

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BROWN

Argued March 19, 2008.

Decided June 19, 2008.

Justice STEVENS delivered the opinion of the Court.

A California statute known as “Assembly Bill 1889” (AB 1889) prohibits several classes of employers that receive state funds from using the funds “to assist, promote, or deter union organizing.” The question presented to us is whether two of its provisions— § 16645.2, applicable to grant recipients, and § 16645.7, applicable to private employers receiving more than \$10,000 in program funds in any year—are pre-empted by federal law mandating that certain zones of labor activity be unregulated.

I

* * *

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

To ensure compliance with the grant and program restrictions at issue in this case, AB 1889 establishes a formidable enforcement scheme. Covered employers must certify that no state funds will be used for prohibited expenditures; the employer must also maintain and provide upon request “records sufficient to show that no state funds were used for those expenditures.” If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote, or deter union organizing derive in part from state funds on a pro rata basis. Violators are liable to the State for the amount of funds used for prohibited purposes plus a civil penalty equal to twice the amount of those funds. . . .

II

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

* * *

Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), “is intended to preclude state interference with the National Labor Relations Board’s interpretation and active enforcement of the ‘integrated scheme of regulation’ established by the NLRA.” To this end, *Garmon* pre-emption forbids States to “regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.” The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended “be unregulated because left ‘to be controlled by the free play of economic forces.’” *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971)). *Machinists* pre-emption is based on the premise that “‘Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.’”

Today we hold that §§ 16645.2 and 16645.7 are pre-empted under *Machinists* because they regulate within “a zone protected and reserved for market freedom.” We do not reach the question whether the provisions would also be pre-empted under *Garmon*.

III

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

. . . The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees. . . .

. . . The Taft-Hartley Act amended §§ 7 and 8 in several key respects. First, it emphasized that employees “have the right to refrain from any or all” § 7 activities. Second, it added § 8(b), which prohibits unfair labor practices by unions. Third, it added § 8(c), which protects speech by both unions and employers from regulation by the NLRB. Specifically, § 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

From one vantage, § 8(c) “merely implements the First Amendment,” in that it responded to particular constitutional rulings of the NLRB. But its enactment also manifested a “congressional intent to encourage free debate on issues dividing labor and management.” . . .

Congress’ express protection of free debate forcefully buttresses the pre-emption analysis

in this case. . . . In the case of noncoercive speech, however, the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of § 8(c) expressly precludes regulation of speech about unionization “so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’”

. . . California's policy judgment that partisan employer speech necessarily “interfere[s] with an employee's choice about whether to join or to be represented by a labor union” is the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act. To the extent §§ 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally pre-empted.

IV

The Court of Appeals concluded that *Machinists* did not pre-empt §§ 16645.2 and 16645.7 for three reasons: (1) the spending restrictions apply only to the *use* of state funds, (2) Congress did not leave the zone of activity free from *all* regulation, and (3) California modeled AB 1889 on federal statutes. We find none of these arguments persuasive.

Use of State Funds

* * *

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

* * *

In light of these burdens, California's reliance on a “use” restriction rather than a “receipt” restriction “does not significantly lessen the inherent potential for conflict” between AB 1889 and the NLRA. AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his “free speech right to communicate his views to his employees,” or else to refuse the receipt of any state funds. In so doing, the statute impermissibly “predicat[es] benefits on refraining from conduct protected by federal labor law,” and chills one side of “the robust debate which has been protected under the NLRA.”

. . . Although a State may “choos[e] to fund a program dedicated to advance certain permissible goals,” it is not “permissible” for a State to use its spending power to advance an interest that--even if legitimate “in the absence of the NLRA,”--frustrates the comprehensive federal scheme established by that Act.

NLRB Regulation

* * *

The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech encompassed by AB 1889. It is equally obvious that the NLRA deprives California of this authority, since “[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management.”

Federal Statutes

Finally, the Court of Appeals reasoned that Congress could not have intended to pre-empt AB 1889 because Congress itself has imposed similar restrictions. Specifically, three federal statutes include provisions that forbid the use of particular grant and program funds “to assist, promote, or deter union organizing.” We are not persuaded that these few isolated restrictions, plucked from the multitude of federal spending programs, were either intended to alter or did in fact alter the “wider contours of federal labor policy.”

* * *

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

Had Congress enacted a federal version of AB 1889 that applied analogous spending restrictions to *all* federal grants or expenditures, the pre-emption question would be closer. But none of the cited statutes is Government-wide in scope, none contains comparable remedial provisions, and none contains express pro-union exemptions.

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

It is so ordered.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

* * *

. . . Thus the question before us is whether California's spending limitations amount to *regulation* that the NLRA pre-empts. In my view, they do not.

I

* * *

Although I agree the congressional policy favors “free debate,” I do not believe the operative provisions of the California statute amount to impermissible regulation that interferes with that policy as Congress intended it. . . .

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

Second, California's operative language does not weaken or undercut Congress' policy of “encourag[ing] free debate on issues dividing labor and management.” For one thing, employers remain free to spend *their own* money to “assist, promote, or deter” unionization. More importantly, I cannot conclude that California's statute would weaken or undercut any such congressional policy because Congress itself has enacted three statutes that, *using identical language*, do precisely the same thing. . . . Could Congress have thought that the NLRA would prevent the States from enacting the very same kinds of laws that Congress itself has enacted? Far more likely, Congress thought that directing government funds away from labor-related activity was *consistent*, not *inconsistent*, with, the policy of “encourag[ing] free debate” embedded in its labor statutes.

* * *

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

I can find nothing in the majority's arguments that convincingly answers these questions. The majority says that California *must* be acting as an impermissible regulator because it is not acting as a “market participant” (a role we all agree would permit it broad leeway to act like private firms in respect to labor matters). . . .

The majority also complains that the statute “imposes a targeted negative restriction,” one

applicable only to labor. I do not find this a fatal objection, because the congressional statutes just discussed (which I believe are consistent with the NLRA) do exactly the same. . . .

The majority further objects to the fact that the statute does not “apply” the constraint “uniformly,” because it permits use of state funds for “*select* employer advocacy activities that promote unions.” . . . But this exception underscores California's basic purpose-maintaining a position of spending neutrality on *contested* labor matters. Where labor and management agree on unionization, there is no conflict.

II

* * *

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

* * *

. . . But in doing so, it did not address the Chamber of Commerce's argument that the California statute's compliance provisions affected non-state-funded speech to the point that the NLRA pre-empted the statute. Neither did the Court of Appeals address the question whether the compliance provisions themselves constitute sufficient grounds for finding the statute pre-empted.

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

I respectfully dissent.