No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES *et al.*,

Petitioners,

v.

BILL LOCKYER *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND SHERWOOD COX IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: *Davenport v. Washington Education Ass'n,* No. 05-1589 (U.S. argued Jan. 10, 2007); *Air Line Pilots Ass'n v. Miller,* 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986); *Ellis v. Railway Clerks,* 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements, which lie at the heart of this litigation over California's "neutrality" statute. *See, e.g., Dana Corp.*, 341 N.L.R.B. 1283 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006), *appeal docketed*, No. 06-3791 (6th Cir. May 15, 2006).

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was written and produced solely by the *Amici* and their counsel. No counsel for a party authored the brief in whole or in part.

Under many common "neutrality" agreements, employers' speech is silenced, unions are provided with employees' home addresses and other personal information, and secret-ballot elections supervised by the National Labor Relations Board ("NLRB") are waived in favor of so-called "card checks." Under these arrangements, employees are often pressured to sign union authorization cards that are counted as "votes" in favor of unionization. These provisions, and the state statutes that mandate them, strike at the heart of employees' right to choose or refrain from unionization under § 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157. The Foundation and its supporters want to ensure that this Court, as it considers this important Petition for Writ of Certiorari, understands the manner in which these state mandated "neutrality" schemes are created, enforced, and abused to hinder employees' exercise of their § 7 right to choose or reject unionization.

Sherwood Cox is a registered nurse employed by Western Medical Center Santa Ana, an acute care hospital located in Orange County, California. He is affected by the California state law at issue because his employer may be a recipient of state funds and has a "neutrality agreement" with the California Nurses Association ("CNA"). That "neutrality agreement" grants CNA several exclusive privileges and powers that enable it–above all other unions–to become the nurses' collective bargaining representative. Mr. Cox has been forced to file numerous unfair labor practice charges against his employer and the CNA to protect his § 7 rights from abridgement by their neutrality agreement. By filing this brief as *amici curiae*, Mr. Cox seeks to protect his and all other employees' § 7 right to choose or reject unionization in an informed and intelligent manner.

Pursuant to Supreme Court Rule 37.2(a), *Amici* state that all Respondents have granted written consent to the filing of this brief.

QUESTION PRESENTED

The *Amici* adopt and incorporate by reference the Petitioners' Question Presented.

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Petitioners' Statement of the Case.

SUMMARY OF THE ARGUMENT

Assembly Bill No. 1889 ("AB 1889") is the law at issue here. It is a state labor regulation that has only one purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence and corral uninformed employees into unionization. AB 1889's "gag rule" directly conflicts with federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed decision to choose or reject unionization. Employees are the real victims of this misguided state effort to undo federal labor policy.

AB 1889 also enables unions to demand and receive so-called "neutrality and card check" agreements, under which employees' right to choose or reject unionization in a free and uncoerced manner is further hampered. AB 1889 fails to pass muster and must be deemed preempted under both *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ("*Machinists*") and *San Diego Building Trades Council*

v. Garmon, 359 U.S. 236 (1959) ("*Garmon*"). Therefore, the Petition for Writ of Certiorari should be granted in this important case.

REASONS FOR GRANTING THE WRIT

Federal Labor Law Has One Core Policy: Allowing Employees to Choose or Reject Unionization in an Intelligent, Free and Uncoerced Manner. AB 1889 Eviscerates This Policy by Silencing the Non-Coercive Speech of One of the Key Participants in the Debate Over Unionization. For This Reason the Statute Is Preempted under Both the "Machinists" and "Garmon" Branches of This Court's Preemption Doctrine.

I. Introduction

California Assembly Bill No. 1889 and Cal. Gov't Code §§ 16645-16649 ("AB 1889") are state-enforced "neutrality" regulations. Despite their name, however, these regulations are anything but neutral. "[AB 1889] carries a false air of evenhandedness." *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1102 (9th Cir. 2006) (en banc) (Beezer, J., dissenting) (Pet. App. 44a); *see also Chamber of Commerce of the United States v. Lockyer*, 422 F.3d 973, 978 (9th Cir. 2005) (Pet. App. 58a, 64a). This is so because statutes like AB 1889 have one true purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence to corral the uninformed employees into unionization. This "gag rule" against one party directly conflicts with federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed choice about unionization. Congress surely intended such non-coercive speech to be left to the free flow of economic forces, for any

effort to silence such speech would doom the entire NLRA to unconstitutionality. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The Petitioners' brief ably and correctly demonstrates that the Ninth Circuit's en banc ruling upholding AB 1889 is erroneous and conflicts with numerous decisions of this Court that have found state interference with the NLRA preempted in many circumstances. AB 1889's ban on non-coercive employer speech directly conflicts with longstanding federal labor policy that free speech and debate by all parties is central to the purposes of the NLRA. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966), *quoting New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (in a union organizing context, "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks'"). Indeed, "[a]n overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." *Lockyer*, 463 F.3d at 1105 (Beezer, J., dissenting) (Pet. App. 50a); *see also Lockyer*, 422 F.3d at 978 (Pet. App. 64a).

Unlike its two prior panel opinions (Pet. App. 58a & 114a), the en banc Ninth Circuit studiously refused to take into account employees' § 7 interests in hearing all sides of the debate when it upheld AB 1889's gags on non-coercive employer speech. The prior panel opinions properly

recognized that "the National Labor Relations Act pivots on the notion that employers and employees may freely discuss their views about union organizing efforts." *Lockyer*, 422 F.3d at 983 (Pet. App. 72a). The prior panel also recognized that:

> "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. 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."

Id. at 984, *quoting NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) (emphasis added) (Pet. App. 73a).[2]

This common sense desire to effectuate employee free choice, the undisputed core of the NLRA, was echoed in *Healthcare Ass'n v. Pataki* by District Court Judge McCurn, who struck down similar state gags on non-coercive employer speech.

> It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

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[2] As the earliest panel in this case properly held, "an overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." *Chamber of Commerce of the United States v. Lockyer*, 364 F.3d 1154, 1166 (9th Cir. 2004) (Pet. App. 128a).

388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *vacated on other grounds*, 471 F.3d 87 (2d Cir. 2006).

The Ninth Circuit's en banc ruling was particularly erroneous when it held that *Machinists*' preemption only applies "in the context of collective bargaining between organized labor and employers, not in the context of organizing, which is the subject of AB 1889." (Pet. App 13a-14a). *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). Under this fallacious rationale, a state could ban all organizing yet survive a *Machinists*' preemption challenge because it was only regulating "organizing," not collective bargaining.

Petitioners have also ably demonstrated that the Ninth Circuit's en banc ruling is erroneous and in conflict with this Court's other form of labor preemption, the *Garmon* doctrine, in which state practices even "arguably" subject to regulation under the NLRA are preempted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986). The en banc Ninth Circuit engaged in semantic wordplay by construing NLRA § 8(c), 29 U.S.C. § 158(c), as providing employers with no affirmative right of free speech. Such a reading baldy ignores the fact that even without § 8(c), all parties under the NLRA–unions, employers and employees–have inherent free speech rights, and that without such free speech rights the Act could not function as intended and would likely be unconstitutional under the First Amendment. *Gissel Packing Co.*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established

and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment . . ." by protecting the employer's right to engage in non-coercive speech).

Therefore, the *Amici* adopt the Petitioners' well-crafted arguments concerning the preemption issues, and will not repeat them here. Instead, *Amici* will focus on the deleterious impact that statutes like AB 1889 have on employees' § 7 right to freely choose or reject labor unions. The evil of these statutes is not just that they silence one party in order to keep employees in the dark about critical unionization issues, but also that they usher in the use of other "top down" organizing tactics which further tilt the playing field in favor of union organizing. Instead of allowing free and informed employee choice to reign, AB 1889 undermines that choice by exerting pressure on employees to accept unionization. The en banc Ninth Circuit neither recognized nor protected the core policy of the NLRA–allowing employees to hear all sides of the debate about unionization and then freely to choose their desired course–so its decision must be reviewed by this Court and reversed.

II. Employee Rights Suffer When State and Local Governments Mandate "Neutrality" in Order to Tilt the Playing Field in Favor of Unionization.

As the Petitioners properly point out, a major vice of AB 1889 is not just that it enforces employer silence, but that it induces employers to capitulate to union demands for so-called "voluntary recognition agreements" or "neutrality and card check" agreements. (Pet. 27); *see also Lockyer*, 463 F.3d at 1102 (Beezer, J., dissenting) (Pet. App. 44a) (AB 1889 is "[s]imilar to neutrality agreements"). Because statutes like AB 1889 inexorably lead to union demands for broader "neutrality

and card check" agreements, the Court needs to understand how these agreements actually work and how they further diminish or destroy entirely employees' § 7 right to freely choose or reject unionization.

Armed with the powers and leverage AB 1889 provides, unions demand "neutrality and card check" agreements from employers because unions face a steady decline in the number of employees who voluntarily choose union representation when given a free choice in a secret-ballot election. Financial self-interest has driven unions to search for new ways of acquiring dues paying members.[3] The AFL-CIO's General Counsel has recommended that unions "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, at 176.

However, employees have fewer legal protections "outside the traditional representation processes," and thus little possibility of protecting their right under § 7 to resist union organizing campaigns targeting them. *See, e.g., Dana Corp.*, 341 N.L.R.B. 1283 (2004); NLRB General Counsel Arthur

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[3]The facts are well known: most unions are desperate for new dues paying members. In 2006, 12.0% of wage and salary workers were union members, down from 12.5% in 2005, according to the U.S. Department of Labor, Jan. 25, 2007, http://www.bls.gov/news.release/union2.nr0.htm. The number of persons belonging to a union fell by 326,000 in 2006, to a total of 15.4 million. The union membership rate has steadily declined from a high of 20.1% in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982, the United Auto Workers claimed 1.14 million members, but by 2002 only 700,000. As of today, only 7.4% of the private-sector workforce is unionized, and the other 92.6% does not appear to be flocking to join.

Rosenfeld's Report on Recent Case Developments, No. R-2544, Nov. 17, 2004, http://www.nlrb.gov/ nlrb/press/ releases/r2544.pdf. Indeed, the NLRB's most recent statistics show a steep decline in regional offices' intake of representation cases, dropping 25.6% from fiscal year 2005 to 2006, as unions retreat from the "gold standard" –the NLRB secret-ballot election–and rely overwhelmingly on "top down" organizing to secure new recruits. *Effects of NLRB's Landmark Ruling on Supervisory Status Should Become Clearer*, Daily Lab. Rep., Jan. 17, 2007, at S-9.

With the assistance of some state and local governments, unions demand "neutrality and card check" agreements not because they enhance employees' rights under § 7, but because such agreements limit those rights and hinder employees who wish to refrain from unionization. This is demonstrated by these common "neutrality" provisions:

1) Gag Rule: Although most neutrality agreements purport to require the employer to remain "neutral," in reality they impose a complete gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employers must refuse to provide even truthful information in response to direct employee questions about the particular union and its motives and history. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

In contrast, employees seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else by order of the State of California." Employer silence demanded by a union and

enforced by a state government does not enhance the employee's ability to make a free and informed decision under § 7. Instead, by purposefully keeping employees in the dark and silencing one side of the debate, these gag rules prevent the free flow of ideas that are critical to informed decision-making and employee free choice.

2) Special Union Access: Many "neutrality agreements" require that employers provide the union with employees' personal information, such as home addresses and phone numbers, and physical access to the employers' premises. Employees are rarely asked to consent to the release of their personal information.[4]

Armed with broad access to employees in both their homes and workplaces, unions subject employees to relentless group pressure to sign authorization cards. In one recent case, *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), employee Faith Jetter attested to this coercion in a sworn Declaration that was filed with the Third Circuit in support of a Motion to Intervene.

> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an

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[4] *See* Glenn Taubman, *"Neutrality Agreements" and the Destruction of Employees' Section 7 Rights*, 6 Engage: Federalist Soc'y J. 101 (2005).

> invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

Sadly, these sorts of pressure tactics are the stock-in-trade of union organizers intent on procuring signatures on "authorization cards" from fearful or unsuspecting employees. In another recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a "card check" drive by the United Auto Workers ("UAW") attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, *Dana Corp.*, 341 N.L.R.B. 1283 (2004).

Given such testimony, it is not surprising that this Court has recognized and condemned the abuses that often occur in the collection of union authorization cards. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974). Nevertheless, the underlying purpose of state neutrality statutes like AB 1889 is to give unions leverage to demand broad access to all employees in order to perpetrate these abuses.

3) Waiver of Secret-Ballot Election: Perhaps most egregious, many "neutrality" agreements waive NLRB-supervised secret-ballot elections and substitute the "card check" process, in which a signed authorization card counts as a "vote" for the union. Thus, the union acts to prevent the employees from voting their consciences in private, even though experience shows that the process of soliciting union authorization cards often relies upon coercion and misrepresentations. *See, e.g., HCF Inc.*, 321 N.L.R.B. 1320, 1320 (1996) (pro-union militant warned an employee that if she did not sign an authorization card "the Union would come and get her children"); *Levi Strauss & Co.*, 172 N.L.R.B. 732 (1968) (misrepresentations can invalidate authorization cards).

Clearly, labor union officials and their political allies do not advocate the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can avoid secret-ballot elections and bring to bear enormous pressure on vulnerable employees to sign the cards. Indeed, an employee's choice against signing a union card often does not end the decision-making process for that employee caught in the maw of a "card check" campaign, but instead represents only the beginning of harassment and intimidation. This Court has already recognized this danger.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

Gissel Packing Co., 395 U.S. at 604; see also *Linden Lumber Div.*, 419 U.S. at 306 (there exists "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *Brooks v. NLRB*, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). Illicit pressures are magnified when employees are subjected to a "neutrality and card check" agreement that they neither sought nor approved.

In sharp contrast to the abuses inherent in any "card check" campaign, each employee participating in a NLRB-supervised secret-ballot election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end. This fair process is what AB 1889 undermines.

In short, AB 1889 is designed to usher in just these sorts of abuses, under the rubric of "neutrality and card check," to radically tilt the playing field in favor of unionization and hinder employees' free choice.

III. The Proliferation of State "Neutrality" Regulations Destroys the Uniform Application of Federal Labor Policy.

This Court's review of AB 1889 must take into account the factual and legal landscape that exists in California and elsewhere in this country, in which labor unions and their political allies seek to create 50 different state labor laws in order to circumvent various federal rights, protections and strictures of which they disapprove. As one Ninth Circuit panel

recognized in an earlier opinion in this case, laws like AB 1889 are "'part of a state-by-state effort to de facto rewrite the NLRA.'" *Lockyer*, 422 F.3d at 978 n.4. (Pet. App. 64a).

This is demonstrated by the wide variety of "neutrality" regulations that are cropping up in states and municipalities across the nation. *See, e.g., Healthcare Ass'n v. Pataki*, 471 F.3d 87 (2d Cir. 2006); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001).

Petitioners correctly point out the circuit splits and doctrinal chaos that have arisen concerning state statutes like AB 1889, which carry a veneer of "neutrality" but instead are designed to radically tilt the playing field in favor of unionization. *Compare Lockyer* (en banc) (Pet. App. 1a-57a) with *Healthcare Ass'n*, *Metro. Milwaukee Ass'n of Commerce*, and *Aeroground, Inc.*

Therefore, this Court's review is needed to ensure that state and local governments do not interfere with the uniform federal labor system crafted by Congress, and, more importantly, with employees' paramount right to choose or reject unionization in a free, informed and educated manner. To allow statutes like AB 1889 to proliferate is to permit the balkanization of federal labor policy by 50 states and hundreds of municipalities. *See Retail Indus. Leaders Ass'n v. Fielder*, ___ F.3d ___, 2007 WL 155152, at *12 (4th Cir. Jan. 17, 2007) ("This is precisely the regulatory balkanization that Congress sought to avoid . . . .").

CONCLUSION

Federal labor policy favors robust free speech and debate about unions and unionization, and abhors "gag orders" and other limits on free speech and the free exchange of ideas. The State of California has no valid interests that trump this core federal labor policy, and its parochial attempt at labor law regulation, AB 1889, must be deemed preempted. The Petition for Writ of Certiorari should be granted, and this case set for plenary consideration.

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