

**NEW ASSAULTS ON EMPLOYEE FREE CHOICE:
EMPLOYER NEUTRALITY AND VOLUNTARY RECOGNITION
AGREEMENTS IN THE BOARD AND THE COURTS**

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INTRODUCTION

On March 1, 2007, the U.S. House of Representatives approved the Employee Free Choice Act (H.R. 800). The bill, which is backed by House and Senate majorities, would establish stronger penalties for violations of employee rights when workers seek to form unions and negotiate first contracts. The EFCA also would require mediation and arbitration for first-contract disputes. Significantly, the bill would require employers to recognize unions based on cards signed by a majority of employees authorizing union representation.

The EFCA was prompted by concerns that employer intimidation and delaying tactics have undermined employees' rights to unionize. The NLRB has proved powerless to protect employees from employer retaliation when they organize. Board law also permits smart employers to delay, and even avoid, meaningful bargaining with unions chosen by their employees.

Ignoring the Congressional effort toward encouraging voluntary recognition, the Bush-dominated NLRB is poised to reverse the decades-old acceptance of voluntary agreements that require employer neutrality in organizing campaigns and card checks in lieu of the NLRB's cumbersome election procedures.

While Congress debates the EFCA and the NLRB reconsiders voluntary recognition, states and localities have enacted legislation designed to ensure neutrality by employers that contract with the government. Laws in California, New York and elsewhere forbid employers from using taxpayer dollars to fight or otherwise influence their employees' choice to unionize.

This paper reviews pending and recently-decided cases involving employee free choice. The first four sections focus on the NLRB's imminent assault on voluntary recognition. Part I discusses *Dana Corp./Metaldyne Corp.*, 341 NLRB No. 150 (2004) ("*Dana I*"). In granting review, the Board signaled its intention to overturn or modify the time-honored recognition bar doctrine, which prohibits decertification petitions for a "reasonable time" after voluntarily recognition has been granted based on a card-based

majority. See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). The order granting review is available at http://www.nlr.gov/nlr/shared_files/decisions/341/341-150.pdf.

Part II discusses the NLRB General Counsel's effort to resuscitate the long dormant *Majestic Weaving* doctrine. *Majestic Weaving Co.*, 147 NLRB 859 (1964), *enf. denied*, 355 F.2d 854 (2d Cir. 1966). Under that doctrine, it is an unfair labor practice for bargaining parties to agree to contract terms before the union represents a majority of the bargaining unit employees. The Board is now reviewing the General Counsel's unsuccessful attempt to invalidate a voluntary recognition/neutrality agreement in *Dana Corp.*, 2005 NLRB LEXIS 174, 2005 WL 857114 (NLRB Div. Judges, April 11, 2005) ("*Dana II*"). The ALJ's opinion can be found at www.nlr.gov/nlr/shared_files/decisions/ALJ/JD-24-05.pdf. Until the Board rules, the ALJ opinion gives employers and unions some guidance in crafting agreements that may survive unfair labor practice charges.

Part III looks at the General Counsel's challenge to the *Kroger* (aka *Houston Kroger*) principle, which holds that it is an unfair labor practice for an employer to repudiate an agreement to extend an existing contract to new facilities or other facilities so long as the contract is not applied until the union represents a majority of the new facility's employees. *Houston Div. of Kroger Co.*, 219 NLRB 388 (1975). Last year, the Board granted review of a decision dismissing an employer's petition for a representation election in a unit covered by a typical additional stores clause. Order granting review in *Rite Aid of West Virginia, Inc. and Retail Wholesale and Department Store Union, UFCW*, case 9-RM-1052 (July 14, 2006). The Regional Director's order dismissing the RM petition is available at http://www.nlr.gov/shared_files/Regional%20Director%20Decisions/2006/9-RM-1052%286-6-06%29.pdf.

Part IV focuses on an employer challenge to a California law requiring recipients of government funds to remain neutral in response to organizing campaigns. The statute, commonly known as the "Cedillo Bill," prohibits specified public employers, state grant recipients and state contractors from using state funds to assist or deter their employees' unionization efforts. In an *en banc* decision, Ninth Circuit rejected employer challenges that the statute was preempted by the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 141 *et seq.* *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (2006). The *en banc* decision vacated a panel decision, at 437 F.3d 890 (9th Cir. 2005), which in turn vacated an earlier decision of the same panel, at 422 F.3d 973 (9th Cir. 2005). The two panel decisions concluded that the law could not survive *Machinists* and *Garmon* preemption analysis and that the Supreme Court's "market participant" exception to preemption was inapplicable.

I. DANA I

A. VOLUNTARY RECOGNITION/NEUTRALITY AGREEMENTS

Voluntary recognition/neutrality agreements ordinarily require an employer to remain neutral during an organizing campaign and to recognize the union based on its assertion of majority support. The goal is to supplant NLR election procedures and related unfair labor practice litigation.

Voluntary recognition/neutrality agreements are most commonly entered into by employers that already have a collective bargaining relationship with the union or that, for economic, political or ideological reasons, do not want to overtly oppose unionization.

Employers of this kind are a distinct minority. Why, then, does organized labor view voluntary recognition/neutrality agreements as so important to a revitalization of the union movement? The answer is in the numbers. According to the AFL-CIO, unions currently organize 150,000 to 200,000 workers annually through voluntary recognition agreements, compared to only 70,000 workers a year in NLRB-conducted elections. Aaron Bernstein, "Can this Man Save Labor?," *Business Week*, September 13, 2004, at 80, *quoted in* Anton J. Hajjar & Daniel B. Smith, "National Labor Relations Board Interference With Voluntary Recognition Agreements – Is Repeal of the National Labor Relations Act the Answer?," presented at the ABA Section of Labor & Employment Law, Committee on Practice and Procedure Under the National Labor Relations Act, Midwinter Meeting (2006).

According to another study, unions can expect to win recognition almost 90% of the time where a voluntary recognition/neutrality agreement is in place. In contrast, unions win roughly half of all representation elections. A. Eaton & J. Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," 55 *Ind. & Lab. Rel. Rev.* 42 (2001).

Comprehensive voluntary recognition/neutrality agreements may contain some or all of the following features:

- An agreement to recognize the union if a majority of employees in the proposed unit submits authorization cards to the employer or a neutral umpire.
- A definition of the appropriate unit and identification of supervisors and other excluded employees.

- Limitations on employer communications to employees about the merits of unionization.
- Union access to the facility and to employees in the proposed unit.
- Union access to employee names, addresses and telephone numbers.
- An agreement to submit disputed issues (e.g., inclusion of particular employees in the proposed unit, violations of the employer's pledge of neutrality, and unfair labor practices) to arbitration rather than the Board.
- A timetable for beginning contract negotiations once recognition is granted and, if no agreement is reached, to submit unresolved issues to binding interest arbitration.
- Alternatively, an agreement to extend the terms of another collective bargaining agreement to the proposed unit.

Unlike card check agreements, there is little case law on voluntary recognition/neutrality agreements. But together with card check agreements, voluntary recognition/neutrality agreements have become a preferred target of anti-union groups like the National Right to Work Foundation.

B. THE RECOGNITION BAR DOCTRINE

The National Labor Relations Act has never required employees to select a bargaining representative through a Board-conducted election:

Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation.

NLRB v. Gissel Packing Co., 395 U.S. 575, 597 (1969); *see also MGM Grand Hotel*, 329 NLRB 464, 466 (1999) (“It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations”).

For more than 40 years, the NLRB has ruled that an employer's recognition of a union based upon a showing that the union represented a majority of employees will bar a petition for an NLRB-supervised election a reasonable period of time. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). A "reasonable period of time" is the period necessary, under the circumstances of the case, to conclude a collective bargaining agreement. *MGM Grand Hotel*, at 466. The recognition bar rule promotes stability in collective bargaining by giving a newly-recognized union an opportunity to conclude and administer a contract without "worrying that, unless it obtains immediate results, it will lose majority support and be decertified," and by removing from the employer's "temptation to delay bargaining in the hope that such a delay will undermine the majority support of the union." *Id*; see also *Baseball Club of Seattle, LP, d/b/a Seattle Mariners*, 335 NLRB 563, 564-65 (2001) ("Under the Board's election bar doctrine, voluntary recognition will bar a decertification election even if a decertification petition is supported with a showing of disinterest gathered prior to the grant of recognition").¹

In accepting review of the *Dana Corp.* and *Metaldyne Corp.* decisions, the NLRB appears poised to abandon or circumscribe the recognition bar principle. Both companies negotiated voluntary recognition agreements with the UAW containing neutrality and card check provisions. After card checks by neutrals established that the UAW had won majority support in Dana and Metaldyne facilities, the employers recognized the UAW as the bargaining representative in those facilities.

With help from the National Right to Work Foundation and anti-union groups, Dana and Metaldyne employees filed decertification petitions within three and four weeks, respectively, of recognition. More than 50% of the Metaldyne employees and more than 30% of the Dana employees signed the petitions. The Regional Director dismissed the decertification petitions, relying on the voluntary recognition bar doctrine. The National Right to Work Foundation successfully petitioned for review.

The order granting review explicitly calls for reexamination of the voluntary recognition bar doctrine:

¹ As the Supreme Court recognized long ago, "A bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. . . ." *Franks Brothers Co. v. NLRB*, 321 US 702, 705-6 (1944); see also *Brooks v. NLRB*, 348 US 96, 100 (1954) ("a union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out").

[W]e believe that changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine. As our colleagues acknowledge, the change here is that the use of voluntary recognition has grown in recent years. Although no party here challenges the legality of voluntary recognition, the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation. In such an election, employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast, a card-signing guarantees none of these protections. The issue raised herein is the extent to which, if any, a voluntary recognition should be given election “bar quality.” The issue is significant because “bar quality” means that, for some period, the employees will not be able to exercise their Section 7 right to reject the union and/or choose a different one.

The dissent argues that voluntary recognition is fundamental to national labor policy and critical to the Act’s purposes. By fostering bargaining relationships, voluntary recognition effectuates the NLRA’s fundamental goal of maintaining industrial peace and stability.

Former General Counsel Arthur Rosenfeld’s brief on review proposed a “compromise rule:”

[T]he Board should create a limited exception to the voluntary recognition bar where a decertification petition is filed no later than 30 days after formal written notice to employees of the recognition, where that petition is supported by a document expressing opposition to union representation signed by at least 50 percent of the unit employees no later than 21 days after formal written notice of the recognition.

Available at <http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/NLRBGC.pdf>. Note that the usual showing of interest would be raised from 30% to 50% since a majority of employees would have indicated support for the union before voluntary recognition was accorded.

On July 29, 2004, the Board issued Memorandum OM 04-76 explaining how regional offices should handle card check and neutrality agreements pending the *Dana* and *Metaldyne* decisions. The Memorandum, which can be found at <http://www.nlr.gov/nlr/>

shared_files/ommemo/ommemo/om04-76.pdf, identifies three types of card-check and neutrality cases that must be submitted to Advice.

First are cases involving the voluntary recognition bar. Regions must submit any unfair labor practice charges involving a card check and neutrality, and should consult with the Executive Secretary concerning any related representation cases. Regions must also submit any charges alleging that a neutrality agreement constitutes unlawful assistance to the union (*citing Majestic Weaving*, 147 NLRB 859 (1964) (see Part II of this paper). Finally, Regions must submit any charges claiming that voluntary recognition agreements are unlawful secondary agreements under Section 8(e) (*citing Carpenters District Council of Northeast Ohio (Allesio Construction)*, 310 NLRB 1023 (1993)).

The more than 25 party and amicus briefs in *Dana/Metaldyne*, including the opening and reply briefs of the UAW and amicus curiae AFL-CIO, are available at <http://www.nlr.gov/nlr/about/foia/FrequentlyRequestedDocuments.asp>.

After almost three years before the Board, no decision has issued.

II. *DANA II*

A. THE MAJESTIC WEAVING DOCTRINE

It has long been unlawful for an employer to grant exclusive bargaining status to a union that does not represent a majority of its employees. *International Ladies Garment Workers v. NLRB (Bernhard-Altman Tex. Corp.)*, 366 U.S. 731 (1961). Premajority bargaining (i.e., bargaining for future contract terms before recognition based on majority support has been granted) is further circumscribed by what has recently been enshrined as the “*Majestic Weaving doctrine*.”² *Majestic Weaving Co.*, 147 NLRB 859 (1964), *enf. denied*, 355 F.2d 854 (2d Cir. 1966).

² Until recently, the *Majestic Weaving* decision was little known by practitioners and rarely cited in Board decisions. As Andrew Strom points out in his excellent paper, “Premajority Bargaining: A Review of the Case Law and Prospects for the Future,” presented at the 2005 LCC Conference, *Majestic Weaving* was cited 13 times in the 41 years before the *Dana Corp.* decision. Of that number, only two cases cited it for the proposition that it is unlawful for a union and employer to negotiate contract terms before the union has obtained majority status.

Majestic Weaving began hiring at its new Cornwall, New York plant in February 1963. By February 14, six of the 14 employees had signed authorization cards in favor of Teamsters Local 815. Majestic Weaving began negotiating a new contract with Local 815 that same month, before the union represented a majority of its employees. Majestic Weaving and the union reached agreement on the terms of a contract and agreed to sign it once the union achieved majority support.

By the end of April, the union had secured signed authorization cards from 26 of the 37 employees in the agreed-upon unit. Majestic Weaving thereupon simultaneously recognized the union and executed the new contract, effective February 14 – a date when only six of the 14 employees had signed cards.

A few weeks later, the Textile Workers Union began organizing the plant's employees. In just one week, TWU obtained authorization cards from 34 of the 45 employees. TWU then filed Section 8(a)(2) charges against Majestic Weaving based primarily on the claim that a supervisor had unlawfully assisted Local 815 in obtaining signed authorization cards.

The Board's complaint against Majestic Weaving was premised entirely on the supervisor's alleged unlawful assistance, not on a theory that the contract was premature. The limited scope of the complaint was based on well-established Board precedent. For more than a decade, the Board had held that it is not a violation of Section 8(a)(2) for an employer to negotiate contract terms at a time when the union did not yet represent a majority of the employees, provided the union achieves majority support by the time contract is signed. *Julius Resnick*, 80 NLRB 38 (1949).

Reversing the Trial Examiner, the Board concluded that Majestic Weaving had unlawfully recognized Local 815 at a time when it did not represent a majority of unit employees. 147 NLRB at 860. The Board did not describe the facts on which it based this result.

The Second Circuit denied enforcement on the grounds that the General Counsel's complaint, which alleged only supervisor taint, did not give Majestic Weaving notice that its recognition was premature. 355 F.2d 854, 861 (2d Cir. 1966). The court's decision, however, endorsed the Board's alternative holding that Majestic Weaving's "premature negotiation" (i.e., concluding a contract with Local 815 at a time when it did not represent a majority of Majestic Weaving's employees) was unlawful. The court did not actually rule on this point (saying only that the Board's alternative ruling "could be a good rule") because the allegation was not contained in the General Counsel's complaint.

Years later, this inconclusive decision was inflated and enshrined as the “*Majestic Weaving* doctrine.” As reconstituted in Reagan-era Board decisions, the doctrine makes it illegal for a union and employer to agree to specific terms or conditions of employment that will be set in place once a majority of employees have chosen to be represented (as verified by a card check or an NLRB-conducted election). *American Bakeries Co.*, 280 NLRB 1373, 1374 n.5 (1986) (“The Board has even held that bargaining prior to the achievement of the union’s majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union’s ability to demonstrate majority standing at some later time”); *accord SMI of Worcester, Inc.*, 271 NLRB 1508 (1984).

B. DANA CORPORATION

Recently, the General Counsel has sought to embed and extend the *Majestic Weaving* doctrine, calling for the Division of Advice to review charges addressing:

The effect of dealings between the employer and union on a subsequent majority showing. Included here would be the *Majestic Weaving*-type cases in which Advice has authorized complaint, including one in which, *irrespective of an after-acquired clause issue*³ the evidence established that the employer and union bargained about the terms and conditions of employment of employees before the union had demonstrated majority support. [Emphasis added].

“General Counsel Responses to Questions Propounded by the Practice and Procedure Committee (P&P Committee) of the Labor and Employment Relations Section of the American Bar Association,” Memorandum GC 05-02 (April 11, 2005) (emphasis added); see “Casehandling Instructions Regarding Cases Involving Card Check and Neutrality Agreements,” Memorandum OM 04-76 (July 29, 2004).

Fortunately, the General Counsel lost the first such case, at least before an Administrative Law Judge. *Dana Corp.*, 2005 NLRB LEXIS 174, 2005 WL 857115 (NLRB Div. Judges, April 11, 2005). Briefly summarized, the facts in the case were as follows:

³ The Board’s simultaneous assault on “after-acquired facilities clauses” is discussed in Part III below.

1. The Letter of Agreement. Dana and the UAW were parties to seven collective bargaining agreements covering nine units. Dana and the UAW entered into a letter of agreement establishing procedures for future UAW attempts to organize Dana's non-union plants. The agreement obligated Dana to remain neutral during the organizing efforts, to give the UAW employee names and addresses, and to grant the UAW access to Dana's nonunion facilities.

Dana and the UAW also agreed that certain topics would be addressed in any collective bargaining agreement to be negotiated if the UAW demonstrated its majority status in a particular facility. For example, the letter of agreement provided:

The Union and the Company recognize that the cost of quality healthcare for employees has become a national crisis that jeopardizes the Company's ability to compete in the global markets that Dana serves. Until a national solution to this problem is achieved, the Union and the Company agree that the current situation demands affirmative actions to mitigate the dire affects that the cost of health-care for the Company's employees and the Union's members has on the Company's ability to compete and make a reasonable return on its investment. Therefore the Union commits that in no event will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operation which include premium sharing, deductibles, and out of pocket maximums. The parties are further committed to finding workable solutions to reduce these ever-increasing healthcare costs and mutually agree to further explore other avenues, including legislative initiatives, in the healthcare care arena that could lead to a reduction of these costs for the Company and its employees.

According to the ALJ decision, the letter of agreement provided that Dana would not grant recognition to the UAW in the absence of proof of majority support as demonstrated through a card check procedure. It also provided that any collective bargaining agreement would last for at least four years. The letter of agreement established procedures to be followed if the parties were unable to negotiate a contract, culminating in interest arbitration.

The union did not, however, ask for or receive recognition at the new facility. This last fact proved critical to the ALJ.

2. The Parties' Contentions and the ALJ's Decision. The General Counsel and the Charging Parties (represented by the National Right to Work Foundation) argued that the letter of agreement constituted unlawful pre-recognition bargaining. In support of this claim, they argued for an expansive interpretation of *Majestic Weaving*, contending that even though Dana had not formally recognized the UAW at any facility pursuant to the letter of agreement, the *execution* of the letter of agreement constituted implicit recognition of the UAW as the employees' exclusive bargaining representative.

Dana and the UAW argued that their conduct was lawful under the *Kroger* rule (discussed in Part III below), under which after-acquired facilities clauses are enforceable when the union obtains majority support in a new unit. They noted that their letter of agreement did less than what was permissible under *Kroger* – instead of providing for automatic application of the contract at newly-organized facilities, Dana and the UAW merely agreed to general principles to be addressed in negotiations for a new contract if and when the UAW attained majority status at a new facility. The letter of agreement addressed guiding principles rather than establishing binding contract terms.

The ALJ found in Dana's and the UAW's favor. First and foremost, the ALJ ruled that the letter of agreement did not constitute a violation of the *Majestic Weaving* doctrine because Dana never recognized the UAW as the employees' bargaining representative:

Thus the question becomes whether Dana granted recognition to the UAW by entering into the letter of agreement notwithstanding the disclaimers to the contrary. The letter of agreement does indeed touch upon terms and conditions of employment. In some ways the letter of agreement is quite specific. For example, as set forth above in more detail, the letter of agreement commits the parties to negotiate a 4-year collective bargaining agreement and to use interest arbitration to reach a contract if they are unable to do so. . . . But other typical and essential elements of recognition are entirely absent from the letter of agreement and the facts of this case. There is no evidence that Dana deals with the UAW concerning employee grievances. Importantly, Dana remains free to make changes in terms and conditions of employees without first notifying and on request bargaining with the UAW. This is utterly at odds with the notion that Dana has recognized the UAW. There is no concept of partial recognition in labor law; there is either recognition or there is not. Nor can it be said that the letter of agreement constitutes a collective bargaining agreement from which recognition can be inferred. The

letter of agreement does not deal with significant matters such as wages, pensions, grievances and arbitration, vacations, union security, etc. Moreover, in the complaint the General Counsel describes the letter of agreement as setting forth terms and conditions “to be negotiated in a collective bargaining agreement. . . .”

As an alternative ground for his decision, the ALJ held (as argued by the UAW) that the letter of agreement was lawful under the *Kroger* rule, noting that what Dana and the UAW had signed was less than what *Kroger* permitted. Instead of a contract provision providing for automatic application of the existing contract at a new facility, the letter of agreement merely set forth general principles to be addressed in future negotiations if the UAW should obtain majority status at a new facility.

C. BOARD REVIEW

The General Counsel filed exceptions to the ALJ’s decision, and the UAW and the AFL-CIO, as amicus, filed a joint brief in opposition. The order granting review is available at http://www.nlr.gov/nlr/shared_files/decisions/341/341-150.pdf.

The Board’s decision in *Dana Corp.* is expected to issue soon

III. RITE AID OF WEST VIRGINIA

A. THE KROGER DOCTRINE

The Board has created a significant counterbalance to the *Majestic Weaving* doctrine – the *Kroger* (or *Houston Kroger*) rule. In *Houston Div. of Kroger Co.*, 219 NLRB 388 (1975), the Board held that recognition clauses in Kroger’s agreements with the Retail Clerks and Meatcutters unions were enforceable provided the unions’ demands for recognition were based on majority support. Under *Kroger*, it is not unlawful for an employer and union to negotiate an agreement requiring the employer to extend an existing contract to new stores or other facilities so long as the contract is not applied until the union represents a majority of the new facility’s employees.

Kroger arose when Kroger transferred a group of stores from its non-union Dallas division to its unionized Houston division. Both unions offered to submit proof of card-based

majorities, but Kroger refused to grant recognition or apply the contracts at the transferred stores. The unions charged that Kroger's refusal to honor the contracts' recognition clauses violated Section 8(a)(5) of the Act.

The Board found that the recognition clauses amounted to a waiver of Kroger's right to insist upon a Board election before recognizing the unions or applying the contracts. *Id.* at 389. While the recognition clauses contained no express requirement that the unions acquire majority support before seeking recognition, the Board read that requirement into the clauses as a matter of law, in order to preserve their validity. *Id.* Since an employer can lawfully agree to recognize a union based on a card check, there is no reason why an employer cannot enter into contracts requiring recognition in new stores based on future card-based majorities. *Id.* The Board therefore concluded that Kroger violated Section 8(a)(5) of the Act by refusing to honor the recognition clauses.

B. RITE AID OF WEST VIRGINIA

On July 14, 2006, the Board accepted review of the Regional Director's decision in *Rite Aid of West Virginia* dismissing an employer election petition pursuant to the *Kroger* doctrine.

According to the decision of the Regional Director's (which can be obtained at http://www.nlr.gov/shared_files/Regional%20Director%20Decisions/2006/9-RM-1052%286-6-06%29.pdf), the labor contracts between Rite Aid and the Retail, Wholesale and Department Store Union had for decades provided that Rite Aid would recognize the RWDSU as the bargaining representative for employees in a new store, provided that the RWDSU furnished evidence that a majority of the employees in the store desired union representation.

In negotiations for the 2004 collective bargaining agreement, Rite Aid sought, unsuccessfully, to delete the after-acquired stores clause. In 2005 and 2006, Rite Aid nonetheless refused to recognize the RWDSU at two new stores despite proof that the union represented majorities. In response, the RWDSU filed a grievance asserting that the employer had violated the contract's recognition clause. While the grievance was pending, Rite Aid filed RM-petitions seeking representation elections at each store.

The Regional Director dismissed the petitions:

[A]n employer waives its right to a Board election by agreeing to an additional stores clause providing for voluntary recognition so long as majority support is demonstrated in some reasonable form. [Citation omitted]. If a valid contractual waiver exists in the subject case, there is no basis, under existing Board law, to process the current petition and it must be dismissed. . . . Finally, under current Board law, an issue of contract interpretation arising from the assertion of an after-acquired clause is a matter that is properly resolvable through the grievance-arbitration procedure. [Citation omitted]. Thus, in the context of an after-acquired clause, where both the unit is set forth and the contract is deemed to apply to the newly included employees, an arbitrator is appropriately able to determine if an employer has breached its agreement by refusing to apply the clauses in question, including the issue of the validity of the cards.

Decision and Order, *supra*, at 8.

C. BOARD REVIEW

Last year, signaling a new determination to overturn *Kroger*, a 3-2 Board majority granted Rite Aid's request for review of the Regional Director's decision.

A decision invalidating after-acquired facilities clauses will face formidable legal obstacles. The Supreme Court has repeatedly ruled that an employer may lawfully recognize a union without an election if a majority of employees in the unit have demonstrated their approval of the bargaining representative. *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 71-72 n.8 (1956), *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 739 (1961), *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-97 (1969).

Kroger has been the law for 32 years, without challenge by the Board or the appellate courts. A change in the law would allow employers to unilaterally renege on contractual procedures that have been in place for decades, thereby destabilizing existing and future contract relationships. In addition, it would leave the protection of employee free choice in the hands of their employer, which could renounce its contracts and demand elections at will.

IV. CHAMBER OF COMMERCE V. LOCKYER

A. THE CEDILLO BILL

On September 21, 2006, the Ninth Circuit ruled *en banc* that California's "Cedillo Bill"⁴ is not preempted by the NLRA. *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (2006). In so ruling, the *en banc* court overturned a Ninth Circuit panel that had twice ruled the law preempted. *Chamber of Commerce of the United States v. Lockyer*, 422 F.3d 973 (9th Cir 2005), *vacated by* 437 F.3d 890 (9th Cir. 2005).

The Cedillo Bill (which was chaptered and enrolled in 2000 as California Assembly Bill ("AB") 1889) prohibits specified public employers, state grant recipients and state contractors from using state funds to assist or deter their employees from forming a union. The law broadly proclaims as its purpose that "the state should not subsidize efforts by an employer to assist, promote, or deter union organizing." The statute prohibits "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." Cal. Gov't. Code § 16646(b). In contrast, the law allows state funds to be used for processing grievances, negotiating or administering bargaining contracts, "[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." Cal. Gov't. Code § 16647.

The Cedillo Bill also requires covered employers to certify that no state funds will be used in violation of the statute and to maintain detailed records to show that the funds have not been used for improper purposes. Cal. Gov't. Code § 16645.2(c). The law creates a presumption that if state and nonstate funds are commingled, the state funds were used for improper purposes. Cal. Gov't. Code § 16646(b). Violators are subject to fines and, in some instances, treble damages, and may be sued by the state attorney general or any private taxpayer. Cal. Gov't. Code §§ 16645.2(d), § 16645.8. A public official who authorizes improper expenditures is also liable for up to the amount of the state funds. Cal. Gov't. Code § 16645.6(b).

⁴ The bill had been introduced by California Assemblyman Gilbert Cedillo.

B. THE PANEL DECISIONS

The law was challenged by the Chamber of Commerce and other anti-union employer groups. California Attorney General Bill Lockyer, the California Labor Federation, the AFL-CIO, and other labor groups defended the statute. The NLRB General Counsel, authorized by a 3-2 Board vote, filed an amicus brief with the Ninth Circuit arguing that the California law is preempted by the NLRA.

The first decision of the Ninth Circuit panel affirmed summary judgment in favor of the Chamber. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004). The panel thereafter granted rehearing and withdrew its opinion. 408 F.3d 590 (9th Cir. 2005).

In its second published opinion, the panel affirmed its earlier decision to uphold summary judgment for plaintiffs, ruling that AB 1889 is defective under the *Machinists* and *Garmon* preemption doctrines and that the market participant exception to preemption is inapplicable. *Chamber of Commerce of the United States v. Lockyer*, 422 F.3d 973 (9th Cir. 2005), *vacated* 437 F.3d 890 (9th Cir. 2005). According to the panel majority, the Cedillo Bill “chills employers from exercising their free speech rights that are explicitly protected by Congress under [Section 8(c) of the NLRA],” undermines “the delicate balance established by Congress as between labor unions and employers,” and “interferes with the [NLRA’s] extension of exclusive jurisdiction to the National Labor Relations Board for the adoption and enforcement of representation election rules.” *Lockyer*, 422 F.3d at 976.⁵

⁵ The second decision also rejects three non-preemption based defenses. First, the court ruled that the Cedillo bill is not protected by the rule that a facial, rather than an “as applied,” challenge to a statute fails unless the plaintiffs can “establish that no set of circumstances exists under which the Act would be valid,” *quoting United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). *Lockyer*, 422 F.3d at 993. The opinion finds instead that:

The all-or-nothing stakes of NLRA preemption renders [*sic*] the inquiry under *Salerno* moot, because once preemption is called for, the categorical nature of this conclusion automatically commands that “no set of circumstances exists under which the [statute] would be valid.” *Salerno*, 481 U.S. at 745.

Second, the court declined to apply First Amendment analysis to preemption under *Rust v. Sullivan*, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991), which held that

In dissent, Judge Raymond Fisher (who authored the first opinion, as well as the *en banc* decision) said the decision “gives short shrift to California’s sovereignty interests through an overbroad application of federal labor preemption doctrine.” The majority’s “critical error is in failing to recognize our responsibility to honor” two competing interests – “the ability of states to control the use of their own funds, and the federal government’s national labor policy.” Judge Fisher asked:

if a state allows employers to spend their own funds, in whatever manner they please, to advocate for or against unionization, does national labor preemption doctrine require the full preemption of a restriction on the use by employers of state funds alone for such purposes?

Judge Fisher’s answer was “I think not.” *Id.* 422 F.3d at 995.

Judge Fisher agreed with the majority, however, that “[s]ome of the statute’s enforcement provisions appear to have an impermissibly intrusive effect on the NLRA’s balance of private actions between employer and employee, by exposing employers to the risk of significant litigation costs and punitive sanctions if they support or oppose unionization, even without using state funds.” *Id.* 422 F.3d at 1004.

As noted above, the same three-judge panel ruled 3-0 in April 2004, in an opinion written by Judge Fisher, that the California statute was preempted by the NLRA because it “directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers,” and therefore “interferes with an area Congress intended to leave free of state regulation.” 364 F.3d 1154, 1165.⁶ In May 2004, however,

the federal government does not violate the First Amendment by prohibiting the use of federal funds in programs that advocate abortion as a method of family planning. First Amendment defenses are inapplicable to preemption analysis, which derives from another and equally important Constitutional provision, the Supremacy Clause. *Lockyer*, 364 F.3d 994.

Third, the decision concludes that it is irrelevant that several federal statutes, much like the Cedillo Bill, limit the use of federal funds to promote or discourage union organizing. Federal preemption principles are simply inapplicable to federal statutes. *Id.*

⁶ *Healthcare Association of New York State, Inc. v. Pataki*, 388 F. Supp. 2d (N.D.N.Y. 2005), relying heavily on the first panel decision in *Lockyer*, reached a similar

the same three judges withdrew the opinion and agreed to reconsider the case without additional oral argument. 408 F.3d 590. The panel issued its second decision in September 2005. 422 F.3d 973.

The Ninth Circuit granted *en banc* review of the second decision in February 2006, and vacated the opinion. 437 F.3d 890.

C. ANALYSIS OF THE *EN BANC* AND PANEL DECISIONS

The *en banc* court rejected the panel's conclusion that the Cedillo Bill is preempted by the *Garmon* and *Machinists* doctrines, while agreeing with the panel that the statute is not protected by the "proprietary interest" exception to *Machinists* preemption.

1. *Garmon* Preemption: the Panel Decisions. The panel's second decision concluded that the Cedillo Bill is preempted by the *Garmon* preemption doctrine primarily because the law "stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the National Labor Relations Board to uphold its election speech rules and administer free and fair elections." *Lockyer*, 422 F.3d at 985.

The key to the panel's *Garmon* preemption analysis was its conclusion that Section 8(c) of the Act⁷ protects employer speech. The majority found: "Because the Act is a

result in granting summary judgment in favor of the plaintiffs. Upholding *Machinists* preemption, the district court concluded that the New York statute impermissibly interferes with the NLRA's regulatory scheme by stifling free debate over the merits of unionization.

The district court's decision was reversed and remanded by the Second Circuit, 471 F.3d 87 (2006). The appellate decision ruled that several issues of material fact needed to be resolved before it could decide whether the statute was merely a restriction on the use of state funds or an impermissible attempt to regulate the employer speech regardless of whether state funds were at issue. The decision notes that to the extent that the state law burdened employer use of money that could not be considered state funds, the law also impermissibly burdened NLRA speech and satisfied the threshold conditions for *Garmon* possibly *Machinists* preemption.

⁷ Section 8(c) of the Act, 29 U.S.C. § 158(c), provides:

comprehensive regulatory scheme, to say that an activity is not punishable by the Act, which is what Section 8(c) dictates, is the equivalent of protecting that activity.” *Lockyer*, 422 F.3d at 983.⁸

This finding, which was the linchpin of the panel decision, was its great weakness. Protected and prohibited conduct “are not mirror images of one another.” S.E. Befort & B.N. Smith, “At the Cutting Edge of Labor Law Preemption: A Critique of *Lockyer v. Chamber of Commerce*,” 20 *The Labor Lawyer* 1, n.181 (2004); citing *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 4 L. Ed. 2d 454, 80 S. Ct. 419 (1960) (while a work slowdown is not protected by Section 7, it is not *per se* prohibited by the NLRA). Section 8(c) provides that non-coercive speech is not an unfair labor practice, thereby exempting employer speech that otherwise would be prohibited by the Act. It does not protect employer speech. The decision makes the rudimentary mistake of transforming an exception to prohibited conduct into protected conduct.

It is clear from *Garmon* itself that the Act does not protect Section 8(c) speech. The *Garmon* decision precludes states from regulating conduct that is arguably protected by Section 7 or prohibited by Section 8 of the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). Section 7 of the Act protects employees’ right to choose whether or not to organize, form, join, or assist a labor union, or to collectively bargain, or to engage in concerted activity for mutual aid or protection. As the dissent in the second panel decision notes, employer free speech is not among the rights protected by Section 7 – “employer union-related speech is . . . simply left *unregulated* by the NLRA.” *Lockyer*, at 995; emphasis in original.⁹

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 Act, if such expression contains no threat of reprisal or force or promise of benefit.

⁸ The Second Circuit’s *Pataki* decision, 471 F.3d at 100, reaches a similar conclusion: “[S]ection 8(c) does protect employer speech in the unionization campaign context and can provide a basis for *Garmon* preemption.”

⁹ That Section 8(c) does not create a statutory protection for *Garmon* preemption purposes was implicitly recognized by the Ninth Circuit in a case upholding a neutrality/voluntary recognition agreement restricting the employer’s right to campaign against unionization:

Just as the Cedillo Bill does not restrict Section 7 protections and does not regulate activities that arguably would constitute unfair labor practices under Section 8, it does not interfere with or frustrate the Board's primary jurisdiction by, for example, providing an alternative forum for deciding unfair labor practice issues (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978)) or creating a remedial scheme that undermines the Board's authority (*Wisconsin Dept. of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 89 L. Ed. 2d 223, 106 S. Ct. 1057 (1986)). As the dissent in the second panel decision comments:

[W]ere the NLRB to consider an unfair labor practice charge arising from the employer's conduct, it would focus on whether the employer had interfered with the employees' § 7 rights, regardless of whether the employer used state funds in the process. Under AB 1889, the California court would be determining only whether an employer used state funds for any attempt whatsoever to influence employees, not whether that attempt violated the NLRA. Thus, because the statute is focused only on control over the use of state funding, there is no identity of claims, and the primary jurisdiction test is not met.

Lockyer, 422 F.3d at 999.¹⁰

2. Garmon Preemption: the *En Banc* Decision. The *en banc* decision rejected the panel's enshrinement of Section 8(c) as a guaranty of employer free speech rights.

[S]ection 8(c) merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization. This provision does not suggest an employer's agreement not to express its views is unenforceable.

Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 n.9 (9th Cir. 1992).

¹⁰ The panel also ruled that the Cedillo Bill is not protected by the local interest exception to the *Garmon* preemption doctrine. "Regulating employer speech in the labor relations context, which we hold that AB 1889 does, is not a traditional state interest, nor is it 'so deeply rooted in local feeling and responsibility' as to invoke the exception." *Lockyer*, 422 F.3d at 992; internal citation omitted.

“Section 8(c) does not *grant* employers speech rights. . . . Rather, it simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice.” 463 F.3d at 1091; emphasis in original. The *en banc* court also found that the law does not “infringe employers’ First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds.” *Id.* at 1092.

Nor does the statutory scheme interfere with the Board’s primary jurisdiction:

[T]he NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889, namely, whether state funds were used to “assist, promote, or deter union organizing.” Far from being the same as a question the NLRB might consider, a suit under the California statute would entail accounting only for the employer’s possible use of state funds.

Id. at 1093.

Similarly, courts would not be called on to decide whether employers have used state funds to engage in speech that was arguably protected or prohibited by the NLRA. “[T]he California court would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA.” *Id.* at 1094.

The *en banc* court also concluded that even if the statute’s restriction on the use of state program funds intruded on an activity arguably protected or arguably prohibited by the NLRA, the statute was saved by two exceptions recognized in *Garmon*. First, *Garmon* creates an exception for “interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,” the courts should not “infer that Congress ha[s] deprived the States of the power to act.” *Garmon*, 359 U.S. at 243-44. Second, *Garmon* excepts activities that are “merely [of] peripheral concern” to the Board. *Id.*

California has as important and legitimate a sovereign interest in determining how the recipients of state grant and program funds use those funds as it does in entertaining trespass actions. Thus, even if AB 1889 had some peripheral and incidental effect on the arguably protected advocacy rights of employers, given the nature and mechanics of the statute (which has no concern for whether the

speech at issue is protected by the NLRA, but focuses only on the source of the money funding the speech), there is no “significant risk of prohibition of protected conduct.” [Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 207 (1978)]. California’s interest is so strong that we cannot “presume that Congress intended the arguably protected character of the [regulated] conduct to deprive” the state of the ability to control the use of its fisc in this modest manner. *Id.*

Lockyer, 463 F.3d at 1095-95.

3. *Machinists*¹¹ Preemption: the Panel Decisions. The two panel decisions concluded that the Cedillo Bill unlawfully intrudes into an area of federal labor law that Congress intended to be left unregulated and, therefore, violates the *Machinists* preemption doctrine:

Although cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers. In doing so, the California statute runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the National Labor Relations Act.

Lockyer, 422 F.3d at 988.

This conclusion is patently wrong. In *Machinists*, the Supreme Court established that the NLRA “preempt[s] the field” of labor relations, leaving union and employer conduct “to the free play of economic forces” unless the conduct has been specifically proscribed by Congress. *Machinists*, 427 U.S. at 140. The *Machinists* doctrine preempts, for example, state regulations that interfere with an employer’s ability to lock out employees. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 13 L. Ed. 2d 855, 85 S. Ct. 955 (1965).

¹¹ *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 49 L. Ed. 2d 396, 96 S. Ct. 2548 (1976).

Contrary to the panel majority's finding in *Lockyer*, the Cedillo Bill does not regulate conduct in an area that Congress intended to be left to the free play of economic forces. The statute does not prohibit employer speech of any kind. It simply withholds state financing for certain kinds of speech.

In addition, statutory prerequisites for government funding are an established means of safeguarding public funds for public purposes. Governmental conditions on the use its funds are not to "be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980); *see also Northern Ill. Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1006 (7th Cir. 2005) (upholding an Illinois statute requiring recipients of grants for construction of renewable-fuel plants to sign project labor agreements containing a no-strike clause).

The panel's finding of *Machinists* preemption was based on a chain of false premises and inferences. The second panel decision pretends that Section 8(c) gives employer speech protected status under Section 7 of the Act, while falsely claiming that the Cedillo Bill prohibits protected employer speech. The Cedillo Bill permits employers to freely campaign against unionization so long as state funds are not used.

In an effort to demonize the Cedillo Bill, the second panel decision emphasized union support for the statute while ignoring its stated purpose. Noting that the Cedillo Bill "was sponsored by the California Labor Federation, AFL-CIO, and supported by a number of labor organizations" (*Lockyer*, 422 F.3d at 978), the decision finds that the statute "is far from [a] neutral enactment" (*Id.*). The opinion concludes that "[a]lthough cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers." *Lockyer*, 422 F.3d at 988.

There are several problems with the panel's analysis. First, the Cedillo Bill, in reality, is an attempt to avoid government interference with the free play of economic forces that necessarily results when an agency subsidizes an employer's anti-union campaign. By withdrawing public support for anti-union conduct, the statute reestablishes the state's neutrality in private sector labor-management relations. As the dissent states:

The majority's extensive arguments as to the "real" purpose of AB 1889 are beside the point. Neutrality means not taking sides. Even if the majority is right that California is effectively preventing employers from using state funds to advocate *against* unionization only,

California is still remaining neutral – and it is simply irrelevant whether the money would otherwise be spent to support unionization, oppose it, or in some combination.

* * *

Restricting the use of the state’s funds does not imply an attempt to alter an employer’s private decision to support or oppose unionization. An employer who wishes to oppose unionization using its own funds will not suffer any penalty in doing so. It is ironic that a doctrine meant to ensure that employers can engage in self-help is applied today to force government to help employers oppose unionization.

Lockyer, 422 F.3d at 1001; emphasis in original.

Second, the panel decision’s second-guessing of the state legislature’s motivations is bad jurisprudence. See dissent at 998. Subjective legislative motives are irrelevant to preemption analysis. *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1335-36 (D.C. Cir. 1996) (refusing to question President’s motive for issuing executive order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike); *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources*, 390 F.3d 206, 216 n.7 (3d Cir. 2004) (“We do not believe, however, that Boston Harbor and its progeny require a factual investigation into the particular subjective motives of the relevant government agency”); *but see Van-Go Transportation Co., Inc. v. New York City Bd. of Educ.*, 53 F. Supp. 2d 278, 290-93 (E.D.N.Y. 1999) (concluding that, in NLRA preemption analysis, “motives do matter”).

As another decision notes in refusing to inquire into legislators’ motives:

If (as seems likely) Illinois has taken the approach in this law because state officials want to assist organized labor as well as the farmers who supply the grain to be made into ethanol and the owners of ethanol plants, that is neither a surprise nor a reason for invalidity. Most legislation is the product of coalitions among interest groups. Boston wanted to clean up its harbor, but there can be little doubt that it also wanted to shower benefits on workers who were the incumbents’ political supporters. Many a public project is bigger or more expensive than it need be, in order to enlist the support of multiple

interest groups. Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.

Northern Ill. Chapter of ABC, 431 F.3d at 1007; emphasis in original.

Where decisions have inquired into a legislature's purpose, they have inferred the purpose from the legislation itself rather than from statements by the measure's supporters. *Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037-38 (9th Cir. 1999) (inferring regulatory purpose from fact that statute applied to all public works contracts in state rather than a specific project); *Associated Builders & Contractors, Inc. v. City of Seward*, 966 F.2d 492, 496 (9th Cir. 1992) (finding from objective circumstances that city was trying to further proprietary goals).

Finally, by equating the withholding of state funds for employer speech with favoritism towards unions, the decision implies that the *Machinists* doctrine *requires* states to continue to fund employer attacks on union campaigns in order to maintain the "delicate balance . . . mandated by Congress." *Lockyer*, 422 F.3d at 988. This absurd result is inescapable based on the court's logic.

4. *Machinists* Preemption: the Panel Decisions. The *en banc* decision properly concluded that the statute does not intrude on conduct that is meant to be left to the free play of economic forces, and therefore free from all governmental regulation:

[T]he state has not engaged in a naked attempt to use its spending power to "introduce some standard of properly balanced bargaining power" or to alter employers' private spending decisions. *Machinists*, 427 U.S. at 149-50 (internal quotation marks and citation omitted). In restricting the *use* of state funds, California has not made employer neutrality or the substantive terms of employment between employer and employee a condition for the *receipt* of state funds. Under AB 1889, an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy. In contrast, had California enacted a statute that required neutrality as a condition of receiving state funds, the employer's use of its own funds would thereby have been curtailed.

Lockyer, 463 F. 3d at 1087-88.

The *en banc* decision rejected the NLRB's principal argument in its *amicus* brief, that the statute interferes with the statutory scheme by limiting the flow of information to employees in matters relating to their exercise of free choice:

Employers remain free to convey their views regarding unionization, and thus to exercise their First Amendment rights, provided only that they do not use state grant and program funds to do so. . . . Nothing prevents the employer from raising additional funds from a non-state source and using those funds for advocacy purposes.

Id. at 1088.

As icing on the cake, the *en banc* opinion recognizes that the California statute's restrictions mirror the language of several federal statutes. For example, the Medicare Act, 42 U.S.C. § 1395x(v)(1)(N), provides: "In determining such reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included." *Id.* at 1089-90. From this, the decision concludes that the federal statutes belie the claim that Congress meant that government-funded employer speech regarding unionization are not subject to state regulation:

In sum, the mechanism California has employed to preserve its neutrality in labor disputes does not affect an employer's ability to use its own funds in connection with union organizing activities; nor do such activities constitute an area Congress intended to be free from all regulation. Accordingly, AB 1889 is not preempted under *Machinists*.

Id. at 1090.

5. The "Market Participant" Exception. All three decisions conclude that the Cedillo Bill is not protected by the proprietary interest exception to *Machinists* preemption because the statute "is not focused on California's proprietary interest in efficiently procuring goods and services, but instead seeks to broadly color the state's impact on labor relations between employees and prospective labor union representatives." In addition, the proprietary interest exception is inapplicable because the law's primary goal was to

encourage a general policy rather than to address a specific proprietary problem. *Lockyer*, 422 F.3d at 991-92; see also *Lockyer*, 462 F.3d at 1084.

In the *Boston Harbor* case,¹² the Supreme Court ruled that a state agency acted lawfully as a market participant when it required contractors working on the clean-up of Boston Harbor to agree to the terms of a project labor agreement as a condition of receiving a contract. 507 U.S. at 220-22, 232-33. The purpose of the requirement was to assure labor stability over the life of the project. *Id.* at 221-22. The Court noted that the agency's actions were proprietary, not regulatory, in nature, explaining that they were taken with respect to "one particular job," in an effort to "ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232.

Boston Harbor found that the NLRA authorizes private employers in the construction industry to enter into similar agreements and that this fact indicates that Congress did not view such agreements as interfering with federal labor policy. *Id.* at 230-32. The Court inferred that if Congress contemplated that private parties could enter into agreements of this kind, Congress would not have intended to prohibit governmental bodies from entering into similar agreements when acting as market participants. *Id.*

In contrast to *Boston Harbor*, the Court in *Wisconsin Department of Industry, Labor, and Human Relations v. Gould*, 475 U.S. 282, 89 L. Ed. 2d 223, 106 S. Ct. 1057 (1986), found preempted a state statute that disqualified potential government contractors with records of labor law violations. The law directed a state agency to maintain a list of persons and entities that violated the NLRA three times within a five-year period and prohibited the state from purchasing products manufactured or sold by those persons and entities. *Gould*, 475 U.S. at 283-84.

While the government agency in *Boston Harbor* required project labor agreements based on proprietary management concerns, the statute in *Gould* was a regulatory effort to deter labor law violations. *Boston Harbor*, 507 U.S. at 228. The *Gould* Court found that the Wisconsin statute "function[ed] unambiguously as a supplemental sanction for violations of the NLRA." *Gould*, 475 U.S. at 287-89. The statute could not "even plausibly be defended as a legitimate response to state procurement constraints," because "the

¹² *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 122 L. Ed. 2d 565, 113 S. Ct. 1190 (1993).

manifest purpose and inevitable effect of the debarment rule [was] to enforce the requirements of the NLRA.” *Id.* at 291.

In contrast to the statute in *Gould*, the Cedillo Bill does not seek to regulate labor relations generally. Management remains free to make independent decisions regarding labor relations, colored only by the requirements of federal labor law, so long as it does not use state funds advance or deter unionization. As *Northern Ill. Chapter of ABC* finds:

Any owner or contractor that does not want to deal with organized labor may indulge that preference. The lure of a subsidy may lead firms at the margin to reach labor agreements that they would not otherwise have signed, but if an incentive to change one’s conduct is a form of “regulation” then *South Dakota v. Dole*, *Rust v. Sullivan*, and many other cases were wrongly decided. Federal labor laws give both workers and employers a right to avoid unions, but states may pay them to surrender that right even though states can’t confiscate it by sumptuary legislation.

Id., 431 F.3d at 1007.

Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, 390 F.3d 206 (3d Cir. 2004), illustrates the differences between a regulation that survives preemption analysis because the state is acting as a “market participant” rather than as a “regulator.” The issue in *Sage Hospital* was “whether federal labor law preempts the City of Pittsburgh’s decision to condition a grant of tax increment financing upon the recipient’s acceptance of a labor neutrality agreement.” *Id.* at 207. The employer’s hotel was built largely with taxpayer financing. As a precondition for funding, the City required the employer “to be signatory to collective bargaining agreements where the City of Pittsburgh has a financial or proprietary interest.” *Id.* at 208. The labor contract must:

contain a provision prohibiting the labor organization and its members . . . from engaging from [*sic*] any picketing, work stoppages, boycotts or any other economic interference. . . for the repayment of public indebtedness incurred to finance the acquisition or development of such Capital Project, or for the duration of Contractor’s contract or contracts with the City for the operation of such Capital Project, whichever period of time is more extensive (the “No-Strike Pledge”). Each agreement must provide that during this time period, all disputes

relating to employment conditions or the negotiation thereof shall be submitted to final and binding arbitration.

Sage had not yet entered into a labor agreement with any labor union when construction was completed. The City therefore passed a resolution withdrawing the issuance of \$3.56 million in public funds. A week later, Sage signed a “Labor and Neutrality Agreement” with Local 57 that “contained, inter alia, a no-picketing promise and a provision that union representation would be determined using a card-check procedure,” as well as a provision “that disputes arising under it would be settled by arbitration.” After signing the agreement, Sage received the promised funding. *Id.*

A card check was later conducted by the City, which Local 57 somehow lost. Local 57 sought to arbitrate the outcome of the card count and requested a second card count, but Sage refused to comply with the request, claiming that the Labor and Neutrality Agreement was illegal and void. Local 57 then filed suit to compel arbitration. Sage defended by arguing that the ordinance, and therefore the neutrality/voluntary recognition, was preempted. *Id.* at 209-10.

The court applied a two-part test to determine whether a funding requirement “falls within the Boston Harbor exception to preemption review.” *Id.* at 215.

First, does the challenged funding condition serve to advance or preserve the state’s proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition “specifically tailored” to the proprietary interest? *Boston Harbor*, 507 U.S. at 232. If a condition of procurement satisfies these two steps, then it reflects the government’s action as a market participant and escapes preemption review. But if the funding condition does not serve, or sweeps more broadly than, a government agency’s proprietary economic interest, it must submit to review under labor law preemption standards.

Id. at 215-16.

The decision concludes that the ordinance met both parts of this test. First, the City had a direct interest in the project’s success because it will yield tax revenues. *Id.* at 217. Second, the requirement that contractors sign no-strike agreements was “specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property” by “ensuring that labor strife does not damage the development.” *Id.* Thus, the

City was acting as a market participant and the funding condition was not subject to *Machinists* preemption.¹³

In contrast, the proprietary interest exception does not protect the Cedillo Bill. As the *en banc* decision finds:

The statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislation's purpose is to prevent "state funds and facilities" from being used to subsidize an employer's attempt to influence employee choice about whether to join a union

Lockyer, 463 F.3d at 1084.

A similar conclusion was reached in *Healthcare Association of New York State, Inc. v. Pataki*, 388 F. Supp. 2d (N.D.N.Y. 2005), since reversed and remanded by the Second Circuit 471 F.3d 87 (2006). As noted in footnote 6 above, the state law in issue prohibited the use of state funds for the purpose of "encouraging or discouraging union organization." New York contended that it was acting as a market participant while the plaintiffs responded that the state was acting in a regulatory capacity and therefore had impermissibly substituted its own policy for the federal labor policy established in the NLRA. The district court ruled that the law was preempted because, despite its proprietary language and legislative purpose, the law fell closer to the regulatory end of the continuum than it did to the proprietary end. The Second Circuit vacated summary judgment in favor of the employer association and ordered additional fact-finding.

¹³ As in *Sage*, the district court in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 359 F. Supp. 2d 749 (E.D. Wis. 2005), upheld an ordinance requiring contractors to sign labor peace agreements with unions that sought to organize employees who performed county-funded work. The decision contains a thoughtful analysis of an issue that the *Lockyer* decision mostly sidesteps – potential governmental interference with First Amendment-protected employer speech. Relying on *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), the district court concluded that the government's interests as a contractor outweighed the contractor's free speech interests.

V. THINGS TO COME

The NLRB should issue decisions in *Dana I* and *Dana II* any day now, and a decision in *Rite Aid of West Virginia* should follow within months. For now, unions would be well-advised to resist the temptation to address future contract terms in neutrality/voluntary recognition agreements, and to prepare for the possibility that decertification elections may be held following voluntary recognition.

While the anticipated decisions in *Dana I* and *Dana II* are troubling, a decision in *Rite Aid* abandoning the *Kroger* doctrine and permitting employer election petitions in violation of express contract language to the contrary would destabilize longstanding, collectively-bargained procedures for resolving representation questions.

The probable results in all three cases are out of step with the Employee Free Choice Act and the goal of expanding voluntary recognition based on card-based majorities.

In contrast, the *en banc* decision in *Chamber of Commerce v. Lockyer* is a victory for California and for other states' legislative efforts to ensure that government funds are not used to finance anti-union campaigns. Since the statute does not violate the core principles and purposes of either the *Garmon* or *Machinists* doctrines, the Ninth Circuit's decision was palpably correct. As a bonus, it is consistent with the reforms embodied in the Employee Free Choice Act.

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