)* right for employers to use funds as they please in unionization campaigns. I see no such specific broad protection under *section 8(c)* that could warrant *Garmon* preemption.

Understanding the mechanics of *section 8(c)* requires an explanation of the broad protections and prohibitions set forth in *sections 7* and *8* of the NLRA. *Section 7* authorizes unions to engage in "concerted activities for the purpose of collective bargaining or other mutual aid for protection." *29 U.S.C. § 157. Section 7* also extends protection to employees' concerted labor activities that occur on employer property. *Section 8*, on the other hand, prohibits several forms of picketing by employees, labeling them "unfair labor practices." *Id.* at *§ 158(b). Section 8* also prohibits employers from interfering with an employee's *section 7* rights. *Id.* at *§ 158(a).* Amidst this array of protections and prohibitions, lies one provision **[**62]** -- *section 8(c)* -- with its own history and application.

Section 8(c) addresses a specific problem. Prior to its enactment, the NLRB held that any employer speech expressing disfavor in the unionization process constituted an unfair labor practice. After the Supreme Court's decision in *Thomas v. Collins, 323 U.S. 516, 536-37, 65 S. Ct. 315, 89 L. Ed. 430 (1945)*, Congress passed the Taft-Hartley Act, which added *section 8(c)* to the NLRA. *Section 8(c)* ensures that employer speech does not constitute evidence of an unfair labor practice so long as the employer speech contains "no threat of reprisal or force or promise of benefit." *29 U.S.C. § 158(c).* By negating the possibility of an unfair labor practice suit against an employer who speaks without any threat of reprisal or force or promise of benefit, *section 8(c)* is best seen as an exception from the broader category of prohibited conduct under *section 8(a).* In other words, *section 8(c)* limits the scope of *section 8(a)*'s prohibition on unfair labor practices by an employer. This serves to protect employer speech from sanction by the NLRB (the goal of the Taft-Hartley Act), rather than to grant to employers **[**63]** the right to fund unionization campaigns without state interference.

For *Garmon* preemption to apply, *section 211-a* must in some way affect a party's rights or remedies under the NLRA, or in some way affect the NLRB's jurisdiction. *Section 211-a* does none of these things because an employer does not have a protected right to fund speech under *section 8(c).* Thus, *Garmon* preemption is inappropriate.

I do not suggest *Garmon* preemption is impossible under *section 8(c)* -- rather, that it is just not appropriate in this case. *Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)* provides an example of how *Garmon* could preempt a state law conflict with *section 8(c).* In *Linn*, the Supreme Court found *Garmon* preemption appropriate for a state libel law that lacked a malice component. The Supreme Court expressed its concern that unless state libel laws required malice, they would frustrate *section 8(c)* by narrowing the universe of employer speech. The Supreme Court's analysis noted the limited scope of *section 8(c)*: "The wording of the statute indicates . . . that *section 8(c)* was not designed to serve [free debate **[**64]** on issues dividing labor and management] by immunizing *all statements* made in the course of a labor controversy." *Id. at 62 n. 5* (emphasis added). In **[*111]** other words, the Court recognized that *section 8(c)* does not go so far as to create outright protections for employer speech in the labor context. If this had not been the case and Congress had actually immunized employer speech in *section 8(c)*, the Supreme Court in *Linn* would have had a relatively easy task in determining that state libel laws were preempted under *Garmon.*

Let me offer several hypotheticals to show why I believe *Garmon* preemption is inappropriate in this case. The State seeks an accounting by an employer who used state funds to train persons to encourage or discourage union organization. No similar question could possibly arise under the NLRA because *section 8(c)* offers no protection against allegations of an employer's misuse of funds. Or a case may arise like *Linn*, where a state court has to determine whether an employer was attempting to "encourage or discourage" union organization in violation of *section 211-a.* But even a determination of whether the employer was encouraging **[**65]** or discouraging union organization does not trigger *section 8(c)* because it is only concerned with whether such speech is a threat -- a much higher threshold than determining whether employer speech encourages or discourages unionization. As a result, I fail to see how *Garmon* works to preempt *section 211-a.*

Preemption analysis is never easy. For me, the task is made insurmountable when broad protections are read into limited statutory provisions. My point of departure from my two colleagues is not one of semantics; it is a disagreement of focus. I agree with my colleagues that *Machinists* preemption ensures the free exchange of ideas between an employer and its employees about unionization as a matter of national labor policy. However

that conclusion has nothing to do with the rights and remedies under the NLRA, or the jurisdiction of the NLRB. Thus while I agree with my colleague's conclusion, I cannot embrace the entirety of his analysis.

LEXSEE 128 S.CT. 2408

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Petitioners v. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, et al.

No. 06-939

SUPREME COURT OF THE UNITED STATES

128 S. Ct. 2408; 171 L. Ed. 2d 264; 2008 U.S. LEXIS 5033; 76 U.S.L.W. 4482; 156 Lab. Cas. (CCH) P11,043; 184 L.R.R.M. 2385; 21 Fla. L. Weekly Fed. S 405

March 19, 2008, Argued
June 19, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Chamber of Commerce of the United States v. Lockyer, 463 F.3d 1076, 2006 U.S. App. LEXIS 24025 (9th Cir. Cal., 2006)

DISPOSITION: Reversed and remanded.

DECISION:

National Labor Relations Act, as amended (*29 U.S.C.S. § 151 et seq.*), held to pre-empt some California statutory provisions purportedly prohibiting specified classes of employers that received state funds from using such funds to assist, promote, or deter union organizing.

SUMMARY:

Procedural posture: Petitioners, business organizations, sued respondents, the California Department of Health Services and state officials, in federal district court, seeking to enjoin enforcement of *Cal. Gov't Code §§ 16645*-16649 (Supp. 2008). The district court granted partial summary judgment in favor of the organizations. The United States Court of Appeals for the Ninth Circuit reversed. The Supreme Court granted certiorari.

Overview: The California statute prohibited several classes of employers that received state funds from using the funds to assist, promote, or deter union organizing. The district court found that *Cal. Gov't Code §§ 16645.2* and *16645.7* were pre-empted by the National Labor Relations Act (NLRA), *29 U.S.C.S. § 151 et seq.*, because they regulated employer speech about union organizing. The court of appeals concluded that Congress did not intend to preclude states from imposing such restrictions on use of state funds. The Supreme Court held that Machinists pre-emption applied because *§§ 16645.2* and *16645.7* regulated within a zone protected and reserved for market freedom. The addition of *29 U.S.C.S. § 158(c)* to the NLRA manifested congressional intent to encourage free debate on labor-management issues; *§ 158(c)* expressly precluded regulation of noncoercive speech about unionization. The fact that the California statute restricted use rather than receipt of state funds did not significantly lessen the inherent potential for conflict with **[**265]** the NLRA. Certain federal statutory restrictions on union-related advocacy did not contract the NLRA's pre-emptive scope.

Outcome: The Court reversed the judgment of the circuit court and remanded the case. 7-2 decision; 1 dissent.

LAWYERS' EDITION HEADNOTES:

[LEdHN1]**

COMMERCE §128.5 COMMERCE §129

FEDERAL LABOR POLICY -- STATE LAW

Headnote:[1]

Although the National Labor Relations Act (NLRA), *29 U.S.C.S. § 151 et seq.*, itself contains no express pre-emption provision, Congress has implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as Garmon pre-emption, is intended to preclude state interference with the National Labor Relations Board's (NLRB's) interpretation and active enforcement of the integrated scheme of regulation established by the NLRA. To this end, Garmon pre-emption forbids states to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. The second, known as Machinists pre-emption, forbids both the NLRB and states to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces. Machinists pre-emption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN2]**

COMMERCE §128.5

STATE LAW -- PRE-EMPTION

Headnote:[2]

Cal. Gov't. Code §§ 16645.2 and *16645.7* are pre-empted under Machinists because they regulate within a zone protected and reserved for market freedom. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN3]**

CONSTITUTIONAL LAW §955

EMPLOYERS -- SPEECH -- UNIONIZATION

Headnote:[3]

The United States Supreme Court has recognized a *First Amendment* right of employers to engage in noncoercive speech about unionization. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN4]**

LABOR §47 LABOR §98 LABOR §113

LABOR MANAGEMENT RELATIONS ACT

Headnote:[4]

The Labor Management Relations Act of 1947 (Taft-Hartley Act) amends §§ 7 and 8 of the National Labor Relations Act, *29 U.S.C.S. §§ 157* and *158*, in several key respects. First, it emphasizes that employees have the right to refrain from any or all § 7 activities. *29 U.S.C.S. § 157*. Second, it adds *§ 158(b)*, which prohibits unfair labor practices by unions. *28 U.S.C.S. § 158(b)*. Third, it adds *§ 158(c)*, which protects speech by both unions and employers from regulation by the National Labor Relations Board. *29 U.S.C.S. § 158(c)*. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN5]**

LABOR §98 LABOR §113

UNFAIR LABOR PRACTICE -- EXPRESSION OF VIEWS

Headnote:[5]

See *29 U.S.C.S. § 158(c)*, which provides: "The expressing of any views, argument, or opinion, or the **[**266]** 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." (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN6]**

CONSTITUTIONAL LAW §955LABOR §47

NATIONAL LABOR RELATIONS ACT -- FREE DEBATE -- FIRST AMENDMENT

Headnote:[6]

From one vantage, *29 U.S.C.S. § 158(c)* of the National Labor Relations Act (NLRA) merely implements the *First Amendment*, in that it responds to particular constitutional rulings of the National Labor Relations Board (NLRB). But its enactment also manifests a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress has deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. This policy judgment, which suffuses the NLRA as a whole, has been characterized as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word has been expressly fostered by Congress and approved by the NLRB. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN7]**

COMMERCE §128.5

NATIONAL LABOR RELATIONS ACT -- NONCOERCIVE SPEECH -- STATE LAW

Headnote:[7]

Under Machinists, congressional intent to shield a zone of activity from regulation is usually found only implicitly in the structure of the National Labor Relations Act, drawing on the notion that what Congress left unregulated is as important as the regulations that it imposed. In the case of noncoercive speech, however, the protection is both implicit and explicit. *29 U.S.C.S. § 158(a)* and *(b)* demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to *29 U.S.C.S. § 157* calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of *§ 158(c)* expressly precludes regulation of speech about unionization so long as the communications do not contain a threat of reprisal or force or promise of benefit. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN8]**

COMMERCE §128.5

STATE LAW -- PRE-EMPTION

Headnote:[8]

To the extent *Cal. Gov't Code §§ 16645.2* and *16645.7* actually further the express goal of *Cal. Gov't Code §§ 16645*-16649 (Supp. 2008), the provisions are unequivocally pre-empted. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN9]**

COMMERCE §128.5

LABOR RELATIONS -- ACTIVITIES -- STATES

Headnote:[9]

In pre-emption cases under the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.*, judicial concern has necessarily focused on the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted. Pre-emption analysis turns on the actual **[**267]** content of the state's policy and its real effect on federal rights. A state plainly cannot directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that a state may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN10]**

COMMERCE §128.5

LABOR RELATIONS -- STATE FUNDS

Headnote:[10]

Constitutional standards, while sometimes analogous, are not tailored to address the object of labor pre-emption analysis: giving effect to Congress's intent in enacting the National Labor Relations Act (NLRA), *29 U.S.C.S. § 151 et seq.*, and the Labor Management Relations Act of 1947. Although a state may choose to fund a program dedicated to advance certain permissible goals, it is not "permissible" for a state to use its spending power to advance an interest that--even if legitimate in the absence of the NLRA--frustrates the comprehensive federal scheme established by that Act. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN11]**

COMMERCE §128.5

LABOR RELATIONS -- PRE-EMPTION

Headnote:[11]

Machinists pre-emption under the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.*, has been characterized as creating a zone free from all regulations, whether state or federal. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN12]**

COMMERCE §128.5

LABOR RELATIONS -- NONCOERCIVE SPEECH -- STATE LAW

Headnote:[12]

The National Labor Relations Board (NLRB) has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the National Labor Relations Act (NLRA), *29 U.S.C.S. § 159*. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech encompassed by *Cal. Gov't Code §§ 16645*-16649 (Supp. 2008). It is equally obvious that the

NLRA deprives California of this authority, since the states have no more authority than the Board to upset the balance that Congress has struck between labor and management. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN13]**

LABOR §9

UNION ORGANIZING -- FEDERAL POLICY

Headnote:[13]

Three federal statutes, *29 U.S.C.S. § 2931(b)(7)* and *42 U.S.C.S. §§ 9839(e)* and *12634(b)(1)*, include provisions that forbid the use of particular grant and program funds to assist, promote, or deter union organizing. The United States Supreme Court is not persuaded that these few isolated restrictions, plucked from the multitude of federal spending programs, are either intended to alter or do in fact alter the wider contours of federal labor policy. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN14]**

COMMERCE §128.5

LABOR RELATIONS -- PRE-EMPTION

Headnote:[14]

A federal statute will contract the pre-emptive scope of the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.*, if it demonstrates that Congress has decided to tolerate a **[**268]** substantial measure of diversity in the particular regulatory sphere. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

[LEdHN15]**

COMMERCE §128.5

FEDERAL LABOR POLICY -- EMPLOYER SPEECH -- STATES

Headnote:[15]

29 U.S.C.S. § 2931(b)(7) and *42 U.S.C.S. §§ 9839(e)* and *12634(b)(1)* neither conflict with the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.*, nor otherwise establish that Congress has decided to tolerate a substantial measure of diversity in the regulation of employer speech. Unlike the states, Congress has the authority to create tailored exceptions to otherwise applicable federal policies, and (also unlike the states) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies. Consequently, the mere fact that Congress has imposed targeted federal restrictions on union-related advocacy in certain limited contexts does not invite the states to override federal labor policy in other settings. (Stevens, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ.)

SYLLABUS

Organizations whose members do business with California sued to enjoin enforcement of "Assembly Bill 1889" (AB 1889), which, among other things, prohibits employers that receive state grants or more than $10,000 in state program funds per year from using the funds "to assist, **[**269]** promote, or deter union organizing." *Cal. Govt. Code Ann. §§ 16645.2(a), 16645.7(a)*. The District Court granted the plaintiffs partial summary judgment, holding that the National Labor Relations Act (NLRA) pre-empts *§§ 16645.2* and *16645.7* because they regulate employer speech about union organizing under circumstances in which Congress intended free debate. The Ninth Circuit reversed, concluding that Congress did not intend to preclude States from imposing such restrictions on the use of their own funds.

Held: Sections 16645.2 and *16645.7* are pre-empted by the NLRA. Pp. 4-16.

(a) The NLRA contains no express pre-emption provision, but this Court has held pre-emption necessary to implement federal labor policy where, *inter alia*, Congress intended particular conduct to "be unregulated because left **[***2]** 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396*. Pp. 4-5.

(b) *Sections 16645.2* and *16645.7* are pre-empted under *Machinists* because they regulate within "a zone protected and reserved for market freedom." *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc., 507 U.S. 218, 227, 113 S. Ct. 1190, 122 L. Ed. 2d 565*. In 1947, the Taft-Hartley Act amended the NLRA by, among other things, adding *§ 8(c)*, which protects from National Labor Relations Board (NLRB) regulation noncoercive speech by both unions and employers about labor organizing. The section both responded to prior NLRB rulings that employers' attempts to persuade employees not to organize amounted to coercion prohibited as an unfair labor practice by the previous version of *§ 8* and manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582*. Congress' express protection of free debate forcefully buttresses the pre-emption analysis in this case. California's policy judgment that partisan employer speech necessarily interferes with an employee's choice

about union [***3] representation is the same policy judgment that Congress renounced when it amended the NLRA to preclude regulation of noncoercive speech as an unfair labor practice. To the extent *§§ 16645.2* and *16645.7* actually further AB 1889's express goal, they are unequivocally pre-empted. Pp. 5-8.

(c) The Ninth Circuit's reasons for concluding that *Machinists* did not pre-empt *§§ 16645.2* and *16645.7*--(1) that AB 1889's spending restrictions apply only to the *use* of state funds, not to their *receipt;* (2) that Congress did not leave the zone of activity free from *all* regulation, in that the NLRB still regulates employer speech on the eve of union elections; and (3) that California modeled AB 1889 on federal statutes, *e.g.,* the Workforce Investment Act--are not persuasive. Pp. 8-16.

463 F.3d 1076, reversed and remanded.

COUNSEL: Willis J. Goldsmith argued the cause for petitioners.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Michael Gottesman argued the cause for respondents.

JUDGES: Stevens, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Souter, Thomas, and Alito, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined.

OPINION BY: STEVENS

OPINION

[*2410] Justice **Stevens** delivered the opinion of the Court.

A California statute known as "Assembly Bill 1889" (AB 1889) prohibits several classes of employers that receive state [***4] funds from using the funds "to assist, promote, or deter union organizing." See *Cal. Govt. Code Ann. §§ 16645-16649 (West Supp. 2008).* [*2411] The question presented to us is whether two of its provisions--*§ 16645.2*, applicable to grant recipients, and *§ 16645.7*, applicable to private employers receiving more than $10,000 in program funds in any year--are preempted by federal law mandating that certain zones of labor activity be unregulated.

I

As set forth in the preamble, the State of California enacted AB 1889 for the following purpose:

> "It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds 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. Stats. ch. 872, § 1.

AB 1889 forbids certain [***5] employers that receive state funds--whether by reimbursement, grant, contract, use of state property, or pursuant to a state program--from using such funds to "assist, promote, or deter union organizing." See *Cal. Govt. Code Ann. §§ 16645.1 to 16645.7.* This prohibition encompasses "any attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" and "[w]hether to become a member of any labor organization." *§ 16645(a).* The statute specifies that the spending restriction applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for . . . an activity to assist, promote, or deter union organizing." *§ 16646(a).*

Despite the neutral statement of policy quoted above, AB 1889 expressly exempts "activit[ies] performed" or "expense[s] incurred" in connection with certain undertakings that promote unionization, including "[a]llowing a labor organization or its representatives access to the employer's facilities or property," and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." *§§ 16647(b), (d).*

To ensure compliance [***6] with the grant and program restrictions at issue in this case, AB 1889 establishes a formidable enforcement scheme. Covered employers must certify that no state funds will be used for prohibited expenditures; the employer must also maintain and provide upon request "records sufficient to show that no state funds were used for those expenditures." *§§ 16645.2(c), 16645.7(b)-(c).* If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote, or deter union organizing [**271] derive in part from state funds on a pro rata basis. *§ 16646(b).* Violators are liable to the State for the amount of funds used for prohibited purposes plus a civil penalty equal to twice the amount of those funds. *§§ 16645.2(d), 16645.7(d).* Suspected violators may be

sued by the state attorney general or any private taxpayer, and prevailing plaintiffs are "entitled to recover reasonable attorney's fees and costs." *§ 16645.8(d).*

II

In April 2002, several organizations whose members do business with the State of California (collectively, Chamber of Commerce), brought this action against the California Department of Health Services **[*2412]** and appropriate state officials (collectively, **[***7]** the State) to enjoin enforcement of AB 1889. Two labor unions (collectively, AFL-CIO) intervened to defend the statute's validity.

The District Court granted partial summary judgment in favor of the Chamber of Commerce,[1] holding that the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, *29 U.S.C. § 151 et seq.* pre-empts *Cal. Govt. Code Ann. § 16645.2* (concerning grants) and *§ 16645.7* (concerning program funds) because those provisions "regulat[e] employer speech about union organizing under specified circumstances, even though Congress intended free debate." *Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199, 1205 (CD Cal. 2002).* The Court of Appeals for the Ninth Circuit, after twice affirming the District Court's judgment, granted rehearing en banc and reversed. See *Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1082 (2006).* While the en banc majority agreed that California enacted *§§ 16645.2* and *16645.7* in its capacity as a regulator, and not as a mere proprietor or market participant, see *id., at 1082-1085*, it concluded that Congress did not intend to preclude States from imposing such restrictions on the use of their own funds, see *id., at 1085-1096.* We granted **[***8]** certiorari, *552 U.S. , 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007)*, and now reverse.

1 The District Court held that the Chamber of Commerce lacked standing to challenge several provisions of AB 1889 concerning state contractors and public employers. See *Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199, 1202-1203 (CD Cal. 2002).*

[LEdHR1]** [1] Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*, "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986) (Golden State I).* To this end, *Garmon* pre-emption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986).* The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate **[***9]** conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations* **[**272]** *Comm'n, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)* (quoting *NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)). Machinists* pre-emption is based on the premise that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *427 U.S., at 140, n. 4, 96 S. Ct. 2548, 49 L. Ed. 2d 396* (quoting Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)).

Today we hold that **[**LEdHR2]** [2]*§§ 16645.2* and *16645.7* are pre-empted under *Machinists* because they regulate within "a zone protected and reserved for market freedom." *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc., 507 U.S. 218, 227, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (Boston Harbor).* We do not reach the question whether the provisions would also be pre-empted under *Garmon.*

[*2413] III

As enacted in 1935, the NLRA, which was commonly known as the Wagner Act, did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights. See 49 Stat. 449. Rather, it was left **[***10]** to the NLRB, subject to review in federal court, to reconcile these interests in its construction of *§§ 7* and *8.* Section 7, now codified at *29 U.S.C. § 157*, provided that workers have the right to organize, to bargain collectively, and to engage in concerted activity for their mutual aid and protection. Section 8(1), now codified at *29 U.S.C. § 158(a)(1)*, made it an "unfair labor practice" for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7."

Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union--or to join one favored by the employer rather than a rival--amounted to a form of coercion prohibited by *§ 8.* The NLRB took the position that *§ 8* demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the *§ 7* rights of employees. See 1 J. Higgins, The

Developing Labor Law 94 (5th ed. 2006). In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor [***11] policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within the meaning of the Act." *NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477, 62 S. Ct. 344, 86 L. Ed. 348 (1941)*. We subsequently characterized *Virginia Electric* as [**LEdHR3] [3] recognizing the *First Amendment* right of employers to engage in noncoercive speech about unionization. *Thomas v. Collins, 323 U.S. 516, 537-538, 65 S. Ct. 315, 89 L. Ed. 430 (1945)*. Notwithstanding these decisions, the NLRB continued to regulate employer speech too restrictively in the eyes of Congress.

Concerned that the Wagner Act had pushed the labor relations balance too far in favor of unions, Congress passed the Labor Management Relations Act, 1947 (Taft-Hartley Act). 61 Stat. 136. [**LEdHR4] [4] The Taft-Hartley Act amended *§§ 7* and *8* in several key respects. First, it emphasized that employees "have the right to refrain [**273] from any or all" § 7 activities. *29 U.S.C. § 157*. Second, it added § 8(b), which prohibits unfair labor practices by unions. *29 U.S.C. § 158(b)*. Third, it added *§ 8(c)*, which protects speech by both unions and employers from regulation by the NLRB. *29 U.S.C. § 158(c)*. Specifically, *§ 8(c)* provides:

> [**LEdHR5] [5]"The expressing of any views, argument, or opinion, [***12] 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."

[**LEdHR6] [6] From one vantage, *§ 8(c)* "merely implements the *First Amendment*," *NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)*, in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 105, 80th Cong., 1st Sess., pt. 2, pp 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)*. It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather [*2414] than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by [***13] the NLRB." *Letter Carriers v. Austin, 418 U.S. 264, 272-273, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)*.

Congress' express protection of free debate forcefully buttresses the pre-emption analysis in this case. [**LEdHR7] [7] Under *Machinists*, congressional intent to shield a zone of activity from regulation is usually found only "implicit[ly] in the structure of the Act," *Livadas v. Bradshaw, 512 U.S. 107, 117, n. 11, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)*, drawing on the notion that "'[w]hat Congress left unregulated is as important as the regulations that it imposed,'" *Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 110, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (Golden State II)* (quoting *N.Y. Tel. Co. v. N.Y. State DOL, 440 U.S. 519, 552, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979)* (Powell, J., dissenting)). In the case of noncoercive speech, however, the protection is both implicit and explicit. *Sections 8(a)* and *8(b)* demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to *§ 7* calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of *§ 8(c)* expressly precludes regulation [***14] of speech about unionization "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel Packing, 395 U.S., at 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547*.

The explicit direction from Congress to leave noncoercive speech unregulated makes this case easier, in at least one respect, than previous NLRA cases because it does not require us "to decipher the presumed [**274] intent of Congress in the face of that body's steadfast silence." *Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188, n. 12, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978)*. California's policy judgment that partisan employer speech necessarily "interfere[s] with an employee's choice about whether to join or to be represented by a labor union," 2000 Cal. Stats. ch. 872, § 1, is the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act. [**LEdHR8] [8] To the extent *§§ 16645.2* and *16645.7* actually further the express goal of AB 1889, the provisions are unequivocally pre-empted.

IV

The Court of Appeals concluded that *Machinists* did not pre-empt *§§ 16645.2* and *16645.7* for three reasons: (1) the spending restrictions apply only to the *use* of state

funds, (2) Congress did not leave the zone of activity free from *all* [***15] regulation, and (3) California modeled AB 1889 on federal statutes. We find none of these arguments persuasive.

Use of State Funds

[**LEdHR9] [9] In NLRA pre-emption cases, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State I, 475 U.S., at 614, n. 5, 106 S. Ct. 1395, 89 L. Ed. 2d 616* (quoting *Garmon, 359 U.S., at 243, 79 S. Ct. 773, 3 L. Ed. 2d 775*; brackets omitted); see also *Livadas, 512 U.S., at 119, 114 S. Ct. 2068, 129 L. Ed. 2d 93* ("Pre-emption analysis . . . turns on the actual content of [the State's] policy and its real effect on federal rights"). California [*2415] plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.

In *Gould*, we held that Wisconsin's policy of refusing to purchase goods and services from three-time NLRA violators was pre-empted under *Garmon* because it imposed a "supplemental sanction" that conflicted with the NLRA's "integrated scheme of regulation." *475 U.S., at 288-289, 106 S. Ct. 1057, 89 L. Ed. 2d 223.* Wisconsin protested that its debarment statute was "an exercise of the State's spending [***16] power rather than its regulatory power," but we dismissed this as "a distinction without a difference." *Id., at 287, 106 S. Ct. 1057, 89 L. Ed. 2d 223.* "[T]he point of the statute [was] to deter labor law violations," and "for all practical purposes" the spending restriction was "tantamount to regulation." *Id., at 287-289, 106 S. Ct. 1057, 89 L. Ed. 2d 223.* Wisconsin's choice "to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict" between the state and federal schemes; hence the statute was pre-empted. *Id., at 289, 106 S. Ct. 1057, 89 L. Ed. 2d 223.*

We distinguished *Gould* in *Boston Harbor*, holding that the NLRA did not preclude a state agency supervising a construction project from requiring that contractors abide by a labor agreement. We explained that when a State acts as a "market participant with no interest in setting policy," as opposed to a "regulator," it does not offend the pre-emption principles of the NLRA. *507 U.S., at 229, 113 S. Ct. 1190, 122 L. Ed. 2d 565.* In finding that the state agency had acted as a market participant, we stressed that [**275] the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id., at 232, 113 S. Ct. 1190, 122 L. Ed. 2d 565.*

It [***17] is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "specifically tailored to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould, 475 U.S., at 291, 106 S. Ct. 1057, 89 L. Ed. 2d 223.* As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1. Although a State has a legitimate proprietary interest in ensuring that state funds are spent in accordance with the purposes for which they are appropriated, this is not the objective of AB 1889. In contrast to a neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program, AB 1889 imposes a targeted negative restriction on employer speech about unionization. Furthermore, the statute does not even apply this constraint uniformly. Instead of forbidding the use of state funds for *all* employer advocacy regarding unionization, AB 1889 permits use of state funds for *select* employer advocacy activities that promote unions. Specifically, the statute exempts [***18] expenses incurred in connection with, *inter alia*, giving unions access to the workplace, and voluntarily recognizing unions without a secret ballot election. *§§ 16647(b), (d).*

The Court of Appeals held that although California did not act as a market participant in enacting AB 1889, the NLRA did not pre-empt the statute. It purported to distinguish *Gould* on the theory that AB 1889 does not make employer neutrality a condition for *receiving* funds, but instead restricts only the *use* of funds. According [*2416] to the Court of Appeals, this distinction matters because when a State imposes a "use" restriction instead of a "receipt" restriction, "an employer has and retains the freedom to spend its own funds however it wishes." *463 F.3d at 1088.*

California's reliance on a "use" restriction rather than a "receipt" restriction is, at least in this case, no more consequential than Wisconsin's reliance on its spending power rather than its police power in *Gould.* As explained below, AB 1889 couples its "use" restriction with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds. By making it exceedingly difficult [***19] for employers to demonstrate that they have not used state funds and by imposing punitive sanctions for noncompliance, AB 1889 effectively reaches beyond "the use of funds over which California maintains a sovereign interest." Brief for State Respondents 19.

Turning first to the compliance burdens, AB 1889 requires recipients to "maintain records sufficient to show that no state funds were used" for prohibited ex-

penditures, *§§ 16645.2(c), 16645.7(c)*, and conclusively presumes that any expenditure to assist, promote, or deter union organizing made from "commingled" funds constitutes a violation of the statute, *§ 16646(b)*. Maintaining "sufficient" records and ensuring segregation of funds is no small feat, given that AB 1889 expansively defines its **[**276]** prohibition to encompass "any expense" incurred in "any attempt" by an employer to "influence the decision of its employees." *§§ 16645(a), 16646(a)*. Prohibited expenditures include not only discrete expenses such as legal and consulting fees, but also an allocation of overhead, including "salaries of supervisors and employees," for any time and resources spent on union-related advocacy. See *§ 16646(a)*. The statute affords no clearly defined **[***20]** safe harbor, save for expenses incurred in connection with activities that either favor unions or are required by federal or state law. See *§ 16647*.

The statute also imposes deterrent litigation risks. Significantly, AB 1889 authorizes not only the California Attorney General but also any private taxpayer--including, of course, a union in a dispute with an employer--to bring a civil action against suspected violators for "injunctive relief, damages, civil penalties, and other appropriate equitable relief." *§ 16645.8*. Violators are liable to the State for three times the amount of state funds deemed spent on union organizing. *§§ 16645.2(d), 16645.7(d), 16645.8(a)*. Prevailing plaintiffs, and certain prevailing taxpayer intervenors, are entitled to recover attorney's fees and costs, *§ 16645.8(d)*, **[***21]** which may well dwarf the treble damages award. Consequently, a trivial violation of the statute could give rise to substantial liability. Finally, even if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the costs of defending itself against unions in court, as well as the risk of a mistaken adverse finding by the factfinder.

In light of these burdens, California's reliance on a "use" restriction rather than a "receipt" restriction "does not significantly lessen the inherent potential for conflict" between AB 1889 and the NLRA. *Gould, 475 U.S., at 289, 106 S. Ct. 1057, 89 L. Ed. 2d 223*. AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his "free speech right to communicate his views to his employees," *Gissel Packing, 395 U.S., at 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547*, or else to refuse the receipt of any state funds. In so doing, the statute impermissibly "predicat[es] benefits on refraining from conduct protected by federal **[*2417]** labor law," *Livadas, 512 U.S., at 116, 114 S. Ct. 2068, 129 L. Ed. 2d 93*, and chills one side of "the robust debate which has been protected under the NLRA," *Letter Carriers, 418 U.S., at 275, 94 S. Ct. 2770, 41 L. Ed. 2d 745*.

Resisting this conclusion, the State and the AFL-CIO contend that **[***22]** AB 1889 imposes less onerous recordkeeping restrictions on governmental subsidies than do federal restrictions that have been found not to violate the *First Amendment*. See *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*; *Regan v. Taxation With Representation of Wash., 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)*. The question, however, is not whether AB 1889 violates the *First Amendment*, but whether it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the NLRA. *Livadas, 512 U.S., at 120, 114 S. Ct. 2068, 129 L. Ed. 2d 93* (quoting *Brown v. Hotel Employees, 468 U.S. 491, 501, 104 S. Ct. 3179, 82 L. Ed. 2d 373 (1984))*. **[**LEdHR10]** [10] Constitutional standards, while sometimes analogous, are not tailored to address the object of labor pre-emption analysis: **[**277]** giving effect to Congress' intent in enacting the Wagner and Taft-Hartley Acts. See *Livadas, 512 U.S., at 120, 114 S. Ct. 2068, 129 L. Ed. 2d 93* (distinguishing standards applicable to the *Equal Protection* and *Due Process Clauses*); *Gould, 475 U.S., at 290, 106 S. Ct. 1057, 89 L. Ed. 2d 223* (*Commerce Clause*); *Linn, 383 U.S., at 67, 86 S. Ct. 657, 15 L. Ed. 2d 582* (*First Amendment*). Although a State may "choos[e] to fund a program dedicated to advance certain permissible goals," *Rust, 500 U.S., at 194, 111 S. Ct. 1759, 114 L. Ed. 2d 233*it is not "permissible" for a State to use its spending power to advance an interest that--even if legitimate **[***23]** "in the absence of the NLRA," *Gould, 475 U.S., at 290, 106 S. Ct. 1057, 89 L. Ed. 2d 223* --frustrates the comprehensive federal scheme established by that Act.

NLRB Regulation

[LEdHR11]** [11] We have characterized *Machinists* pre-emption as "creat[ing] a zone free from all regulations, whether state or federal." *Boston Harbor, 507 U.S., at 226, 113 S. Ct. 1190, 122 L. Ed. 2d 565*. Stressing that the NLRB has regulated employer speech that takes place on the eve of union elections, the Court of Appeals deemed *Machinists* inapplicable because "employer speech in the context of organizing" is not a zone of activity that Congress left free from "*all* regulation." See *463 F.3d at 1089* (citing *Peoria Plastic Co., 117 N. L. R. B. 545, 547-548 (1957)* (barring employer interviews with employees in their homes immediately before an election); *Peerless Plywood Co., 107 N. L. R. B. 427, 429 (1953)* (barring employers and unions alike from making election speeches on company time to massed assemblies of employees within the 24-hour period before an election)).

[LEdHR12]** [12] The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, *29 U.S.C. § 159*. Whatever the NLRB's regulatory authority within special

settings such as imminent elections, however, [***24] Congress has clearly denied it the authority to regulate the broader category of noncoercive speech encompassed by AB 1889. It is equally obvious that the NLRA deprives California of this authority, since "'[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management.'" *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).*

Federal Statutes

Finally, the Court of Appeals reasoned that Congress could not have intended to pre-empt AB 1889 because Congress itself has imposed similar restrictions. See *463 F.3d at 1090-1091.* Specifically, [**LEdHR13] [13] three federal statutes include provisions that forbid [*2418] the use of particular grant and program funds "to assist, promote, or deter union organizing." [2] We are not persuaded that these few isolated restrictions, plucked from the multitude of federal spending programs, were either intended to alter or did in fact alter the "'wider contours of federal labor policy.'" *Metropolitan Life, 471* [**278] *U.S., at 753, 105 S. Ct. 2380, 85 L. Ed. 2d 728.*

> 2 See *29 U.S.C. § 2931(b)(7)* ("Each recipient of funds under [the Workforce Investment Act] shall provide to the Secretary assurances that none of such funds will be used to assist, [***25] promote, or deter union organizing"); *42 U.S.C. § 9839(e)* ("Funds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing"); *§ 12634(b)(1)* ("Assistance provided under [the National Community Service Act] shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing").

[**LEdHR14] [14] A federal statute will contract the pre-emptive scope of the NLRA if it demonstrates that "Congress has decided to tolerate a substantial measure of diversity" in the particular regulatory sphere. *N.Y. Tel., 440 U.S., at 546, 99 S. Ct. 1328, 59 L. Ed. 2d 553* (plurality opinion). In *New York Telephone*, an employer challenged a state unemployment system that provided benefits to employees absent from work during lengthy strikes. The employer argued that the state system conflicted with the federal labor policy "of allowing the free play of economic forces to operate during the bargaining process." *Id., at 531, 99 S. Ct. 1328, 59 L. Ed. 2d 553.* We upheld the statute on the basis that the legislative histories of the NLRA and Social Security Act, which were enacted within six weeks of each other, confirmed that "Congress intended that the States be free to authorize, [***26] or to prohibit, such payments." *Id., at 544, 99 S. Ct. 1328, 59 L. Ed. 2d 553*; see also *id., at 547, 99 S. Ct. 1328, 59 L. Ed. 2d 553* (Brennan, J., concurring in result); *id., at 549, 99 S. Ct. 1328, 59 L. Ed. 2d 553* (Blackmun, J., concurring in judgment). Indeed, the tension between the Social Security Act and the NLRA suggested that the case could "be viewed as presenting a potential conflict between two federal statutes . . . rather than between federal and state regulatory statutes." *Id., at 539-540, n. 32, 99 S. Ct. 1328, 59 L. Ed. 2d 553.*

[**LEdHR15] [15] The three federal statutes relied on by the Court of Appeals neither conflict with the NLRA nor otherwise establish that Congress "decided to tolerate a substantial measure of diversity" in the regulation of employer speech. Unlike the States, Congress has the authority to create tailored exceptions to otherwise applicable federal policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies. Consequently, the mere fact that Congress has imposed targeted federal restrictions on union-related advocacy in certain limited contexts does not invite the States to override federal labor policy in other settings.

Had Congress enacted a federal version of AB 1889 that applied [***27] analogous spending restrictions to *all* federal grants or expenditures, the pre-emption question would be closer. Cf. *Metropolitan Life, 471 U.S., at 755, 105 S. Ct. 2380, 85 L. Ed. 2d 728* (citing federal minimum labor standards as evidence that Congress did not intend to pre-empt state minimum labor standards). But none of the cited statutes is Government-wide in scope, none contains comparable remedial provisions, and none contains express pro-union exemptions.

* * *

The Court of Appeals' judgment reversing the summary judgment entered for the Chamber of Commerce is reversed, and [*2419] the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: BREYER

DISSENT

Justice **Breyer,** with whom Justice **Ginsburg** joins, dissenting.

California's spending statute sets forth a state "policy" not to "subsidize [**279] efforts by an employer to assist, promote, or deter union organizing." 2000 Cal.

Stats. ch. 872, § 1. The operative sections of the law prohibit several classes of employers who receive state funds from using those funds to "assist, promote, or deter union organizing." *Cal. Govt. Code Ann. §§ 16645-16649* (West Supp. 2008). And various compliance provisions then require maintenance of "records sufficient to show **[***28]** that no state funds were used" for prohibited expenditures, deter the use of commingled funds for prohibited expenditures, and impose serious penalties upon violators. *§§ 16645.2(c), 16645.7(b)-(c).*

The Court finds that the National Labor Relations Act (NLRA) pre-empts these provisions. It does so, for it believes the provisions "*regulate*" activity that Congress has intended to "be unregulated because left to be controlled by the free play of economic forces." *Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)* (internal quotation marks omitted and emphasis added). The Chamber of Commerce adds that the NLRA pre-empts these provisions because they "*regulate* activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)* (summarizing the pre-emption principle set forth in *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*; emphasis added). Thus the question before us is whether California's spending limitations amount to *regulation* that the NLRA pre-empts. In my view, they do not.

1

The operative sections of the California statute provide that employers who wish to **[***29]** "assist, promote or deter union organizing," cannot use state money when they do so. The majority finds these provisions pre-empted because in its view the sections regulate employer speech in a manner that weakens, or undercuts, a congressional policy, embodied in *NLRA § 8(c)*, "'to encourage free debate on issues dividing labor and management.'" *Ante, at ____ - ____, 171 L. Ed. 2d, at 273* (citing *Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)).*

Although I agree the congressional policy favors "free debate," I do not believe the operative provisions of the California statute amount to impermissible regulation that interferes with that policy as Congress intended it. First, the only relevant Supreme Court case that found a State's labor-related spending limitations to be pre-empted differs radically from the case before us. In that case, *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc., 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223*, the Court considered a Wisconsin statute that prohibited the State from doing business with firms that repeatedly violated the NLRA. The Court said that the statute's "manifest purpose and inevitable effect" was "to enforce" the NLRA's requirements, which "role Congress reserved exclusively for the [National Labor Relations **[***30]** Board]." *Id., at 291, 106 S. Ct. 1057, 89 L. Ed. 2d 223.* In a word, the Wisconsin statute sought "to *compel* conformity with the NLRA." *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc., 507 U.S. 218, 228, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* (emphasis added). **[**280]**

[*2420] California's statute differs from the Wisconsin statute because it does not seek to compel labor-related activity. Nor does it seek to forbid labor-related activity. It permits all employers who receive state funds to "assist, promote, or deter union organizing." It simply says to those employers, do not do so on our dime. I concede that a federal law that forces States to pay for labor-related speech from public funds would encourage *more* of that speech. But no one can claim that the NLRA is such a law. And without such a law, a State's refusal to pay for labor-related speech does not *impermissibly* discourage that activity. To refuse to pay for an activity (as here) is not the same as to compel others to engage in that activity (as in *Gould*).

Second, California's operative language does not weaken or undercut Congress' policy of "encourag[ing] free debate on issues dividing labor and management." *Linn, supra, at 62, 86 S. Ct. 657, 15 L. Ed. 2d 582.* For one thing, employers remain free **[***31]** to spend *their own* money to "assist, promote, or deter" unionization. More importantly, I cannot conclude that California's statute would weaken or undercut any such congressional policy because Congress itself has enacted three statutes that, *using identical language,* do precisely the same thing. Congress has forbidden recipients of Head Start funds from using the funds to "assist, promote, or deter union organizing." *42 U.S.C. § 9839(e).* It has forbidden recipients of Workforce Investment Act of 1998 funds from using the funds to "assist, promote, or deter union organizing." *29 U.S.C. § 2931(b)(7).* And it has forbidden recipients of National Community Service Act of 1990 funds from using the funds to "assist, promote, or deter union organizing." *42 U.S.C. § 12634(b)(1).* Could Congress have thought that the NLRA would prevent the States from enacting the very same kinds of laws that Congress itself has enacted? Far more likely, Congress thought that directing government funds away from labor-related activity was *consistent*, not *inconsistent*, with, the policy of "encourag[ing] free debate" embedded in its labor statutes.

Finally, the law normally gives legislatures broad authority to **[***32]** decide how to spend the People's money. A legislature, after all, generally has the right *not* to fund activities that it would prefer not to fund--

even where the activities are otherwise protected. See, *e.g., Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)* ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"). This Court has made the same point in the context of labor law. See *Lyng v. Automobile Workers, 485 U.S. 360, 368, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988)* (holding that the Federal Government's refusal to provide food stamp benefits to striking workers was justified because "[s]trikers and their union would be much better off if food stamps were available," but the "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right").

As far as I can tell, States that *do* wish to pay for employer speech are generally free to do so. They might make clear, for example, through grant-related rules and regulations that a grant recipient can use the funds to pay salaries and overhead, which salaries and overhead might include expenditures related **[***33]** to management's **[**281]** role in labor organizing contests. If so, why should States that do *not* wish to pay be deprived of a similar freedom? Why should they be conscripted into paying?

[*2421] I can find nothing in the majority's arguments that convincingly answers these questions. The majority says that California *must* be acting as an impermissible regulator because it is not acting as a "market participant" (a role we all agree would permit it broad leeway to act like private firms in respect to labor matters). *Ante, at ____, 171 L. Ed. 2d, at 274.* But the regulator/market-participant distinction suggests a false dichotomy. The converse of "market participant" is not necessarily "regulator." A State may appropriate funds without either participating in or regulating the labor market. And the NLRA pre-empts a State's actions, when taken as an "appropriator," only if those actions amount to impermissible regulation. I have explained why I believe that California's actions do not amount to impermissible regulation here.

The majority also complains that the statute "imposes a targeted negative restriction," one applicable only to labor. *Ante, at ____, 171 L. Ed. 2d, at 275.* I do not find this a fatal objection, because the congressional statutes just **[***34]** discussed (which I believe are consistent with the NLRA) do exactly the same. In any event, if, say, a State can tell employers not to use state funds to pay for a large category of expenses (say, overhead), why can it not tell employers the same about a smaller category of expenses (say, only those overhead expenses related to taking sides in a labor contest). And where would the line then be drawn? Would the statute pass master if California had said, do not use our money to pay for interior decorating, catered lunches, or labor relations?

The majority further objects to the fact that the statute does not "apply" the constraint "uniformly," because it permits use of state funds for "*select* employer advocacy activities that promote unions." *Ante, at ____, 171 L. Ed. 2d, at 275.* That last phrase presumably refers to an exception in the California statute that permits employers to spend state funds to negotiate a voluntary recognition of a union. But this exception underscores California's basic purpose--maintaining a position of spending neutrality on *contested* labor matters. Where labor and management agree on unionization, there is no conflict.

II

I turn now to the statute's compliance provisions. They require **[***35]** grant recipients to maintain "records sufficient to show that no state funds were used" for prohibited expenditures; they deter the use of commingled funds for prohibited expenditures; and they impose serious penalties upon violators. *Cal. Govt. Code Ann. §§ 16645.2(c), 16645.7(b)-(c).* The majority seems to rest its conclusions in part upon its belief that these requirements are too strict, that, under the guise of neutral enforcement, they discourage the use of *nonstate* money to engage in free debate on labor/management issues. *Ante, at ____ - ____, 171 L. Ed. 2d, at 275-276.*

I agree with the majority that, should the compliance provisions, as a practical matter, unreasonably discourage expenditure of *nonstate* funds, the NLRA may well pre-empt California's statute. But I cannot say **[**282]** on the basis of the record before us that the statute will have that effect.

The language of the statute is clear. The statute requires recipients of state money to "maintain records sufficient to show that no state funds were used" for prohibited expenditures. *§§ 16645.2, 16645.7(c).* And the class of prohibited expenditures is quite broad: It covers "*any* expense" incurred in "any attempt" by an employer to "influence the decision of its **[***36]** employees," including "legal and consulting fees and salaries of supervisors **[*2422]** and employees" incurred during research for or the preparation, planning, coordination, or execution of activities to "assist, promote, or deter" union organizing. *§ 16646(a)* (emphasis added). And where an employer mingles state funds and non-state funds, (say, to pay a particular employee who spends part of her time dealing with unionization matters) the employer must determine "on a pro rata basis," the portion of the labor-related expenditure paid for by state funds, and maintain sufficient supporting documentation. *§ 16646(b).* Any violation of these provisions is then sub-

ject to strict penalties, including treble damages and attorney's fees and costs. *§ 16645.8.*

What is less clear is the degree to which these provisions actually will deter a recipient of state funds from using non-state funds to engage in unionization matters. And no lower court has ruled on this matter. In the District Court, the Chamber of Commerce moved for summary judgment arguing that the statute, by placing restrictions on state funds, was pre-empted by *Machinists* and *Garmon* and also arguing that the compliance provisions are so burdensome **[***37]** that they would chill even private expenditures. California opposed the motion. And California submitted expert evidence designed to show that its "accounting and recordkeeping requirements . . . are similar to requirements imposed in other contexts," are "significantly less burdensome than the detailed requirements for federal grant recipients," and allow "flexibility in establishing proper accounting procedures and controls." App. 282-283.

The District Court granted the Chamber of Commerce's motion for summary judgment in part, finding that the operative sections of the statute were pre-empted for the reasons I have discussed in Part I, namely, that the operative provisions interfered with the NLRA's policy of encouraging "free debate." *225 F. Supp. 2d 1199, 1204 (CD Cal. 2002).* But in doing so, it did not address the Chamber of Commerce's argument that the California statute's compliance provisions affected non-state-funded speech to the point that the NLRA pre-empted the statute. Neither did the Court of Appeals address the question whether the compliance provisions themselves constitute sufficient grounds for finding the statute pre-empted.

I do not believe that we can, and I would **[***38]** not, decide this question until the lower courts have had an opportunity to consider and rule upon the compliance-related questions. Accordingly, I would vote to vacate the judgment of the Ninth Circuit and remand for further proceedings on this issue.

I respectfully dissent.

REFERENCES
29 U.S.C.S. § 151 et seq.

2 Labor and Employment Law *§§ 36.01-36.03* (Matthew Bender)

L Ed Digest, Commerce § 128.5

L Ed Index, Labor and Employment

The Supreme Court and the right of free speech and press. 93 L. Ed. 1151, 2 L. Ed. 2d 1706, 11 L. Ed. 2d 1116, 16 L. Ed. 2d 1053, 21 L. Ed. 2d 976.

LEXSEE 566 F.2D 810

NATIONAL LABOR RELATIONS BOARD, Plaintiff-Appellant, v. COMMITTEE OF INTERNS AND RESIDENTS, and NEW YORK STATE LABOR RELATIONS BOARD, Defendants-Appellees

Docket No. 77-6075, No. 1447 - September Term, 1976

UNITED STATES COURT OF APPEALS FOR THE [redacted]

566 F.2d 810; 1977 U.S. App. LEXIS 11450; 96 L.R.R.M. 2342; 82 Lab. Cas. (CCH) P10,140

July 20, 1977, Argued
September 21, 1977, Decided

PRIOR HISTORY: [**1] In this action, the National Labor Relations Board sought an injunction in the United States District Court for the Southern District of New York against the holding of a representation election under the auspices of the New York State Labor Relations Board. The NLRB moved for a preliminary injunction, and the defendant cross-moved for summary judgment. The district court, Charles E. Stewart, Jr., J., granted the defendant's motion and the plaintiff appealed.

DISPOSITION: Reversed and remanded.

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JUDGES: Meskill, Circuit Judge, and Edward R. Neaher ** and Albert W. Coffrin, *** District Judges.

** Hon. Edward R. Neaher of the Eastern District of New York, sitting by designation.
*** Hon. Albert W. Coffrin of the District of Vermont, sitting by designation.

OPINION BY: MESKILL

OPINION

[*811] MESKILL, Circuit Judge:

Prior to 1974, workers in voluntary, non-profit hospitals were excluded from coverage under federal labor law. In that year, Congress amended the National Labor Relations Act ("NLRA") to include the labor-management relations of all non-profit health care institutions. Pub. L. No. 93-360, 88 [**4] Stat. 395 (1974) (amending *29 U.S.C. §§ 151 et seq. (1970)*) ("the Health Care Amendments"). This case requires us to consider the preemptive effect of that change.

The Committee of Interns and Residents ("CIR") is a union of housestaff personnel. Its membership consists of doctors receiving post-graduate training in various hospitals. The three categories of its membership are interns, who have just completed medical school and are generally involved in a one-year program; residents, who are in a longer training program leading to certification in a medical specialty; and clinical fellows, who have completed residencies and are being trained in medical sub-specialties. From 1957 to 1974, CIR represented the housestaff at a number of hospitals in New York City under the jurisdiction of the New York State Labor Relations Board ("SLRB").

After the passage of the Health Care Amendments in 1974, a number of housestaff organizations similar to CIR filed election petitions with the NLRB. In March, 1976, the NLRB issued its first decision on these petitions, *Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (1976)*. That case held that while housestaff [**5] "possessed certain employee characteristics," they are "primarily engaged in graduate educational training," and thus were students rather than employees. On this basis, the NLRB concluded that housestaff should not be given collective bargaining rights, and dismissed the petition.

Several weeks later, CIR filed an election petition with the SLRB. In July, 1976, the SLRB dismissed the petition on the ground that federal labor law, as expressed in *Cedars-Sinai*, had preempted the field. *In re Misericordia Hospital Medical Center*, 39 S.L.R.B. No. 32 (1976).

The CIR then brought suit in New York State Supreme Court to compel the SLRB to accept jurisdiction. That court ruled that the SLRB was free to accept jurisdiction over the labor relations of housestaff. *Committee of Interns and Residents v. New York State Labor Relations Board, 88 Misc.2d 502, 388 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1976)*. The following month, the NLRB issued an opinion concerning a housestaff [*812] union in which it explained that its intention in *Cedars-Sinai* had been to preempt the field. *Kansas City General Hospital, 225 N.L.R.B. No. 14A, 93 LRRM 1362 (1976)* [**6] ("Kansas City II"). In light of that decision, the state court vacated its prior decision. *Committee of Interns and Residents v. New York State Labor Relations Board, 89 Misc. 2d 424, 391 N.Y.S.2d 503, 505 (Sup. Ct. N.Y. County 1977)*.

In the interval between the two state court decisions, the NLRB began the action involved in the instant appeal. It sought to enjoin the holding of elections for housestaff officers under the aegis of the SLRB. *See NLRB v. Nash-Finch Co., 404 U.S. 138, 30 L. Ed. 2d 328, 92 S. Ct. 373 (1971)*. The Board moved for a preliminary injunction, and the CIR cross-moved for summary judgment. Judge Stewart granted the CIR's motion, and denied any relief to the *NLRB. 426 F. Supp. 438 (S.D.N.Y. 1977)*. We reverse and remand.

I.

Federal preemption in the labor field is particularly broad. *See Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971)*; COX, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972). As the Supreme Court stated in *Garner v. Teamsters Union, 346 U.S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953)*:

> Congress **[**7]** did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.

Id. at 490. The few exceptions to this pervasive federal regulation fall into a small number of categories. Congress has explicitly given the states jurisdiction over some labor matters, such as damage suits for unfair labor practices. *29 U.S.C. § 187(b).* Suits for state-law torts committed during a labor dispute are traditionally matters of state concern, with only a peripheral federal interest. *Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 296, 97 S. Ct. 1056, 51 L. Ed. 2d 338, 45 U.S.L.W. 4263 (1977).* **[**8]** Finally, Congress has established clear procedures by which the NLRB may cede jurisdiction over labor disputes to appropriate state authorities. *29 U.S.C. §§ 160(a), 164(c).* As discussed below, this case does not fall within any of these exceptions. [1]

> 1 At the time the NLRA was passed, it was thought that some labor disputes were beyond the scope of the commerce power. See 79 Cong. Rec. 9721 (1935) (exclusion of agricultural workers from definition of "employee" in NLRA). There is no contention here that Congress is without power to regulate the labor relations of interns and housestaff.

II.

In *Cedars-Sinai*, the NLRB concluded that housestaff, "although they possess certain employee characteristics, are primarily students." *223 N.L.R.B. at 251.* Accordingly, the Board concluded that collective bargaining was not mandated by the NLRA or the Health Care Amendments, and that the extension of such rights to a student-teacher relationship was contrary to national labor policy. **[**9]**

The district judge seized upon this distinction as the premise of a faulty syllogism. He concluded that, if housestaff were not "employees" as defined in § 2(3) of the NLRA, *29 U.S.C. § 152(3)*, then the CIR was not a "labor organization" as defined in § 2(5), *29 U.S.C. § 152(5)*. Since the NLRA applies only to "labor organizations," he concluded that the Board had waived its jurisdiction over housestaff. *426 F. Supp. at 449.* [2]

> 2 We have recently criticized a similarly literal approach to the definitions contained in the NLRA. *Marriott In-Flite Servs. v. Local 504, Transport Workers of America, 557 F.2d 295 (2d Cir. 1977).*
>
> Even under the district court's analysis, the injunction should have issued. In *Kansas City II*, it is apparent that the NLRB concluded only that housestaff were not "primarily" employees, and not that they lacked all employee characteristics.

[*813] The judgment of the district court is in conflict **[**10]** with the expressed intent both of Congress and the NLRB. In *Cedars-Sinai*, the NLRB stated that "it will effectuate the policies of the Act to assert jurisdiction." *223 N.L.R.B. at 251.* Moreover, §§ 10(a) and 14(c) of the NLRA contain explicit mechanisms by which the NLRB can cede jurisdiction to state labor authorities. *29 U.S.C. §§ 160(a), 164(c).* [3] Had the NLRB intended to cede jurisdiction to the SLRB, it would have been simple to do so. There is no reason to assume the NLRB did implicitly what it could have done expressly.

> 3 These provisions are the exclusive means for ceding federal jurisdiction over activities covered by the NLRA. *Cf. Guss v. Utah Labor Board, 353 U.S. 1, 1 L. Ed. 2d 601, 77 S. Ct. 598 (1957).*

The NLRB made this clear in a subsequent decision. In *Kansas City II, supra*, the Board adhered to its decision that housestaff are not "employees," but held that the hospital is nevertheless their "employer." The Board **[**11]** then stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision

> in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary **[**12]** to that very policy.

93 L.R.R.M. at 1364 (footnote omitted).

Thus, it is clear from *Cedars-Sinai* and *Kansas City II* that the NLRB has not ceded jurisdiction over housestaff. Rather, the NLRB concluded that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they "are primarily students."

There can be no doubt that the NLRB has power to prevent the states from granting collective bargaining rights to housestaff unions. In *Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947)*, the Supreme Court was faced with a closely analogous situation. At the time, the NLRB had concluded that supervisors were "employees" within the meaning of the Act. *Maryland Dry Dock Co., 49 N.L.R.B. 733 (1943)*. However, it had also concluded that, as a matter of national labor policy, unions of supervisors should not be given collective bargaining rights under the Act. The supervisors union filed election petitions with the SLRB, which accepted jurisdiction.

The Supreme Court reversed on preemption grounds. **[**13]** For the Court, Mr. Justice Jackson wrote:

> There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on **[*814]** the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. . . . It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes . . . . We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.
>
> Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are **[**14]** asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . But the power to decide a matter can hardly be made dependent on the way it is decided.

330 U.S. at 755 (citations omitted). *Bethlehem Steel* controls here. The NLRB has asserted its jurisdiction and denied collective bargaining rights. Under *Bethlehem Steel*, State power has been ousted by agency action taken pursuant to a Congressional mandate.

III.

The district judge attempted to distinguish *Bethlehem Steel* by focusing on the decision that housestaff are not employees. [4] In doing so, he misconceived the issue.

> 4 Under the district court's analysis, SLRB jurisdiction would be ousted only if the NLRB

found that (1) housestaff were employees and (2) that they should be denied collective bargaining rights because of their "primarily" student character. It is doubtful that an important aspect of national labor policy could turn upon such a highly technical distinction.

[15]** The inquiry is not a narrow or technical one, but rather whether Congress intended to occupy the field. The court must focus on the activity regulated and determine if it has been brought within the scope of federal power. Thus, in *Bethlehem Steel, supra*, the Court held:

> The federal board has jurisdiction of the *industry* in which these particular employers are engaged and has asserted control of their labor relations *in general*. It asserts, and rightfully so, under our decision in [*Packard Motor Car Co. v. NLRB, 330 U.S. 485, 91 L. Ed. 1040, 67 S. Ct. 789 (1947)]* its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

330 U.S. at 776 (emphasis added). The case at bar presents an identical situation. The federal regulation of labor law is so sweeping that it is inconceivable that the power of the states to act turns upon the way in which the agency decided a policy question. *Bethlehem Steel* explained that:

> When federal administration has made comprehensive regulations effectively **[**16]** governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. . . . However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation . . . . **[*815]** The states are in those cases permitted to use their police power in the interval. . . . However, *the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.*

330 U.S. at 774 (emphasis added; citations **[**17]** omitted).

As the district court found, the unequivocal intent of Congress was to include all the labor relations of voluntary hospitals within the *NLRA. 426 F. Supp. at 448.* [5] Both the Senate and the House rejected amendments meant to ensure continued state jurisdiction in hospital matters. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-06, 16908-11 (May 30, 1974); 22575-76, 22581-82 (July 10, 1974); 22942-43 (July 11, 1974). This is in keeping with the ordinary rule of federal preemption in labor matters. Thus, Senators Mondale and Taft spoke in favor of the Health Care Amendments as a "national approach" to labor relations in hospitals. 120 Cong. Rec. 12944-46 (May 2, 1974). Senator Williams, the chief sponsor of the Health Care Amendments in the Senate, stated:

> The general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation.

120 Cong. Rec. 22575 (July 10, 1974). Similarly, the House sponsor, Representative Thompson, expressed the view that "it is apparent that the Federal law preempts any **[**18]** State law." 120 Cong. Rec. 22942 (July 11, 1974). Furthermore, the House rejected the "Quie Amendment," which would have ceded substantially less jurisdiction to the states than the CIR now claims for the SLRB. Finally, it is clear that Congress intended to include housestaff within the coverage of the Health Care Amendments. For example, in explaining Congress' rejection of amendments to the definition of "supervisor" in § 2(11), *29 U.S.C. § 152(11)*, the Senate Report stated:

> The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions.

S. Rep. No. 93-766, 1974 U.S. Code Cong. & Admin. News 3951. Thus, Congress rejected the amendment because it considered housestaff within the scope of the Health Care Amendments.

> 5 Even with the narrow issue focused on by the district court - exclusion from the definition of "employee" - the underlying Congressional intent can lead to opposite results for preemption purposes. Thus, the exclusion of agricultural workers in § 2(3), *29 U.S.C. § 152(3)*, is the result of a Congressional decision not to exercise federal power over farm labor. *See* 79 Cong. Rec. 9721 (1935); 93 Cong. Rec. 6599 (1947). Therefore, the states may assert jurisdiction over the labor relations of farms and their employees. *See United Farm Workers Organizing Comm. v. Superior Court, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971)* (In banc). However, the exclusion of supervisors in the same Section is the result of a Congressional determination that national labor policy requires that supervisors not be guaranteed collective bargaining rights. Accordingly, the Supreme Court has held that state jurisdiction over supervisors unions has been ousted by § 2(3). *Beasley v. Food Fair of North Carolina, 416 U.S. 653, 40 L. Ed. 2d 443, 94 S. Ct. 2023 (1974)*.

[19]** It is clear that Congress, if it wished, could exclude housestaff from the definition of "employee"; it could also deny them collective bargaining rights under state law. *Beasley v. Food Fair of North Carolina, 416 U.S. 653, 40 L. Ed. 2d 443, 94 S. Ct. 2023 (1974)*. Here, however, that decision has been made by the expert administrative agency to which Congress has delegated wide powers over national labor policy. It is thus clear that Congress has completely ousted state jurisdiction.

IV.

A contrary holding would have a number of damaging effects. Primary among them would be the introduction of disparity in a labor policy designed to be national in **[*816]** scope. As the Supreme Court stated in *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)*:

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted **[**20]** administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.
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> . . . .
>
> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.

Id. at 242-43. If the NLRB erred in its treatment of housestaff unions, the solution is clearly not to create a patchwork of state-governed labor unions. [6]

> 6 The CIR's argument, if accepted, would also create the possibility that housestaff in some states could not organize at all, while the CIR would be fully protected by New York law.

[21]** There are already several areas of conflict and potential conflict between state and federal regulation. For example, the New York Labor Law provides for compulsory arbitration in labor disputes in voluntary hospitals. *N.Y. Lab. Law §§ 716(2), (3), (4)* (McKinney 1977), and the state courts may enjoin hospital strikes, *id. § 716(9)*; on the other hand, the NLRA allows strikes and free collective bargaining, and hospital strikes come within the general prohibition of the Norris-LaGuardia Act. Thus, hospitals would be faced with contradictory duties and obligations if the CIR were to prevail. Similarly, the Health Care Amendments provide an elaborate mechanism for notice to be given by unions with grievances, *29 U.S.C. §§ 158(d), (g)*, while state law contains no such provisions. [7] Finally, a serious possibility of conflict is raised if a jurisdictional dispute should arise between the CIR and a union recognized under the NLRA. [8]

> 7 While this legislative scheme might be better served if housestaff were organized, that is a pol-

icy question for the NLRB or Congress, and it has no relevance to the issue of preemption.

[**22]

8 This Court recently noted, in the context of a voluntary hospital, that "New York policy is fundamentally at odds with the National Labor Relations Act." *NLRB v. St. Luke's Hosp. Center, 551 F.2d 476, 483 (2d Cir. 1976)*. The dispute there was over the related issue of a union's right, under a union security agreement, to represent a distinct class of professional employees who did not wish to be represented by a union of professional and technical workers. We held there that the agreement, valid under New York law, violated the NLRA.

The CIR has vigorously attacked the policy underlying *Cedars-Sinai*. However, the wisdom of the NLRB decision is not before us; it is before the United States District Court for the District of Columbia, where the CIR has brought a lawsuit seeking to overturn *Cedars-Sinai* as an abuse of discretion by the NLRB. *Physicians National House Staff Association v. Murphy, 443 F. Supp. 806 (D.D.C. 1978)*. In that action, the CIR contends that its members are "employees," and asks for an injunction to compel the NLRB to assume [**23] jurisdiction and extend collective bargaining rights. If the NLRB abused its discretion in *Cedars-Sinai*, those proceedings will correct the error. If the Board's action is upheld, however, the CIR may not seek to circumvent it by proceeding before the SLRB. The Health Care Amendments [*817] brought housestaff within national labor policy. Accordingly, the district court's conclusion that the SLRB had jurisdiction over housestaff was erroneous and cannot stand. In view of the State Supreme Court's decision in *Committee of Interns and Residents v. New York State Labor Board, 89 Misc. 2d 424, 391 N.Y.S. 2d 503 (Sup. Ct. N.Y. County 1977)*, acquiescing in the NLRB's finding of preemption in *Kansas City II, supra*, there is doubt regarding whether this controversy has become moot or whether an injunction barring the holding of an election under the aegis of the SLRB is necessary or appropriate. These matters have been neither briefed nor argued. We therefore leave them for consideration by the district court on remand. [9]

9 Justice Gellinoff dismissed the CIR's petition on January 6, 1977, and on January 20 he adhered to that ruling. On January 28, 1977, the NLRB prepared a motion for a stay of further proceedings in the instant action pending a final appellate determination of the state action. The NLRB argued that "unless [the CIR's expected] appeal is successful, this Court will not need to rule on the Board's pleadings herein, since they are directed at a judgment which is now vacated." Unfortunately, this motion was not filed until February 3, 1977, the day after the district court filed its decision. Two days after the district court filed its decision, on February 4, the SLRB reversed its earlier decision, disregarded the decision of the State Court, and announced that, in view of the federal district court's decision, it would resume proceedings. Thus, if our view of the record is accurate, the district court's resolution of the merits on February 2 may have breathed new life into a controversy that was on the brink of mootness only weeks earlier. Such cases are inappropriate for resolution by the federal courts. *See DeFunis v. Odegaard, 416 U.S. 312, 317, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974)* (student about to graduate). Indeed, this case appears to be a good example of a phenomenon of which federal district courts must be wary, namely, the generation, or regeneration, of what appears to be a constitutional "case" or "controversy" by means of the litigation process itself. *Cf. City of Hartford v. Glastonbury, 561 F.2d 1032, 1051 n.3 (2d Cir. 1977)* (en banc; plurality opinion); *id. at 1053* (Kaufman, C.J., concurring). The NLRB's motion for a stay was ultimately denied on March 7, 1977, for the obvious reason that it had come too late.

[**24] The grant of summary judgment is reversed. The cause is remanded to the district court for further proceedings not inconsistent with this opinion. Each party shall bear its own costs on appeal.